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Judgment: approved by the Court for handing down | *Delivered:* **24/5/11**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

IRIS ROBINSON

Plaintiff/Appellant;

-and-

SUNDAY NEWSPAPERS LIMITED

Defendant/Respondent.

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Before: Morgan LCJ, Higgins LJ, and Girvan LJ

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MORGAN LCJ

[1] This is an appeal from an interlocutory decision made by Treacy J on 22 April 2010 in relation to an application for an injunction made on 16 April 2010. Mr Macdonald QC and Mr MacMahon appeared on behalf of the appellant and Mr Hanna QC and Mr Millar for the respondent. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] The appellant is a former MLA. She suffered an episode of severe mental ill health in the form of depression following revelations about her private life in January 2010. The revelations led to considerable media coverage. [Text removed].

[3] On 4 and 11 April 2010 the Sunday World published a series of articles with headlines which included "We Find Iris", "The Scarlet Woman Goes for a Stroll" and "Give us a Ring Iris". They were accompanied by photographs of the plaintiff taken in London by or on behalf of the newspaper. The appellant issued a writ seeking damages for breach of confidence/misuse of private information, harassment and breach of her rights under Arts 2 and 8

ECHR, and for an injunction preventing future surveillance and photographing of the plaintiff and publication of information about her mental health including the location of her treatment.

[4] The learned trial judge made interlocutory orders on 16 April 2010 in the terms sought on consent of the parties and fixed the hearing of any application to vary or discharge that Order for 21 April 2010. At the hearing on 16 April the appellant sought an Order that the hearing to which the application related should be heard in private. Although the respondent at that stage did not oppose the making of such an Order Treacy J indicated that he would have to be persuaded that such a course was appropriate.

[5] In support of the application for the injunction the appellant's solicitor filed an affidavit in which he stated that the pictures published by the respondent newspaper were taken while the appellant was out for a walk as part of her ongoing rehabilitation and treatment. [Text removed].

[6] Dr [text removed] swore two affidavits for the hearing on 21 April. In his first affidavit he said that any further press surveillance or media coverage relating to her mental health or ongoing medical treatment and rehabilitation, including the taking of photographs, would increase the risk of her self-harming or taking her own life and would be likely to prolong her current episode of mental ill health. In his second affidavit he said that intrusive media coverage would continue to pose risks to the plaintiff while she was receiving in-patient treatment and during subsequent outpatient treatment for her illness.

[7] At the hearing on 21 April the appellant's first application was that the hearing of the injunction application should be in private. It is common case that this application proceeded in open court and it appears that at least one member of the public was present. It was possible to deal with the application without reference to the affidavits. The basis of the application was that the substantive application could not be presented without referring to sensitive and intensely private material which would, if disclosed in open court, defeat the object of the application itself and generate further publicity.

[8] Treacy J reminded himself of the well established jurisprudence on the importance of the principle of open justice not being eroded (Scott v Scott [1913] AC 417 and AG v Leveller Magazine [1979] AC 440) which were discussed by Kelly LJ in R v Murphy and anor [1990] NI 306. He noted later cases which restated the need to be vigilant against the erosion of the principle. He set out the reasons for this. Open justice deters inappropriate behaviour on the part of the court, maintains public confidence in the administration of justice, increases the opportunity for more relevant evidence to emerge and makes uninformed and inaccurate comment about the proceedings less likely (Ex p. Kaim [1999] QB 966, per Lord Woolf at 967).

Most recently, the Supreme Court in Al-Ghabra [2010] UKSC 1 found that in an extreme case, where identification or publication of an individual's name could put their life or that of their family in danger, freedom of expression should yield to the right to life and the court could make an anonymity order.

[9] The learned trial judge noted that on 19 April the respondent's solicitors had written to the appellant's solicitors asking how the appellant came to have sight of the articles dated 4 and 11 April, who brought the articles to the appellant's attention and for what reason they were brought to her attention. No answer to that correspondence was made by the time of the hearing before him.

[10] Treacy J found that there was no evidence that the hearing of the case in public, if accompanied by restrictions on publication, would increase the risk of suicide. The risk to her was caused by intrusive media surveillance and reporting. This risk could be mitigated or removed by a reporting restriction. A secret hearing would not address the mischief. In any event, if the appellant succeeded on the substantive action, the coercive orders which would necessarily follow would prevent repetition of the impugned actions.

Fresh evidence

[11] On the hearing of the appeal the appellant sought leave to introduce two further affidavits. The first was a further affidavit from Dr [text removed] sworn on 27 April. He explained that as a result of the media intrusion the appellant's treatment programme had to change. [Text removed]. He [text removed] was of the view that media attention would damage her mental health, increase the risk of self harm or suicide, impede her treatment and delay her recovery. He also stated that if as a result of a public hearing her medical condition and ongoing treatment were to become widely known or she had a reasonable apprehension that these matters were liable to become more widely known her mental health would deteriorate, there would be a materially increased risk of suicide or self harm, her treatment would be prejudiced and her recovery impeded.

[12] The second affidavit was sworn on 17 May by the appellant's solicitor. He explained that Dr [text removed] did not undertake medico-legal work and had declined, therefore, to swear an affidavit. Dr [text removed] had not been able to examine the appellant until just before his third affidavit. This was prompted by a comment in the judgment that there was no affidavit from the treating psychiatrist. The second issue addressed was a press statement issued on behalf of the Robinson family on 6 April after the first article. This statement noted that the appellant had been diagnosed as being acutely mentally ill and had been on suicide watch. [Text removed]. The third issue concerned the delay in issuing proceedings. The appellant's family were reluctant to encourage legal proceedings. They hoped that the press statement

would discourage further coverage. The contents of the Sunday World published on 11 April indicated that the respondents were not likely to desist unless restrained. The fourth issue concerned the failure of the appellant herself to make an affidavit. It was not considered necessary or desirable to do so when she was undergoing inpatient psychiatric treatment.

[13] Where there has been a trial or hearing on the merits fresh evidence is generally only admitted if the conditions set out in Ladd v Marshall [1954] 1 WLR 1489 are satisfied. These are that the evidence could not with reasonable diligence have been obtained for the trial, that it will probably have an important influence on the result and that it appears credible. These tests can be relaxed if the trial was on affidavit (see McKernan v HM Prison Governor [1983] NI 83) or on an appeal in interlocutory proceedings (see Forward v West Sussex CC [1995] 4 All ER 207). The court is bound to decide the facts of the case as they exist at the date of the appeal. Since this was a trial on affidavit in an interlocutory matter and the material was relevant to issues noted by the learned trial judge in his judgment we, therefore, concluded that we should admit the fresh evidence taking into account that there was no prejudice to the respondent in doing so.

The submissions of the parties

[14] The appellant submitted that ordering a hearing in private would be a precautionary step which could be reversed by publication of the judgment or transcript after the hearing if it was found to be appropriate to do so. It would, by contrast, be impossible to repair the damage done by a refusal to make such an order if it turned out that such an order was necessary. The appellant referred to the State's positive duty to protect her rights under Articles 2, 3 and 8 ECHR. Mr Macdonald relied on recent case law on how the balance should be struck between the appellant's right to privacy and the media's right to freedom of expression (Murray v Big Pictures (UK) Ltd [2008] EWCA Civ 446 at paras. 35-40, per Sir Anthony Clarke MR, Mosley v News Group [2008] EWHC 1777 (QB) at paras. 8-10 per Eady J). There was a need for an intense focus on the comparative importance of the specific rights being claimed in the individual case (S (a child) [2004] UKHL 47 at para. 17, per Lord Steyn). Proportionality was central to the balancing test (Douglas v Hello! Ltd [2001] QB 967 at [137] per Sedley LJ). While arguing that it was not uncommon for well-known persons to obtain such an order on the basis of their privacy rights alone, the applicant said that cases based on the right to life were rarer. Where that right was engaged a step which mitigated the risks to the appellant's Article 2 rights constituted insufficient protection.

[15] The appellant further submitted that the learned trial judge did not take into account the full range of media in which damaging information could leak out if the hearing was in open court. He was wrong to think that a reporting restriction was sufficient. He had failed to consider both the old-

fashioned method of word of mouth in a small jurisdiction and the new media of social-networking sites and Twitter. The appellant argued that users of both of these latter forms of communication were likely to be less respectful of a reporting restriction and harder to enforce against than the traditional media. It was also argued that internet publication could take place outside the jurisdiction and that the local court could not control such publication.

[16] Finally the appellant submitted that it was impossible for the case to be properly argued without opening the evidence of Dr [text removed]. His evidence was not already in the public domain. The effect of the judgment was to require her to put this information into the public domain without proper consideration of her rights under Arts 2, 3 and 8 ECHR.

[17] The respondent relied on the case law set out by the learned trial judge stressing the importance of open justice and the need to ensure that the courts did not create myriad exceptions to it. Mr Hanna relied on the remarks of Tugendhat J on the importance of this principle in LNS v Persons Unknown [2010] EWHC 119. That judgment also noted correctly that the burden of proof in displacing the principle lies on the appellant.

[18] Dr [text removed]'s fresh evidence could have been provided at an earlier date. That evidence did not suggest that an open hearing, as opposed to future media reporting of the case, would cause further detriment to the appellant's mental health or increase her risk of suicide. [Text removed].

Consideration

[19] In this case there is a significant degree of agreement between the parties about the legal principles which are applicable. The appellant agrees that the principle of open justice is an important safeguard against judicial arbitrariness or idiosyncrasy and maintains public confidence in the administration of justice (see Lord Diplock in AG v Leveller Magazine [1979] AC 440 at 449). Lord Steyn made it clear in Re S (a child) [2005] 1 AC 593 at 604 that given the number of statutory exceptions a court has no power to create by a process of analogy, except in the most compelling circumstances, further exceptions to the principle of open justice.

[20] In support of its submissions on the importance of open justice the respondent relied on the remarks of Tugendhat J in LNS v Persons Unknown [2010] EWHC 119. That was a very different case to this where the persons subject to the proposed order were not represented and unlikely ever to see some at least of the material on which the judge was asked to act. It is of significance, however, that at paragraph 22 of that judgment Tugendhat J recognised that it was not uncommon in cases where an injunction was sought in relation to the publication of private information to hold a private hearing since without such an order the application would be self defeating.

That is a reflection of the fact that the necessity test which Treacy J derived from AG v Leveller Magazine was satisfied in those cases. Al-Ghabra [2010] UKSC 1 is authority for the unsurprising proposition that the test may also be satisfied in a case involving a threat to life because of the state's obligation to take positive steps to protect the citizen's rights under Article 2 of the ECHR where there is a real and immediate risk to life. These cases and many others are authority for the proposition that the principle of open justice may have to give way to the need to protect convention rights.

[21] The respondent for its part recognises that this is a case where some restriction on the information which should be made available to the public may be necessary. The extent of that restriction will only, of course, be apparent after the hearing of the injunction application. The respondent submits that if a restriction is necessary it can be achieved by reporting restrictions which will prevent public reporting of the hearing. It is submitted that it is the public reporting of the hearing that is the potential cause of the risk to life or the risk of harm in this case and that measures short of a private hearing can deal satisfactorily with that risk. Similarly if the appellant satisfies the court that there is an interference with private life through publication contrary to Article 8 ECHR this again can be controlled by reporting restrictions.

[22] In each case in which a departure from the principle of open justice is sought it is necessary to examine closely the particular circumstances to see whether the high threshold required for such a departure is justified. This is a case in which there is evidence that the appellant has undergone two periods of inpatient treatment for mental health difficulties where on each occasion there was a substantial risk of her causing herself serious physical harm as a result of her illness. The medical evidence indicates that there would be a materially increased risk of suicide or self harm if as a result of a public hearing matters relating to her current medical condition and ongoing treatment were to become more widely known.

[23] We have no reason to doubt that if there was a reporting restriction that it would be meticulously honoured by the respondent and any other reputable publisher. It is also clear, however, from the manner in which the respondent reported its coverage of this issue on 4 and 11 April that the progress of the medical treatment of the appellant is an issue about which there appears to be a high degree of interest in at least some elements of the media. It is, therefore, appropriate to infer similar interest among some elements of the public.

[24] We are satisfied that we should take judicial notice of the fact that social networking sites, Twitter and the internet generally now provides an alternative means of publication to traditional daily or Sunday newspapers. Although the numbers of persons to whom the publication is made may be

considerably less than the circulation of a popular Sunday newspaper publication on the internet is difficult to control and in particular the source of the publication may be outside the jurisdiction of the court. Publication can also occur on a more limited basis by word of mouth. The hearing of the application will inevitably involve the discussion of aspects of the appellant's treatment and condition. In view of the interest to which we have referred in the appellant's medical treatment in the preceding paragraph we consider that there is a real danger that if these proceedings were open to the public the information disclosed in the hearing would be disseminated on the internet even if a reporting restriction was imposed.

[25] It is also necessary to keep in mind that what is sought to be protected in these proceedings is information in relation to the medical treatment of the appellant. The application does not seek to prevent publication in respect of any other matters concerning the appellant so the scope of what it is sought to protect is limited. On the other hand the nature of the matter which it is sought to protect is the sort of private information which Article 8 ECHR may well prevent being made public so it is necessary to recognise that this information may well be entitled to protection long after any issue about the risk to the appellant's health has abated.

[26] A private hearing does not necessarily exclude public access to the material indefinitely. If the respondent succeeds in preventing the continuation of the injunction there may then be publication of the matters raised at the hearing. In any event the trial judge will have to make a decision as to what if any material should be disclosed in a judgment. If so satisfied after the hearing the trial judge can direct the availability of a transcript. Although it is true that a private hearing inevitably prevents the scrutiny of the proceedings that attendance of the public ensures, the obligation on the judge to publish as much as possible after the hearing operates as a balance to that loss.

[27] In light of the risk of publication identified in paragraph 24 above and the potential consequences of such publication by way of harm to the appellant we consider on the material before us that the positive obligation under Articles 2 and 3 ECHR requires us to direct a private hearing of the application for the continuation of the injunction. Although the appellant advanced grounds on Article 8 ECHR also that argument was not extensively developed and it is not necessary for us to deal with it. Accordingly we allow the appeal.

[28] At the start of the hearing of this appeal the appellant submitted that we should deal with it in private since in order to advance the case it would be necessary to rely on much of the medical information with which the case was concerned. In cases of this type such a course is often followed as is clear from paragraph 22 of LNS v Persons Unknown. We have no doubt that this

was the correct course in this case. This judgment sets out some of the history of the medical treatment of the appellant and should not, therefore, be disclosed at this time. The case will be put into the list of the senior Queen's Bench judge who will determine how to proceed with the interlocutory application and the action generally. The judge will take into account any new materials or circumstances drawn to his attention. Any application for disclosure of this judgment should be made in the first instance to the judge dealing with the injunction application and the action.

[29] We should make it clear that the appellant has not sought anonymity in these proceedings nor sought to conceal from the public the fact that she is bringing these proceedings. The interlocutory order made by Treacy J does not prohibit publication of the fact that the plaintiff has been suffering from ill-health in the form of depression, that she has been under suicide watch and that she has received treatment for same.