[2020] IEHC 280

THE HIGH COURT

[No. 2020 3945 P]

BETWEEN

HEALTH SERVICE EXECUTIVE

PLAINTIFF

AND

NEILL BRADLEY

DEFENDENT

EX TEMPORE judgment (No. 1) of Mr. Justice O'Connor delivered on the 5th day of June 2020

1. Before the Court is a notice of motion seeking interlocutory reliefs against the defendant. The initial application is for an order directing that the application be heard otherwise than in public.

2. Last Monday (1st June 2020) I heard an *ex parte* application, in the intended proceedings leading to these proceedings, by counsel for the plaintiff for an interim injunction restraining the defendant. On that day a similar application for an in camera application was made. Counsel for the plaintiff cited the judgment of O'Donnell J. in the Supreme Court in *Gilchrist v. Sunday Newspapers Limited* [2017] 2 IR 284 ("Gilchrist") and the judgment of Kelly P. in *Medical Council v. Anonymous* [2019] IEHC 109 ("Medical Council Application").

3. In last Monday's application the Court was brought through the defendant's tweeted threats including one at 5.35pm on 30 May 2020 (through one of his multiple twitter handles) that he "will release on a Monday and a Friday to the public …" databases with details of patients. Earlier in May 2020 he had tweeted about having stolen data to which he could give access.

4. Counsel submitted that publication of details relating to the ex parte hearing and the terms of the order which might be granted (later that day I granted a restraining order) would facilitate the nefarious threats of the plaintiff. It was submitted that the potential release of earlier details on the internet, through publication of the hearing and order would facilitate wider access to the databases, which the defendant formerly accessed unlawfully according to the plaintiff. I was assured that technical steps had been taken earlier in May on discovering the breach of privacy to prevent any further breach by the defendant.

5. Having had regard to the said judgements cited, I made an order that the ex parte hearing be heard otherwise than in public. I made it clear that the order was limited to that day only and the reporting of the order made on that Monday. Suffice to say that I was aware of the necessity for strict construction and the balance which the Court must strike between the protection of privacy rights and the requirement of Article 34.1 of the Constitution for the administration of justice in public. There was no one in Court for the application last Monday save those engaged by the plaintiff and those connected to the Court. I was also informed that requests had been made to eliminate references on or through the internet to the means of accessing the historical data which was the subject

of the application and that those requests could be compromised if there was publication of the order before further hearings in these proceedings.

6. Therefore, when the motion for the interlocutory hearing came before me today (having been adjourned to facilitate compliance with the further order of Reynolds J made yesterday, Thursday 4th June 2020), I was aware of the background.

7. Counsel rightly makes the application now before we embark on the hearing of the interlocutory application. I have read the judgments in *Gilchrist* and the *Medical Council Application* again. Matters have moved on to an extent that requires more consideration today.

8. A concise way of summarising the law is to quote from the judgement of O'Donnell J. in *Gilchrist* as did Kelly P. did at para. 25 of the *Medical Council Application* which is as follows: -

> "(i) The Article 34.1 requirement of administration of justice in public is a fundamental constitutional value of great importance.
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> (ii) Article 34.1 itself recognises however that there may be exceptions to that fundamental rule;
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> (iii) Any such exception to the general rule must be strictly construed, both as to the subject matter, and the manner in which the procedures depart from the standard of a full hearing in public;
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> (iv) Any such exception may be provided for by statute but also under the common law power of the court to regulate its own proceedings;
>
> (v) Where an exception from the principle of hearing in public is sought to be justified by reference only to the common law power and in the absence of legislation, then the interests involved must be *very clear, and the circumstances pressing*. . . . (emphasis added)
>
> (vi) While if it can be shown that justice cannot be done unless a hearing is conducted other than in public, that will plainly justify the exception from the rule established by Article 34.1, but that is not the only criterion. Where constitutional interests and values of considerable weight may be damaged or destroyed by a hearing in public, it may be appropriate for the Legislature to provide for the possibility of the hearing other than in public, (as it has done) and for the court to exercise that power in a particular case if satisfied that it is a case which presents those features which justify a hearing other than in public.
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> (vii) The requirement of strict construction of any exception to the principle of trial in public means that a court must be satisfied that each departure from that general rule is no more than is required to protect the countervailing interest. It also means that the court must be resolutely sceptical of any claim to depart from any aspect

> of a full hearing in public. Litigation is a robust business. The presence of the public is not just unavoidable, but is necessary and welcome. In particular, this will mean that even after concluding that case (sic) warrants a departure from that constitutional standard, the court must consider if any lesser steps are possible such as providing for witnesses not to be identified by name, or otherwise identified or for the provision of a redacted transcript for any portion of the hearing conducted in camera".

In conclusion, the court jealousy guards the provisions of the Constitution.

9. I will now summarise the facts and the submissions made by senior counsel for the plaintiff. The Court understands that the plaintiff applies for this case to be heard otherwise than in public (particularly this interlocutory injunction application) because if it is heard in public there is a clear risk to the privacy rights of patients and others. Counsel drew my attention to paragraphs 40 to 45 of the grounding affidavit to submit that if anyone hears of an account of this application, they may be alerted to specific material which could be on the internet. He eloquently submits also that if this application proceeds in public, the defendant may use the ultimate order as "an engine" to proceed along the lines that he has threatened in the undignified recent responses to emails following service of last Monday's order.

10. The in camera order which I made on Monday was granted with some reluctance. However, I was satisfied then that the plaintiff should be afforded time to prevent the defendant and those in communication with him from disseminating historically uploaded details which was indeed more than a possibility given the plaintiff's tweeted threats.

11. The onus is on the plaintiff to establish the exception to allow the Court to exercise its limited inherent jurisdiction to restrict the effect of Article 34.1 of the Constitution.

12. The plaintiff has not satisfied me today that there are circumstances which merit having the interlocutory injunction application heard otherwise than in public. It may transpire once the application has been heard that "lesser steps are possible" to anonymise or keep matters private which need not concern those other than patients and the plaintiff who are owed a duty of confidentiality. I do not ignore the fear expressed on behalf of the plaintiff in relation to the information which may be out there and which may be accessed potentially by unprincipled people. At this stage it appears that those concerns can be addressed by framing and publishing the terms of the ultimate order that will be made by the Court. In short, I refuse the application for this application to be heard otherwise than in public. The Court will now proceed to hear the application for interlocutory relief without restricting the public from observing.