THE COURT OF APPEAL

Neutral Citation Number: [20106] IECA 296

[2016 No. 310]

[2013 No. 11583 P]

The President
Birmingham J.
Sheehan J.

BETWEEN

ISABEL ROGERS

PLAINTIFF

AND

SUNDAY WORLD NEWSPAPERS LIMITED, COLM MCGINTY AND

NICOLA TALLANT

DEFENDANTS

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

NON-PARTY/INTERVENER

AND

[2016 No. 309]

[2013 No. 11544 P]

BETWEEN

PATRICK BENEDICT GILCHRIST

PLAINTIFF

AND

SUNDAY WORLD NEWSPAPERS LIMITED, COLM MCGINTY AND

NICOLA TALLANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

NON-PARTY/INTERVENER

JUDGMENT of the President delivered on 21st October 2016

Introduction

1. In this unusual, even unique case, the High Court made certain restrictive orders that are the subject of appeal by the Commissioner of An Garda Síochána and by the defendant newspaper, the Sunday World, on an application by the Commissioner in which she sought to be joined as a notice party in defamation proceedings and also that the hearings be conducted behind closed doors, with no publicity except for the verdict. The matter is urgent because the case is specially fixed for hearing on 3rd November 2016.

2. The two actions for defamation by Ms. Rogers and Mr. Gilchrist have their origins in previous litigation by a protected witness in the Witness Security Scheme operated by An Garda Síochána. He claimed, in High Court proceedings in which he was the plaintiff, that the relevant agencies had breached agreements and undertakings to provide him with facilities and arrangements, including relocation that he alleged he was promised. His action was ultimately dismissed after a hearing behind closed doors which was ordered as a result of an application by An Garda Síochána and other defendants: see *Mooney v. Commissioner of An Garda Síochána & Ors.* [2014] IEHC 155 for the judgment on the procedural issue.

3. The newspaper articles on which the plaintiffs' claims in these cases are based concerned those earlier proceedings and the roles allegedly played by the plaintiffs in the events giving rise to that claim. The instant defamation actions by the plaintiffs against the

Sunday World therefore relate to some, at least, of the matters at issue in the earlier trial but An Garda Síochána is not a party. The Commissioner applied to the High Court to be joined as a notice party in these cases. She submitted that the same issues of public, national importance and the protection of life and the interests of State security and public safety arise in these trials and she also sought similar orders to the earlier case for hearings otherwise than in public, with the Press being excluded as well. The defendants want to have the case heard in public in the normal way. The plaintiffs, above all else, wishe the case to proceed as scheduled and submit that a private trial, as sought by the Commissioner, is the most efficacious way to achieve that.

4. In the High Court, Mac Eochaidh J. went some way with the Commissioner's requests, but stopped well short of the full relief she sought. The judge endeavoured to balance the rights of the parties by limiting access to the proceedings to persons strictly associated with them and required to be there for the purposes of the litigation, such persons to include the Garda Commissioner; permitting the Commissioner to apply to the court to prevent publication of any evidence which would harm or possibly harm the integrity of the State Witness Protection Scheme; permitting the Press to be present, but imposing a time delay to apply automatically for a period of 24 hours restricting the reporting of any evidence during the course of the proceedings, following the expiration of which there was to be freedom to report and publish. In the result, neither contending party was satisfied and both the Commissioner and the Sunday World defendants have appealed to this Court against the orders as made. They are in agreement that the compromise solution found by the High Court is unworkable in practice.

5. Article 34.1 of the Constitution is central to the appeal, providing as follows:

> "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 cases as may be prescribed by law, shall be administered in public."

In his judgment for the majority of the Supreme Court in *In In Re R Ltd.* [1989] I.R. 126, Walsh J. said that the exception phrase in the section "is to be construed as a law enacted, or re-enacted, or applied by a law enacted by the Oireachtas subsequent to the coming into force of the Constitution". However, the parties to this appeal accept, following the decision of the Supreme Court in *Irish Times Ltd & Ors v Ireland & Ors* [1998] 1 IR 359 that the courts do have jurisdiction in some exceptional circumstances, even in the absence of legislative provision, to direct that a criminal trial may be heard otherwise than in public. The Sunday World defendants submit that there is no jurisdiction to make any such orders in the context of civil proceedings and particularly civil defamation proceedings. They argue that the relevant cases, when properly interpreted and understood, express this principle but if, however, there is a jurisdiction in principle in a civil case to restrict contemporaneous reporting or otherwise interfere with the public hearing as envisaged by Article 34.1, they submit that such order can only be made where there is a real risk of an unfair trial for one or both of the parties to the proceedings unless such restrictions are imposed, which is not the situation here. It is submitted on their behalf that the rights and interests invoked by the Commissioner are irrelevant to the mode or procedure to be adopted at the trial, that it is not legitimate to take into account the interests or entitlements of non-litigants as the trial judge did in this case and that the rights of the defendants are superior to any such interests.

6. The central question in the appeal is the interpretation of the legal principle underlying the decision in *Irish Times Ltd v Ireland. The Commissioner* relies, inter alia, on the judgment of Gilligan J. in the *Mooney* case above mentioned for the procedure to be adopted. The Sunday World defendants argue that the *Mooney* judgment may be distinguished from the instant cases; alternatively, that case was wrongly decided.

7. The facts are not in dispute as will be apparent from what follows. The Sunday World made clear in the first article that is the subject of these proceedings that the Witness Protection Programme was vital to the State and that the action brought by David Mooney would lift the lid on the operation of the programme and would expose matters at the heart of the secret Garda protection unit. The point that the instant actions will traverse substantially the same ground is deposed to in the affidavit of Detective Chief Superintendent O'Sullivan and not denied and is actually a matter of reasonable inference. The other potential consequences, as outlined in the affidavit, are also not denied. The stakes could scarcely be higher in the battle of principles that is fought out in this motion.

8. In the Irish Times case, the Supreme Court held that it was open to the court to order the hearing of the criminal trial in question, if it was satisfied of the necessary conditions, to be held otherwise than in public notwithstanding the absence of specific statutory authority. This was a significant departure from the categorical interpretation previously expressed by Walsh J. The defendants hold fast to the proposition that the Irish Times decision is to be confined in its application to criminal trials and so it cannot justify a departure from public hearing in any civil action.

9. My judgment is that the Irish Times jurisprudence and subsequent cases establish that it is possible to exercise the jurisdiction to depart from public hearings in civil actions and not just in criminal trials but the circumstances must be extreme and rare indeed and the evidence cogent. In the extraordinary circumstances that obtain in these cases, it seems to me that the applicant has surmounted the very high threshold necessary to justify the order sought. On the undisputed facts, the Commissioner has established that there is an existential threat generally and in particular to a practically unique catalogue of public and individual Constitutional rights and interests which is sufficient to outweigh the indisputably important requirements of Article 34.1.

10. In this judgment, I set out in more detail the considerations that lead me to these conclusions.

The Articles Complained Of

11. The Sunday World articles appeared in the editions of 9th June 2013 and 16th June 2013 and they were also published on the newspaper's website. The most material for our purpose in this appeal is the first of the articles. It will be for the jury to determine the meaning of the words of the article, or if either case is heard by a judge alone, for the judge. It is not, in my view, appropriate, therefore, for this Court to express any view as to the meaning of the words, and accordingly I will make only such reference as I think is necessary in order to set out the background factual material to the consideration of the appeal. The article of 9th June 2013 appeared on pages 10 and 11 and contains photographs of the two plaintiffs. Under the headline:

> "WITLESS PROTECTION
>
> SPECIAL INVESTIGATION: By NICOLA TALLANT
>
> THE WORLD IS WATCHING COPS UNDER SPOTLIGHT
>
> • Landmark case set to expose the 'shambles' at heart of secret Garda unit
>
> • Doctor who assessed witnesses wasn't registered with Irish Medical Council

• She became the lover of cop handler who was probed over unit's cash"

the article begins:

> "THIS IS the former top garda and his 'doctor' lover at the centre of an explosive High Court case which is set to lift the lid on the operation of the State's vital Witness Protection Programme."

12. The article and the follow-up on the following Sunday proceed to give information about the transactions between the plaintiff in that action, Mr. Mooney, and the two plaintiffs. It identifies the plaintiff, Mr. Gilchrist, as a handler on the Witness Protection Programme and the plaintiff, Ms. Isabel Rogers, as a 'doctor' who assessed the suitability of witnesses. Various claims and assertions are made in the article. The follow-up on 16th June 2013 provided information about an application for discovery and then went on to describe the relationship between these two plaintiffs, who are now married, and the investigation into funds and expenses that was described in the earlier article.

13. The plaintiffs issued proceedings which are in largely the same form except in respect of the meanings that are ascribed to the articles insofar as they concern each of the plaintiffs. The case for Ms. Rogers, for example, includes pleas that the words in their natural and ordinary meanings meant that the plaintiff was at the centre of the shambles that was the State's Witness Protection Programme; that she was responsible for and contributed to the creation of a shambles; that she wrongly passed herself off as a medical doctor and many other meanings in addition to pleas based on innuendo. Further defamatory meanings are alleged in respect of the article dated 16th June 2013.

14. In the case of Mr. Gilchrist, a further series of natural and ordinary meanings alleged to be defamatory is listed as well as innuendo meanings, both in respect of 9th and 16th June 2013 articles.

15. The defendants plead justification in respect of such meanings as they accept and they deny the other meanings. There is, in effect, a full defence.

Application by the Commissioner of An Garda Síochána

16. By notice of motion in each of the cases dated 9th June 2016, the Chief State Solicitor gave notice on behalf of the Commissioner of her intention to apply to court in each case for orders, *inter alia*, joining the Commissioner as a notice party to the proceedings and directing that the proceedings be held otherwise than in public. The application was grounded on the affidavit of Detective Chief Superintendent Michael O'Sullivan, sworn on 8th June 2016. The deponent says that he is attached to Liaison and Protection and he refers to the two sets of proceedings. The Detective Chief Superintendent says that the Commissioner is the person charged with ultimate responsibility for the Witness Security Programme which is a non-statutory programme that was established following the murder of Veronica Guerin. It is run by members of An Garda Síochána of various ranks and the programme also seeks assistance from suitably qualified experts from time to time, such as Ms. Rogers, one of the plaintiffs. He says that the purpose of the programme is to guarantee as far as possible the lives and safety of "at risk" individuals and their families who have cooperated with the Garda Síochána by giving evidence for the prosecution in criminal trials. The deponent says that it is of paramount importance that the integrity and efficiency of the programme is not compromised in any way for a series of reasons which he sets out. First, it is in the public interest that there should be a functioning Witness Security Programme in the State; otherwise, people who would otherwise cooperate with the Gardaí in the investigation and prosecution of serious crime might not do so. Second, the programme is responsible for the protection of the lives of protected witnesses and their families and any interference with its integrity and efficiency could potentially result in a threat to the lives of protected witnesses and their families. Third, the divulging of the identity or other details relating to those connected to the programme could potentially lead to a situation where the lives of those people and of protected witnesses and their families would be endangered. For obvious reasons, he says the identities of programme officers, employees and external consultants or contractors are kept secret. Fourth, publication of details of the workings of the programme could potentially lead to a situation where confidence in it would be compromised and people who would otherwise cooperate might not do so. Fifth, the WSP relies on the cooperation of other states to operate efficiently, and specifically, to relocate protected witnesses from time to time, which occurs on a wholly gratuitous basis so that any threat to the integrity and efficiency of the programme could result in the withdrawal of such cooperation.

17. Detective Chief Superintendent O'Sullivan says that the fact that the workings of the Witness Protection Programme are likely to feature in the proceedings leads him and the Commissioner to believe that she has a legitimate interest in the proceedings such that it is necessary and desirable that she be joined as a notice party. The deponent says that he is advised that the court – meaning the High Court – has requested that the views of the Garda Commissioner be procured in relation to the issue of privilege claimed in respect of certain documentation that may be discovered, and in that connection, Chief Superintendent O'Sullivan refers to correspondence from the Garda Commissioner to the parties in the two actions. It will be apparent from that correspondence that the Commissioner is of the view that documentation relating to the operation of the WSP is essentially secret and falls within the purview of the Official Secrets Act. The Commissioner has requested that the parties identify the evidence and documentary material they propose to rely on so that she can determine whether or not to grant authorisation for the use of the material. The Commissioner has asked whether the action is to be heard before a judge alone or a jury. Specific security concerns may arise in the event that the cases are to be heard before a jury. That is the case as we are aware. Chief Superintendent O'Sullivan says that it follows that the Commissioner's interest in the proceedings is not confined to litigating discrete issues concerning privilege in the context of a discovery application, but she is rather concerned to be a notice party with a view to doing all necessary to ensure and protect the integrity of the WSP.

18. The deponent says that it would seem inevitable from the content of the article that the evidence will involve a detailed examination of the operation of the WSP in order for the matters in issue to be determined. It is difficult to see how this might happen without publication or further dissemination of the identities of Witness Protection officers, including the plaintiffs. He says that the identity of everybody concerned in the operation of the programme is kept secret because they might be targeted and placed under surveillance by organised criminals or subversives for the purpose of locating protected witnesses. The hearing of the proceedings in public would inevitably lead to the identification of Witness Protection officers, both past and present, which would place their lives in danger and also the lives of their families and of protected witnesses with whom they have dealt in the past or might deal with in the future. The proceedings, he says, will also involve revelation of the trade craft and operational procedure of the programme which is material that is manifestly privileged and secret in nature.

19. Referring to the involvement of other countries, the Detective Chief Superintendent says that the programme relies on the goodwill of equivalent programmes in other countries and publication of the material that is the subject of his apprehensions will have a serious detrimental impact on the ability of equivalent programmes in other countries to cooperate with the Witness Security Programme. Operatives of a foreign protection programme will be unwilling and unable to meet with publicly-identified WSP officers for fear of themselves being identified by organised criminals and subversives. There would be a reluctance to cooperate.

20. Detective Chief Superintendent O'Sullivan refers to the judgment of Gilligan J. in the case of *Mooney v. Commissioner of An Garda Síochána & Ors.* saying that it is of considerable relevance that the issues in those proceedings substantially overlap with those under consideration in these actions. In that circumstance, he believes that there is no good reason to depart from the conclusion reached by Gilligan J. in that case that proceedings dealing with the issues should be heard in camera and the other orders sought in the notice of motion.

21. The letters referred to by Detective Chief Superintendent O'Sullivan are dated 8th June 2016 and were written by the Chief State Solicitor on behalf of the Garda Commissioner. Ms. Creedon wrote in similar terms with necessary changes to the solicitors for the plaintiffs and the solicitors for the defendants. The letters say that it appears to the Commissioner that the Witness Security Programme will feature in defamation proceedings and that she is instructed to bring to the solicitors' and their clients' attention the provisions of the Official Secrets Act 1963, and in particular, s. 4(1) and s. 4(4) and she sets out those provisions which are as follows:

> "(1) A person shall not communicate any official information to any other person unless he is duly authorised to do so or does so in the course of and in accordance with his duties as the holder of a public office or when it is his duty in the interest of the State to communicate it . . .
>
> (4) In this section 'duly authorised' means authorised by a Minister or State authority or by some person authorised in that behalf by a Minister or State authority."

The letter cites the definition of official information as:

> "Any secret official code word or password, and any sketch, plan, model, article, note, document or information which is secret or confidential or is expressed to be either and which is or has been in the possession, custody or control of a holder of a public office, or to which he has or had access, by virtue of his office and includes information recorded by film or magnetic tape or by any other recording medium."

22. The letter goes on to request the solicitors to indicate to the Chief State Solicitor in advance if they are proposing to call any witness who currently or in the past held public office or was a member of An Garda Síochána and from whom it was intended to elicit material or information relating to the working of the Witness Security Programme. The Chief State Solicitor also asks if they are intending to disclose material or information in relation to the working of the programme. In the event that they do intend calling such a witness, the Chief State Solicitor advises the parties that authorisation will be required from the Commissioner before any information can be disclosed or deployed in the course of the defamation proceedings. Any person who disclosed or deployed official information without authorisation would be liable to criminal prosecution. In addition, any person who caused material or information relating to the programme to become public by any method or person without such authorisation would also be liable to prosecution. The letter says that the Commissioner is proceeding on the assumption that the defamation proceedings will be heard before a jury.

Submissions/Arguments of the Parties

Submissions of the Garda Commissioner

23. The Commissioner firstly points out that the High Court accepted all of the evidence of Detective Chief Superintendent O'Sullivan, including the high importance of the integrity of the programme and its secrecy and the importance to the State of protecting the programme. The proceedings to be heard in these cases would give rise to extensive evidence in relation to the WSP.

24. The Commissioner submits that in her office, she is a person who would be affected by the proceedings and is accordingly entitled to be joined as a notice party to the proceedings. The procedure envisaged by the High Court required the Commissioner to be represented throughout the proceedings in order to make submissions as to publication of matters that arose in evidence. Taking account of the interests that the Commissioner seeks to protect, including the right to life, an order excluding all persons and members of the Press from the court during the proceedings is warranted and necessary. The Commissioner is the person with ultimate responsibility for the Witness Support Programme.

25. In *Bupa Ireland v. Health Insurance Authority* [2006] 1 I.R. 201, the Supreme Court held that it was appropriate that a party that had a vital interest in the outcome of a matter be joined as a notice party. The High Court implicitly accepted that the Commissioner had a legitimate interest in the proceedings.

26. In respect of the application for the hearing of the proceedings otherwise than in public, the Commissioner submits that the *Irish Times & Ors. v. Ireland & Ors.* [1998] 1 I.R. 359, is authority for the application the Commissioner seeks. It is submitted that the position in law was correctly articulated by Denham J. (as she then was) at pp. 398-399 of the report. Although there is no general discretion available to courts as to Article 34.1 to order a hearing otherwise than in public, the constitutional provision does not exist in a vacuum:

> "There are competing constitutional rights, rights relating to other persons and in addition the courts have duties under the Constitution. The court has a duty and jurisdiction to protect constitutional rights and to make such orders as are necessary to that end. There were several rights for consideration at the trial before the Circuit Court. The accused had a right to trial in due course of law (Article 38.1) and to a trial with fair procedures (Article 40.3). The trial judge had a duty to uphold the Constitution and the law and to defend the rights of the accused. Balanced against that was the communities' right to access to the court, to information of the hearing, to the administration of justice in public (Article 34.1). That right is clearly circumscribed by the terms of Article 34.1. However, also in the balance was the freedom of expression of the community, a freedom of expression central to democratic government, to enable democracy to function. There was also the freedom of expression of the Press. Thus, consideration should have been given to Article 40.6.1(i), which may include the publication of information: *Attorney General for England and Wales v. Brandon Book Publishers Ltd.* [1986] I.R. 597. The right to communicate (Article 40.3) was also a part of the panoply of rights in the bundle of rights for consideration.

None of the rights in consideration are absolute. Where there are competing rights, the court should give a mutually harmonious application. If that is not possible, the hierarchy of rights should be considered, both as between the conflicting rights and the general welfare of society: *People v. Shaw* [1982] I.R. 1 at p. 56.

The accused's right to a fair trial is superior to the other rights in the balance: *D. v Director of Public Prosecutions* [1994] 2 I.R. 465; *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476."

27. Denham J. went on to propose a test that has been endorsed in the cases subsequently and was also concurred in by her colleagues in that case. It is, first, whether there is a real risk that the accused would not receive a fair trial if it was held in public. Secondly, assuming an affirmative answer to the first question, can the risk be avoided by appropriate rulings and directions? If it is impossible to do so, then it is open to the court to make the appropriate direction as to procedure.

28. In this case, the Commissioner seeks to protect fundamental constitutional rights which include, in the first place, the right to life of witnesses who are in the protected programme. That is a constitutional right which necessitates the highest degree of protection by the courts. The High Court erred in placing the constitutional interest that justice be administered in public above the right to life of cooperating witnesses. It might be more accurate to say that it placed the constitutional imperative in Article 34.1 above measures to avoid the risk of endangerment of the lives of witnesses. It is also submitted that the interests of the State and of the public in the prosecution and the investigation of serious crime is also high in the scale of constitutional rights and obligations.

29. The Commissioner relies on the decision of the High Court per Gilligan J. in the related proceedings of *David Mooney v. An Garda Síochána* [2014] IEHC 155. Gilligan J. concluded that matters of life and death were in issue as, he said, both parties were in agreement. The averments by Detective Chief Superintendent O'Sullivan were important in establishing the danger of undermining the integrity and efficiency of the witness programme. That operates to the benefit of society as a whole and the citizens as well as the officers involved in the programme and the cooperating witnesses. The Commissioner submits that the instant proceedings will traverse the same issues as those canvassed in Mooney.

Defendants' Submissions
30. The Sunday World defendants submit as follows. First, the jurisdiction of the courts identified in *Irish Times v. Ireland* applies only in a criminal case where there is a real risk of an unfair trial; it does not apply to civil actions. If that submission succeeds, that is the end of the matter. Secondly, if there is in principle a jurisdiction to make an order in a civil case, this can only arise where there is a real risk of an unfair trial for one or both of the parties if such an order is not made. This is not a case. Third, potential infringement or damage to other rights is not relevant to the exercise of the jurisdiction. The only question that is relevant is the interest of a fair trial. Fourth, the High Court judge gave insufficient weight to the interests of the defendants, including their entitlement to vindicate their reputations and also their constitutional right of freedom of expression and gave excessive weight to the interests of the Garda Commissioner who was not even a party to the proceedings and who had intervened late in the day. Fifth, they say that the fundamental issue at the heart of their appeal is the High Court's interpretation of the Supreme Court judgments in *Irish Times v. Ireland*. This case is support for the position adopted by the Sunday World defendants.

31. In circumstances where the contending parties are in agreement that the orders made by the High Court ought not to stand, this appeal is less concerned than it would otherwise be with the reasons whereby the High Court determined that the particular orders were appropriate in the case. It is more concerned with the overall principles which were applied by the High Court and which also have to be considered for ablication by this Court. Mac Eochaidh J. said in his ex tempore judgment that he was neither going to apply nor dis-apply the decision in *Mooney v. Garda Commissioner & Ors*. because he found "that there is sufficient guidance in the Supreme Court in the decision of the *Irish Times v. Ireland* as to the nature and extent of a court's jurisdiction to depart from what would appeal to be a blanket rule set out in Article 34 of the Constitution . . ." That case is a binding precedent, but for my part, I find great assistance in all the other cases that were cited and I think it is of particular assistance to have the decision in *Mooney* because it is so closely related to the circumstances that give rise to the two actions with whose procedures we are concerned in this appeal.

32. The development of these submissions is comprised in the discussion of the principles to be applied and the relevant authorities that are contained subsequently in this judgment and it is accordingly unnecessary to set out in detail the argument as developed by Counsel for the Sunday World defendants.

Submissions of the Plaintiffs
33. The plaintiffs' submissions begin with a declaration that they are a married couple and have issued four sets of proceedings against the defendants of which the present cases are two. Mr. Gilchrist is a family mediator and resides in England. He is a former member of An Garda Síochána who was engaged by the force as an operative in the Witness Protection Programme. He retired from the force in March 2008. Ms. Rogers is a psychotherapist. She provided professional services to the programme. It is submitted that arising from the risks associated with their former roles within the witness programme of An Garda Síochána, "anonymity, confidentiality and privacy were, and remain, integral to the plaintiffs' security and ability to earn a livelihood".

34. The submissions outline in brief summary the defamatory meanings that the plaintiffs ascribe to the articles and online publication, but it is unnecessary to deal with those. Similarly, the references to the [2014] Gilchrist and Rogers proceedings do not require comment or summary.

35. The plaintiffs' position in this appeal is that they do not wish to participate in the appeal except to vindicate their interests in having the actions proceed as planned on the scheduled date and that the jury verdict is published fully without restriction. The plaintiffs are particularly concerned that the proceedings, which are now fixed specially for the third time, should not suffer any further adjournment or interference (for my part, I think it is indeed unsatisfactory that trials of this kind should suffer repeated adjournments).

36. The plaintiffs do not object to the joinder of the Commissioner as a notice party subject to indemnification by the Commissioner in respect of additional costs. They do not, however, acknowledge any entitlement by the Commissioner to interfere in the orderly running of the trial or to interfere with questions of the admissibility of evidence. On those questions, they reserve their position.

37. In oral submissions on the hearing of the appeal, Counsel for the plaintiffs accepted that the reality was that the best way to ensure that the actions would proceed on the scheduled date was for orders to be made as sought by the Commissioner. If that did not happen, the issue of the Official Secrets Act would loom large over the proceedings and indeed it might operate to prevent the plaintiffs actually giving evidence at the trial, although the plaintiffs maintained that they would be able to surmount any such procedural issue in the fullness of time, and if necessary, by appropriate litigation, that is the very thing that the plaintiffs wish to avoid. A protracted legal battle about the entitlement of the Commissioner to interfere with the capacity of the plaintiffs to assert their constitutional rights to their good names by way of defamation proceedings would operate to frustrate the realisation of the determination of the issues between the plaintiffs and the Sunday World defendants. In the result, Counsel was entirely reconciled to the position that an order in favour of the Commissioner was the most practical and efficacious way of ensuring that their proceedings were heard as schedule.

38. Counsel for the plaintiffs did not adopt a particular position in regard to the legal issues canvassed in the appeal or in the High Court between the Commissioner and the defendants. There was some criticism of this position as being entirely pragmatic and not

related to legal principle, but it does seem to me in the circumstances that it is a quite reasonable position to adopt.

The Irish Times Limited & Ors v. Ireland & Ors [1998] I.R. 359
39. The interpretation of this case is the critical and central point in the appeal. It is clear that it permits a court to depart from the strict application of Article 34.1 of the Constitution but only in special and wholly exceptional circumstances. The case was concerned with a trial in the Circuit Criminal Court and the question is whether the decision is restricted to a case where the right to a fair trial in criminal proceedings is in issue or goes further in legal principle. Some relevant citations may be helpful.

40. The facts were that at the commencement of a number of related criminal proceedings in the Circuit Criminal Court, the judge made an order imposing certain restrictions on contemporaneous reporting of the trial by the media. They challenged the ruling in judicial review proceedings on grounds including that the judge had acted outside of his jurisdiction or in excess of it. They also contended that the judge had failed to have regard to the right of the press to freedom of expression and the right of citizens to receive information.

41. Hamilton C.J. said at page 385:

> "While the public nature of the administration of justice and the constitutional right of the wider public to be informed of what is taking place in courts established by the Constitution are matters of public importance these rights must in certain circumstances be subordinated to the interests of justice and the rights of an accused person which are guaranteed by the Constitution.
>
> I am satisfied that the exercise of the rights conferred by Article 34.1 can be limited, not only by Acts of the Oireachtas, but also by the courts where it is necessary in order to protect an accused person's constitutional right to a fair trial."

42. O'Flaherty J. upheld the test proposed by Morris J. in the High Court as the correct one, but said that it should only operate in very limited circumstances. That was (a) that there is a real risk of an unfair trial and (b) that the damage which any improper reporting would cause could not be remedied by the trial judge either by appropriate directions to the jury or otherwise.

43. Denham J. said at page 399:

> "While there is no discretion in Article 34.1 to order a trial otherwise than in public Article 34.1 does not exist in a vacuum. There are competing constitutional rights, rights relating to other persons and in addition the court has duties under the Constitution. The court has a duty and jurisdiction to protect constitutional rights and to make such orders as are necessary to that end. There were several rights for consideration at the trial before the Circuit Court. The accused had a right to trial in due course of law (Article 38.1) and to a trial with fair procedures (Article 40.3). The trial judge had a duty to uphold the Constitution and the law and to defend the rights of the accused. Balanced against that was the community's right to access to the court, to information of the hearing, to the administration of justice in public (Article 34.1). That right is clearly circumscribed by the terms of Article 34.1. However, also in the balance was the freedom of expression of the community, a freedom of expression central to democratic government, to enable democracy to function. There was also the freedom of expression of the press. Thus consideration should have been given to Article 40.6.1 (i), which may include the publication of information: *Attorney General for England and Wales v. Brandon Book Publishers Ltd.* [1986] I.R. 597. The right to communicate (Article 40.3) was also a part of the panoply of rights in the bundle of rights for consideration."

44. None of the rights in consideration are absolute. Where there are competing rights, the court should give a mutually harmonious application. If that is not possible, the hierarchy of rights should be considered both as between the conflicting rights and the general welfare of society: *People v. Shaw* [1982] I.R. 1 at p. 56:

> "The accused's' right to a fair trial is superior to the other rights in the balance: *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465; *Z. v. Director of Public* Prosecutions [1994] 2 I.R. 476. However, categorising the rights and placing them in the appropriate hierarchy does not dispose of this matter.

45. Barrington J said at page 402:

> "If therefore the press were to put in jeopardy the right of an accused person to a fair trial I have no doubt that the courts would have all powers necessary to defend and vindicate the constitutional rights of the accused. (See the *State (Quinn) v. Ryan* [1965] I.R. 70). I have no doubt therefore that a trial judge would, in a proper case have a right to prohibit the contemporaneous reporting of part, or even in an extreme case, of all of the evidence in a criminal trial."

46. Keane J. said at page 410:

> "The right of the public to be informed as to proceedings in court is not, however, an absolute right: its exercise may, on occasions, have to yield to other constitutional requirements, specifically Article 38.1, which provides that:-
>
> 'No person shall be tried on any criminal charge save in due course of law'.
>
> The limitations imposed by this Article on the contemporaneous reporting of court proceedings are not, in general prescribed by any Act of the Oireachtas."

Discussion
47. Although the words of Article 34.1 are categorical and clear in their meaning, they have not been applied in their natural and ordinary meaning. They are interpreted by the Supreme Court and in a series of High Court judgments as meaning that there are other interests that will operate to make it necessary or appropriate to have some court proceedings otherwise than in public, even in the absence of statutory provision allowing for that. The understanding of Article 34.1 as explained by Walsh J. in *In Re R*, speaking for the majority, was that there was a constitutional imperative to have the administration of justice carried out in public subject to such exceptions as might be provided for by statutory provision. That was and remains the general Constitutional obligation which enjoys high status in the hierarchy of rights. The point that Walsh J. made was that it was not sufficient simply to have a statutory provision excluding the proceedings in a particular situation from public view; he and the majority were of the view that that was only the starting point and that a party seeking an *in camera* hearing had to go further and show that the administration of justice itself would

in some sense be imperilled if the privacy order were not made. This was a very high threshold, even where there was specific statutory authorisation for the exceptional jurisdiction to order *in camera* hearings. This latter part is the *ratio decidendi* of *In Re R*, as held by the majority. The minority, consisting of Finlay C.J. and Hamilton P. addressed the circumstances put forward on behalf of the applicant for privacy and were of the view that those exigencies were sufficient to meet the statutory test and would have ordered in camera hearing of the case.

48. The significance of *Irish Times* is, first and principally, that it departed from the categorical rule proposed in *In Re R.* The Supreme Court held that there was, in the accused's right to a fair trial, which was a fundamental constitutional right, an interest of sufficient importance to weigh in the balance as against the interest of the public and the general desirability or even imperative of having court cases/administration of justice conducted in public. This case accepted the principle that there could be circumstances absent specific statutory provision in which a court would be faced with a decision to order proceedings to be held otherwise than in public because of a major constitutional interest that was at stake and where it was necessary to protect that interest. The first point is not the specific rights that were in issue in *Irish Times*. It is that the court departed from an absolute rule. This case is, therefore, a landmark authority for the proposition that there are some circumstances in which the court will order a hearing otherwise than in public, even when there is no statutory provision for such an order. It seems to me that this approach makes sense; indeed, it is the only one that makes sense. In circumstances where there is a conflict between constitutional rights, the courts look first for a harmonious interpretation of the Constitution that enables rights and obligations to be reconciled one with the other. But where there are clashes of constitutional rights, and harmony is impossible in the sense of finding an interpretation that will accommodate all the legitimate interests, rights and obligations, the court has to look to the hierarchy of constitutional rights. It is clear from all the authorities that the courts very properly accord the right to a fair trial the status of one of the highest constitutional rights. The Irish Times case was concerned specifically with the constitutional rights of the accused and that is the focus of its attention. It seems to me, however, that the important principle to be taken from the case is that the constitutional provision in Article 34.1 is undoubtedly clear but it is not absolute. When faced with a constitutional right of sufficient importance, the court was prepared to set aside or to depart from the stated rule. It did so in order to protect another fundamental right that was entitled to very high rank in the hierarchy.

49. The fact that the Supreme Court endorsed a departure, or was prepared to endorse a departure from Article 34.1, obligations is the crucial point, not the facts of the particular case that were in issue. The Sunday World defendants in this case argue that the *Irish Times* case is authority only for the proposition that in the circumstances of a criminal trial and the issue as to whether the accused's right to a fair trial is in jeopardy, the court will be prepared to make an order for a hearing in private. They argue that that means it is only in those circumstances that it can apply. But is there any logic in that? Granted, the case applies to the rights of an accused to a fair trial in criminal proceedings. That does not mean, however, that the only circumstances in which the exceptional jurisdiction will be employed are in such a context. That strikes me as being wholly too narrow a construction and it also seems to be scarcely a logical approach. It is much too specific to the individual case. The principle is that if the competing constitutional right is of sufficient rank and is in jeopardy, the court will countenance departure from the constitutional rule and saying that it will depart from the constitutional rule is probably the wrong way of expressing the point. The fact is that the court is engaged to reconciling or harmonising different rights and obligations as contained in the Constitution. That is more or less the general function of law as it applies in the world. There is nothing new about it. It might properly be described as engaging in interpretation and construction where interpretation is ascertaining the meaning of the words, not in their dictionary definition sense, but in their application in the circumstances as they appear and for the purposes for which they are used in the enactment or provision. Construction, on the other hand, is construing the words so as to seek the proper meaning and application that they have in the circumstances to which they must be applied, a process that may result in the words being given a different meaning, and in some circumstances, an apparently conflicting meaning with the natural and ordinary meaning as contained in the dictionary. My conclusion about the *Irish Times* case is that it endorses a departure from the strict rule of Article 34.1. where the competing interest that is in conflict with Article 34.1 is of a sufficient status in the ranking of constitutional rights to warrant such a departure. It is of course necessary for the evidence to be sufficient as to the nature of the potential infringement with the right of the person to a constitutionally protected right. So, in the case of a fair trial, which the court was dealing with in *Irish Times*, it established the rule that there must be a real and substantial risk to the accused's right to a fair trial, and the second requirement is that there must be no way that the danger can be removed by appropriate rulings and decisions of the trial judge in the course of the proceedings. In my judgment, it is not the fact that it was a criminal trial that is decisive, but rather that it was an interest that is of high importance in the constitutional structure. It is true that the individual judgments for the most part focus on issues arising in a criminal trial and the accused's right to fairness, but that is because the question before the court concerned a criminal trial. Nevertheless, Denham J. did not confine her remarks specifically to a criminal context and her judgment is relied on by the Commissioner in this case and was cited by Mac Eochaidh J. in the High Court and also by Gilligan J. in his decision in the *Mooney* case. Denham J. said that Article 34.1 did not exist in a vacuum. By this, she meant that it had to be considered in its relation to other constitutional rights and provisions. So, the point is that *Irish Times* is authority for a court's entitlement to order a trial otherwise than in public, notwithstanding Article 34.1 and the absence of statutory provision in that regard where there is a major competing constitutional right that is at risk.

50. This analysis seems to me to be consistent with the other decisions that are relevant and that have been cited. I think it worth recalling that we are dealing with case law that is developed by the analysis of decisions that arise in different circumstances and where the proper approach is not simply to look for words and phrases that may confirm one view or rebut another, but rather to look for the underlying principle that is applied in the judgment. In *Re Ansbacher (Cayman) Ltd*. [2002] 2 I.R. 517 is a good example. The High Court had appointed inspectors pursuant to section 8 of the Companies Act, 1990 to investigate and report to the court on the affairs of a company. Persons who did not want their names to be revealed in the report as clients of the company sought orders preventing disclosure. The reliefs they sought included a direction that the application and future proceedings be held *in camera*. McCracken J. rejected the application on the basis that the privacy interest claimed could not defeat the interest expressed in Article 34.1. It is true that McCracken J. said that the jurisdiction that was examined and applied in *Irish Times* was confined to criminal trials, but that seems to me to be an *obiter* comment. If it was not *obiter*, I respectfully disagree. The real importance, as McCracken J. held, is that the interest that was advanced as being endangered by the public proceedings was insufficiently elevated in the hierarchy of rights under the Constitution. It is in accordance with my interpretation and understanding of *Irish Times* that the interest must be of a high order before the question arises in the first place. In the course of his judgment, McCracken J. said the following which is quoted by the Sunday World defendants in their submissions:

> ". . . the Supreme Court judgments in *Irish Times Ltd. v. Ireland* [1998] 1 I.R. 359 were intended to be restricted to criminal cases and to exceptions which arose under Article 38 of the Constitution. In particular, it was made quite clear that a desire for confidentiality could not under any circumstances be considered one of the special and limited cases prescribed by law."

51. In the second sentence of this quotation, the learned judge expresses precisely the point that seems to me to arise from the authority in question. However, I am unable to agree with the first sentence, as I have said, but the second is actually a separate matter with which I entirely agree. It is not that *Irish Times* is limited to criminal cases or rights under Article 28 in respect of a fair

trial, but rather that confidentiality is not a sufficiently important counterbalance to the constitutional rule in Article 34.1.

52. This analysis is, I think, supported by other relevant authorities. Denham J. (as she then was) in the Supreme Court in *Salinas de Gortari v. Smithwick* [1999] 4 I.R. 223, said at p. 229:

> "There is an inherent jurisdiction in the courts to order that a criminal trial be held otherwise than in public: *Irish Times Ltd. v. Ireland* [1998] 1 I.R. 359. The right of an accused to a fair trial is one of the most fundamental constitutional rights afforded to persons and on a hierarchy of constitutional rights is a superior right: *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465. A court may limit the publication of proceedings where that is necessary in order to protect the right of an accused person to a fair trial. However, in order to exercise this discretion the trial judge must be satisfied, (a) that there is a real risk of an unfair trial if contemporaneous reporting is permitted, and, (b) that the damage which any reporting would cause could not be remedied by the trial judge either by giving appropriate directions to the jury or otherwise: *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476."

53. It seems to me to be erroneous to assume that the learned judge in this passage was excluding the capacity of the courts to make an order in other circumstances than those of a criminal trial when constitutional rights of a sufficiently high status and importance are in issue. It was sufficient for the court to express the particular right that was in issue in the proceedings and to locate it in the decision in *Irish Times*. However, nowhere in the judgment in the case, and specifically in the quotation cited by the Sunday World defendants, is there any exclusion of the possibility of application elsewhere.

54. Other cases cited do not challenge or undermine or refute this analysis. In *Doe v. Revenue Commissioners* [2008] 3 I.R. 328, Clarke J. said:

> ". . . it seems clear that parties are not entitled to call in aid the undoubted constitutional right to a good name or to privacy, as a countervailing factor to the constitutional imperative that justice be administered in public. It is only where there are no other means of achieving the undoubted entitlement of parties to a just determination of their proceedings, that it has been established that a court has a constitutional entitlement to interfere with the obligation that justice be fully administered in public, and even then the court is constrained to interfere as little as possible with that imperative.

55. In *Independent Newspapers (Ireland) Ltd. v. Anderson* [2006] 3 I.R. 341, the same judge said that rights to a good name or privacy are not appropriately taken into account in the context of Article 34.1. The logic appears to me to be by reference to the decision of McCracken J. which the judge made that the rights proposed as being endangered by the proceedings were not sufficient to call in question the application of Article 34.1. It is to be borne in mind that any proceedings necessarily expose a person to some degree of publicity and to the possibility of embarrassment or even of the interference with the person's good name. As to privacy, it is practically a condition precedent to the institution of proceedings that the litigant sacrifices at least some elements of the right to privacy. As for a defendant, there is no choice in the matter, save perhaps to concede the case without contest. The point is that litigation does involve interference with privacy, and at least potentially with good name. It was held in these cases that a person was not entitled to assert privacy and good name rights to displace the constitutional rule. Indeed, it is difficult to see how the courts could accommodate litigants' rights to privacy and good name in a manner consistent with Article 34.1.

56. In *Mooney v. Commissioner of An Garda Síochána & Ors*. [2014] IEHC 155, Gilligan J. ruled in favour of the Garda Commissioner's application to have the proceedings in which she was a defendant heard in private. The judge concluded that if the proceedings were permitted to be heard in public, the lives of persons giving evidence and persons identified during the course of the trial could well be at stake. The Witness Security Programme was operated by the State for the benefit of law-abiding citizens and the general welfare of society and it could be seriously compromised. The order sought did not compromise the plaintiff's right to a fair trial or to call any relevant evidence. His right to achieve vindication was not threatened either. The only detriment to him was that his action would not be heard in public. The court held that it was appropriate and proportionate that an order should be made providing that the proceedings be heard otherwise in public with the judgment handed down in open court. Gilligan J. in the course of his judgment, held that he had jurisdiction to make an order for a hearing otherwise than in public in a civil action, preferring insofar as it was necessary to do so, the observations of Clarke J. in *Doe v. Revenue Commissioners* [2008] 3 I.R. 328 to those of McCracken J. in *Re Ansbacher (Cayman) Ltd*. [2002] 2 I.R. 517, but he did not actually agree that the latter judge had ruled out the making of the order sought. The Sunday World defendants argue that the *Mooney* case is distinguishable from the present for a variety of reasons, but if it is not to be distinguished, then they argue that it was wrongly decided. This is contrary to the conclusions that I am reaching, namely, that the exceptional jurisdiction identified by the Supreme Court in *Irish Times Ltd*. is not logically restricted to criminal proceedings, although they were the specific occasion that called for the decision. Insofar as the courts can identify major constitutional interests that are at stake, they are not shut out from making appropriate orders. Indeed, it seems to me that the function of the courts is to declare the law in circumstances where there is conflict between major rights, entitlements and obligations. That is whether they arise under the Constitution or in law, whether statutory or common law. Here, there is, on any view, a major conflict of serious interests. If the Sunday World defendants are correct, it means that the proceedings here will take place in public with whatever consequences ensue. The price of the administration of justice in public may be a high one in terms of human life and health and the State and the general nation may suffer as a consequence in its relations with other states involved in the Witness Security Programme with consequences for national security and public safety, but those may be sacrifices that have to be made on the altar of Article 34.1. It seems to me to return to the Mooney case that the distinctions suggested are either not applicable or not appropriate in differentiating the underlying principle that is to be applied. In deference, however, to the defendants' submissions, I propose to take them in turn and deal with them.

57. First, it is said that the applicant in *Mooney* was a party to the proceedings. The obvious answer here is that the Commissioner is actually applying to be a party to the action on the ground that she is entitled to do so because she has a vital stake in how the proceedings are conducted, arising from her responsibility as the head of the police force that is the agency for witness security operations and cooperation with other countries. In addition, the Commissioner has statutory functions and duties under the Official Secrets Act 1963 which have direct relevance to the proceedings and the manner in which they are conducted and the evidence that may be advanced in the case. That applies to examination and cross-examination and the production of documents and even the process of discovery. Second and third, the Commissioner's argument in *Mooney* was that her ability to defend herself fully at the trial would be impaired without the order and Gilligan J. based his decision on the fact that the administration of justice would be imperilled without the order. It is true that the Commissioner is not making the case here that the Garda Síochána are prevented from making a case and the appeal is on more general grounds of the risk to life and public safety and security interests.

58. However, as outlined above, they are the very issues that persuaded Gilligan J. as I have cited from his concluding remarks. Moreover, the administration of justice may well be imperilled in this case because of the operation of the Offences against the State Act as Counsel for the plaintiffs emphasised in his submissions. If it happens that because of the public nature of the proceedings, the Commissioner refuses to give the necessary permissions under the Act, the plaintiffs will be greatly inhibited in the evidence that they

are able to give. Fourthly, there is no statutory provision giving a discretionary power in defamation actions, notwithstanding the recent enactment of legislation in the Defamation Act 2009. This is undoubtedly the case, but it seems to me to be no more than a statement of fact as to the nature of the proceedings in question in *Mooney* as contrasted with the instant actions. Points 5 and 6 are that these defendants seek vindication in public and assert their freedom of expression rights which did not arise in *Mooney*. It seems to me that these are differences but not distinguishing features of the principles applied by Gilligan J.

59. These features reflect detriments that will accrue to the defendants in the event that the orders sought by the Commissioner are made. But they are not features of legal, rational distinction in undermining the applicability of the approach adopted by Gilligan J. Point 7 is that Gilligan J's order allowed his judgment to be made public, whereas in these cases, there will be a jury verdict which will merely give the outcome of the case and the jury's deliberations will not be revealed. That is a feature of jury trial which, in this case, has been sought by the defendants and it applies to every jury trial. Again, it strikes me that it is not a point of legal distinction as a matter of reasoning whereby the judgment of Gilligan J. might be declared non-applicable to the present cases. Point 8 is that there is material already available to the public in respect of the matters in issue. That is a matter of fact which is relevant to the consideration of the grounds of application, but not to the principle as applied by the High Court in the *Mooney* decision. Point 9 is an allegation of delay on the part of the Commissioner in making the application, but is not a reason to consider the application of the law by Gilligan J.

60. The tenth and final point of distinction raised is that the Commissioner has not specified the evidence or witnesses or measures to protect witnesses that are in issue. This is said to contrast with the *Mooney* case in which the Commissioner was able to indicate specific evidence that it would not be possible to call without the protection of the orders sought. However, that was not the basis of the judgment given by the High Court and is not a reason why *Mooney* should not be applied. This submission as to distinguishing *Mooney* is not relevant to an argument about distinguishing the judgment. The Sunday World defendants do indeed argue that the evidence is in fact insufficient, but that is another issue.

61. The issue as to administration of justice, otherwise than in public, is always and necessarily going to arise in the context of a trial, whether civil or criminal. A civil trial may be as important to a litigant as a criminal trial; it is impossible to declare *a priori* that the interests comprised in one are more vital than another. The judgment of Denham J. in the *Irish Times* case in 1989 appears to be applicable to a civil trial. Moreover, the logic of the judgments on the criminal trial issue that was before the court is also applicable to a civil trial, always provided that it can be shown that questions of constitutional rights of a sufficiently high status arise and that the imperilment of those rights is made out to a sufficiently cogent degree. If the jurisdiction were in fact restricted to criminal cases only, the judgments in *Ansbacher*, *Doe* and *Independent Newspapers*, among others, should have failed *in limine*; the issue would simply not have arisen once it was established that these cases did not concern criminal proceedings. Yet, they were debated as if civil cases could, in principle, engage the exceptional category. In the result, the interests cited in those cases were not of sufficient importance in the constitutional framework to oust the imperative principle embodied in Article 34.1. If one supposes that the defendants' interpretation is correct in law, and also that Detective Chief Superintendent O'Sullivan is accurate in his analysis and description of the threats posed by an open, reported trial, what is the rational, legal justification for such dangerous constitutional fundamentalism as would expose persons' lives and welfare and those of families, not only of protected witnesses, but of police officers and their families and would also endanger the whole programme in its operation and in its international connections? Where is the harmonious constitutional reconciliation between rights to be found in the application and operation of an absolute rule, notwithstanding the potential human and political and national devastation that it might wreak?

62. It seems to me that the principle is that Article 34.1 may be overborne in circumstances not provided by statute in the administration of justice, whether criminal or civil, but only in circumstances of such dire and exigent need in which major constitutional rights and interests are in issue and imperilled to a significant degree which is established by cogent evidence; where the protection of vital national and/or personal rights and interests can only be protected by *in camera* hearings or other ancillary orders and where the jurisdiction is confined to rare and exceptional and extreme cases. I am also satisfied that this case is such an instance, being unique and of the highest degree of national and individual importance. As to the evidence, like Gilligan J, I am impressed by the material placed before the court in the affidavit of Detective Chief Superintendent O'Sullivan. I do not consider it to be too general in its nature. It is necessarily so and it would take little imagination to work out the specific nature of the dangers involved.

63. It seems to me that this conclusion is justified in the circumstances by the evidence put forward which is uncontested. I do think that the cases pointing against this conclusion can be readily explained, and, if necessary, distinguished, but that I do not find to be necessary because for the most part, the observations relied on seem to me to amount to *obiter dicta* rather than *ratio decidendi*. The fact that a potential litigant is inhibited as to making a perhaps entirely legitimate claim because he fears publicity and damage to his good name or reputation is not a fault of the system of open justice; it is the result of a decision whereby he balances the pros and cons of instituting proceedings. That is quite a different issue to the argument that his constitutional right to his good name and/or his unspecified privacy rights are sufficient to displace a clear constitutional imperative.

64. In my view, this jurisdiction is available in a civil action, but only in highly exceptional and rare circumstances and the test to be applied is (a) that there must be a high constitutional right or interest that is at stake; (b) that there must be cogent evidence as to an existential threat to that right or interest; (c) I follow, as I must, the jurisprudence that declares that the endangered interest cannot be protected otherwise than by a secrecy order *e.g.* by rulings of the trial judge at the hearing or in advance and (d) the order should embody an element of proportionality in that the scale of the issues and the nature of the threat must be such that it is reasonable in all the circumstances as a matter of proportion to make the order.

Conclusion

65. In my view, these tests are satisfied in the present case. I respectfully adopt and endorse the contents of the concluding paragraphs of the judgment of Gilligan J. on the procedural issue in the *Mooney* case as follows:

> "43. The Court considers that this is an exceptional case. The Court has to be conscious of the present situation in Ireland pertaining to subversives and organised crime. There is no need to highlight the level of concern that must exist in this regard and the general welfare of society. Furthermore, both parties to these proceedings agree that matters of life and death are involved and more particularly, the averments of the deponent that the publication of the identity of members of An Garda Síochána involved in the Programme would effectively render them targets for subversive and organised criminal gangs is not contradicted. Further, an averment that the Programme itself would be seriously compromised if information relevant to the case is made public is not disputed. The averment that the revelation of the relationship between the Programme and the third country party in question would render the operation of the Programme extremely difficult, is not contradicted. This Court does not find favour with the submission of counsel for the plaintiff that the first named defendant has overstated the difficulties which it faces. These difficulties have been averred to on affidavit and, in the view of this Court, are not directly contradicted and are accepted by the Court as *bona fide*

assertions of fact.

44. I take the view that it is reasonable to come to the conclusion in the particular circumstances that if these proceedings are permitted to be heard in public the lives of persons giving evidence and persons identified during the course of the trial could well be at stake. Furthermore, it is clear that the Programme as operated by the state for the benefit of its law abiding citizens and the general welfare of society could be seriously compromised. It further has to be borne in mind that the order as sought does not compromise in any way the plaintiff's right to a fair trial and the right to call any relevant evidence to the issues at stake between the parties to these proceedings. The plaintiff's right to achieve the vindication which he requires is not threatened, save only that the trial of the action, will not be in public. I find favour with the submission on the defendants' behalf that the judgment of the Court be handed down in open court, subject to any necessary redaction arising always bearing in mind the interests of justice.

45. In all the circumstances, the Court is of the view that it is appropriate and proportionate that an order should be made providing that these proceedings be heard otherwise than in public, with the judgment handed down in open court."

66. In the result, the constitutional rights and interests that are in issue in this litigation and are the same as those considered by Gilligan J. There is no question of their status in the hierarchy of Constitutional rights and interests, including as they do rights to life, State security, public safety and international cooperation to combat crime of the most serious kind. I would add the functions of the Commissioner under the Official Secrets Act 1963. The nature of the interests that are at stake are indeed vital to the State as the Sunday World article declares. The threat to these interests is indeed existential as explained in the affidavit of Detective Chief Superintendent O'Sullivan, which is undisputed. It is also clear that the only way that these interests may be safeguarded in the litigation of the claims by the plaintiffs is by an order of the kind sought by the Commissioner and which is similar to what Gilligan J. ordered previously. It is proper to join the Commissioner as a notice party to the actions to enable legitimate security issues to be raised in the course of the trial, but I would leave the precise manner in which the Commissioner's counsel may participate as a matter to be decided by the trial judge.

67. I also take the view, accepting the submission of Counsel for the plaintiffs that the orders I am proposing can and should be seen as operating to protect the entitlement of the plaintiffs to fair trial of the claims and adopt that as a separate, distinct and additional ground for my decision.

No Redaction Needed