Neutral Citation Number: [2013] IEHC 222

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 53 JR]

BETWEEN

BREIFNE O'BRIEN

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Kearns P. delivered on the 16th day of May, 2013.

This is an application brought by way of judicial review seeking prohibition of a criminal trial on the grounds that the applicant could not now or at any future time secure a fair trial by reason of substantial and ongoing adverse publicity.

The applicant, a former businessman, stands charged with 45 charges of theft and deception contrary to ss. 4 and 6 of the Criminal Justice (Theft and Fraud Offences) Act 2001 relating to five complainants namely, Evan Newell, Louis Dowley, Martin O'Brien, Pat Doyle and Daniel Maher, all allegedly committed between the 4th December, 2003 and the 27th November, 2008 at various locations in counties Dublin and Kildare. In essence, it is alleged that the applicant operated a pyramid or ponzi type scheme during the course of which he sought and received large sums of money from the five complainants on the basis of fictitious investment opportunities. His alleged *modus operandi* was to seek money from one investor and, having promised that investor a return, when the time came for the return of the investment, if he was not able to convince the investor to reinvest in another further bogus transaction, he would seek a different investor and would use the new investment to pay off the first investment and its bogus return. This process is alleged to have been repeated over a ten to fifteen year period, but in December 2008 it became apparent that the applicant was in financial difficulty and was unable to repay sums allegedly invested by the complainants and other investors. It transpired that substantial monies had not been held in the manner agreed or used for the purpose agreed but rather were appropriated to fund various uses including meeting the applicant's own personal lifestyle, alleged to be of a lavish and high profile nature.

The applicant attended a meeting on 13th December, 2008 at the offices of McCann Fitzgerald solicitors where he met with Mr. Brian Quigley, a solicitor, and a number of his creditors. It is alleged that the applicant there made a number of admissions to the effect that he had dishonestly misappropriated funds entrusted to him for specific purposes. These alleged admissions are detailed in affidavits sworn by Mr. Quigley in civil proceedings issued in the Commercial Division of the High Court against the applicant on behalf of seven separate plaintiffs and a full set of pleadings in relation thereto (including his own affidavits and the court order of the 15th December, 2008) are included in the book of evidence herein. Mr. Brian Quigley has also provided a statement in relation to the subject matter of the said meeting and the admissions made by the applicant which said statement is also included in the book of evidence. Two of the plaintiffs from those proceedings namely, David O'Reilly and Evan Newell, made statements in the High Court civil proceedings describing the said meeting and the admissions allegedly made at the said meeting by the applicant. In an affidavit sworn by the applicant in January 2009, the applicant outlined his current assets as well as the location and current status of the various monies allegedly placed under his control by the plaintiffs in the civil proceedings, from which it is alleged that it is patently clear that monies advanced to the applicant were not used by him for the purposes for which they were given.

Other evidence collected by the investigation team in this case claims to go beyond the statements of various complainants and the applicants alleged admissions in relation thereto and includes documentation evidencing bank transactions, business documentation, correspondence and cheques drawn on various accounts and the paper trail in relation to the uses to which they were put.

The book of evidence was served on the applicant on the 1st day of November 2012. Leave to bring the present judicial review proceedings was granted by the High Court (Peart J.) on the 28th January, 2013. The notice of motion seeking an order of prohibition restraining the respondent from taking any further steps in the criminal proceedings was made returnable for the 19th March, 2013. The statement of opposition was delivered on the 14th March, 2013 and the full hearing of the application took place before this Court in the week commencing the 30th April, 2013.

Affidavit evidence was tendered to the Court during the course of the hearing by Elayne Fitzmaurice, a solicitor in the office of the respondent, to clarify that the earliest available date for the applicant's trial, on the basis that a trial date would be sought at the present time, would be in mid February, 2014. Given that the case is likely to take a number of weeks, it is anticipated, having regard to the current state of the list and the dates currently being assigned, that the trial of the applicant will not be given a date until some time in the second quarter of 2014.

Despite this lengthy interval of time since the discovery of the applicant's alleged wrong-doing and the proposed date of trial, it is alleged on behalf of the applicant that the adverse and negative publicity surrounding his activities are such as to preclude the possibility that the applicant will ever receive a fair trial, and the primary relief sought is a complete ban on a trial ever taking place. However, at the hearing itself, and with the Court's leave, counsel on behalf of the applicant indicated to the Court that, if unable to secure such relief, the applicant would seek a lengthy stay or adjournment of his trial so as to permit the operation of a "fade factor" whereby the memory of potential jurors of offensive publicity would sufficiently subside so as to permit a safe trial.

THE PUBLICITY COMPLAINED OF

The material complained of by the applicant may be categorised under the following four headings:-

(a) remarks made by Kelly J. during the course of the civil proceedings against the applicant;

(b) a chapter in a book entitled *Bust: How the courts have exposed the rotten heart of the Irish Economy*, authored by Dearbhail McDonald, a well-known legal correspondent;

(c) numerous articles, many of a lurid and sensational nature, contained in various national newspapers between 2008 and 2012;

(d) a television documentary entitled *Beware Ireland, con artists caught in the act*, first televised on the 29th February, 2012, repeated on the 3rd October, 2012 and further repeated on Channel 3e on the 1st January, 2013.

Each of these categories require to be considered in turn for the purpose of making some assessment of their likely impact on the minds of potential jurors, either separately or cumulatively.

(a) Comments made by Kelly J. during the civil proceedings

The civil proceedings in the Commercial Court brought against the applicant by various plaintiffs culminated in a judgment in early 2009 for a sum of approximately €13 million. It is not in dispute but that in the course of the aforementioned proceedings, Kelly J. referred to the alleged activities of the applicant as constituting "an unsophisticated yet successful confidence trick" and as "odious". In addition, by comparing the applicant to the fictional character Montague Tigg, a fraudster depicted by Charles Dickens in the novel *Martin Chuzzlewit*, it is submitted that the judge severely prejudiced the applicant's chances of a fair trial in circumstances where those remarks had been the subject of widespread media attention. The judge also recommended that the matter be referred to the Garda Bureau of Fraud Investigations.

(b) The book authored by Dearbhail McDonald was published in September, 2010. It contains a chapter devoted entirely to the applicant, his alleged activities and the proceedings brought against him and is entitled "The Glenageary Madoff", a reference to notorious convicted American ponzi scheme operator, Bernie Madoff. The chapter in question addressed in considerable detail the various transactions in which the applicant was allegedly involved, noting his close relationship with those who entrusted money to him, the nature and range of his assets and investments, his *modus operandi* and the luxurious lifestyle enjoyed by the applicant and his wife during the Celtic Tiger years of the Irish economy.

(c) Newspaper Articles

The applicant has exhibited two affidavits of material which span a period of three years and eight and a half months from the 17th December, 2008 to the 2nd November, 2012. Such material includes publications in various national newspapers with very wide circulations including, the Irish Independent, the Sunday Independent, the Irish Daily Mail, the Irish Times, the Irish Examiner, the Irish Mirror and the Evening Herald.

Throughout the course of such media reporting, the applicant is variously and consistently depicted as a "self-confessed pyramid schemer", a "rogue advisor", a "shamed tycoon", a "fraudster", a "self-confessed conman" and as "Ireland's Bernie Madoff". Much of the material tendered to the Court matter of factly states that the applicant had "duped his oldest friends", "misappropriated up to €15 million in a ponzi scheme", "pillaged", "conned", "ripped-off" and betrayed close acquaintances and family members and routinely sought "victims" and "targets" to prey on with his "fictitious investment opportunities".

There are also repeated references made to the applicant having lived a lavish and excessive lifestyle and multiple references to his subsequent "fall from grace" when the allegations of his alleged wrong-doing came to light. There are references to alleged "victims" including some who are not complainants in the actual criminal proceedings. Many of the articles and publications are accompanied by large photographs of the applicant himself, his former spouse, Fiona Nagle, and his previous residence. On behalf of the applicant it is contended that the effect of this adverse publicity is compounded by the fact that, prior to the allegations, both the applicant and his wife were already well-known social personalities with established media profiles.

While the bulk of the published material appeared between 2008 and 2009, something of the order of 60 articles have been published about the applicant and his affairs which, although they tapered off in volume by 2011, reappeared to quite considerable degree in 2012 when he was formally charged.

It is not disputed by the respondent that much of the media coverage contained in the newspapers articles constitute 'emotional publicity' in the sense that they highlighted the applicant's opulent lifestyle prior to the collapse of his financial affairs and focused - not without indications of satisfaction - on his subsequent fall from grace, his humiliation and reduced personal circumstances.

(d) Television broadcasts

The TV3 broadcast was first televised on TV3 on the 29th February, 2012 when it had viewing figures of 131,500 persons. The later broadcast of the same programme on the same channel in October 2012 was watched by 120,700 persons. A more recent broadcast of the same programme featured on Channel 3e and was watched by 52,300 persons.

These figures were supplied, at the Court's request and by agreement of the parties, from TV3 itself. Facilities were provided to enable the Court to view so much of the programme as related to the applicant, and which lasted for approximately ten minutes. This coverage was in the nature of an exposé which focused on the *modus operandi* of the applicant in allegedly setting up and operating a ponzi type scheme to defraud investors over a prolonged period of time.

During the course of the hearing, and by agreement of both parties to the present application, the Court directed that there be restricted reporting of the hearing, so as to exclude the publication of excessive details of the material relied upon by the applicant in seeking the prohibition of his trial. Thus while the bringing of the present proceedings could be reported, the Court, and in consequence of its direction, the media also, ensured that no widespread republication of the detailed material relied upon by the applicant arose from the making or hearing of the present application.

THE LEGAL TEST

In order to establish an entitlement to an order of prohibition on the basis of a threatened breach of an accused's right to a trial in due course of law, an applicant must establish that the grounds relied upon in support of the application for a prohibition demonstrate that there is a real and serious risk of an unfair trial. In *Savage v. Director of Public Prosecutions* [2009] 1 I.R. 185, Denham J. explained the meaning of a real and serious risk of an unfair trial in the following terms at p.203-204:-

"all of the above are subject to the fundamental test to be applied by the court, that of 'real risk' as described by Finlay

C.J. in *Z v. Director of Public Prosecutions* [1994] 2. I.R. 476 at p. 506:

> 'This court in the recent case of *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465 unanimously laid down the general principle that the onus of proof which is on the accused person who seeks an order prohibiting his trial on the ground that circumstances have occurred which would render it unfair is that he should establish that there is a real risk that by reason of those circumstances (which in that case also was pre-trial publicity) he could not obtain a fair trial.'

He continued at p. 507:

> '…where one speaks of an onus to establish a real risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of the trial must be unavoidable unfairness of trial." (Emphasis added)

In the present case, counsel for the applicant accepts, as indeed he must, that the jurisdiction of the Superior Courts, as noted in *D.C. v. Director of Public Prosecutions* [2005] 4 I.R. 281, to intervene in criminal proceedings by way of prohibition is "exceptional".

In his instructive work on *The Criminal Process*, (2009 Ed., Thomson Round Hall) Professor Tom O'Malley draws a distinction between different forms of publicity which may affect the criminal process. He states (at para. 16.35):

> "Case-specific publicity may, in turn, be subdivided into what are sometimes classified as factual publicity and emotional publicity. As the term suggests, factual publicity consists of material which simply reports facts connected with the crime or the accused. This does not prevent it from being prejudicial. It might be a fact, for example, that the accused had several previous convictions for a similar offence, but a jury might well become biased as a result of exposure to this knowledge. Emotional publicity may take many forms but its unifying characteristic is that it goes beyond the facts (assuming that it troubles to acknowledge them at all) and gives prominence to certain matters that are likely to affect the target audience in a particular way. At least one study has shown that jurors exposed to factual publicity were more likely to convict than those who are not but that the impact of such publicity declined or indeed disappeared when there was an appreciable interval between the publicity and the trial. Emotional publicity, on the other hand, tended to have a more lasting impact which was not always reduced by delay. This form of publicity can obviously take many forms."

Noting the absence of research into the impact on potential jurors of pre-trial publicity, the author goes on to state (at para. 16.36):-

> "There is significant empirical support for the proposition that prejudicial pre-trial publicity can influence jurors in the sense of making them more likely to view the accused person negatively and to increase the likelihood of a guilty verdict. Many of the leading studies do, however, emanate from the United States where much greater levels of pre-trial publicity are legally permitted than in Ireland and most other common law countries. Empirical studies conducted in such an environment must be evaluated in this light. Studies conducted in legal cultures closer to our own have been less willing to assume that pre-trial publicity has such a negative effect, though such studies have been few in number. A leading Australian study, resulting from a detailed study of a selection of crimes in New South Wales, found that jurors mostly recall the crime having been committed (assuming that it has been widely reported) but are less likely to recall learning of the accused person's arrest with the various pre-trial hearings. Counsel and, to a lesser extent, judges tend to overestimate the extent to which jurors recollect publicity about the crime or the accused. There were, however, three situations in which jurors were likely to recall media coverage: (a) where the accused was otherwise well known within the community; (b) when the crime occurred where a juror lived; (c) where the publicity did not occur or was not encountered until after the trial began. All of these, and particularly the last, stand to reason, and there will seldom be much that can be done about the first, though in bigger countries a change of venue may help. In a review of the aforementioned Australian study, Butler wrote:
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> 'The perennial problem besetting any debate concerning the impact of pre-trial publicity on the conduct of the trial and the effectiveness or otherwise of the sub judice rule is that rarely if ever is such a debate able to venture beyond mere assertion in the absence of relevant data'.
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> This certainly holds true in Ireland as well. The tension between a fair trial and free press was noted at the outset of this chapter. When it comes to evaluating the possible impact of pre-trial publicity on jurors another tension comes into play, this time a tension between faith and science. Irish, British and commonwealth law reports are replete with judicial expressions of faith in the ability of juries to reach a decision on the basis of the evidence and to put extraneous material out of their minds. Rarely is there any reference to the science or literature on the matter. More seriously, of course, is the dearth of research on the matter in these islands generally, something that is now badly needed because of present certainly that every crime of any notoriety involving a well known defendant will be given widespread publicity, especially in some of the print media, prior to the trial itself."

As a general proposition I am disposed to accept the respondent's submission that properly directed juries can be expected to abide by their oath and find facts on the evidence properly before them. It is a view I expressed in the case of *Redmond v. Director of Public Prosecutions* [2002] 4 I.R. 133 when stating (at p. 141):-

> "While acknowledging that an individual's right to a fair trial is a superior right to that of the community to prosecute, the importance of the community's right must not be devalued or given mere lip service. The efficacy of a society's system of justice involves giving due recognition to both rights and not just the former. That is not to say that one right may be traded off in some way against the other or that an accused's right to a fair trial be balanced detrimentally against the community's right to have alleged crimes prosecuted. It simply means, in my view, that there is an onus on a judge where the trial of an accused may be put in issue by allegations of prejudicial publicity to determine firstly, if the risk of an unfair trial is a real one and, if so, can it be overcome by the giving of appropriate warnings or directions by the trial judge in the first instance to the jury panel and, during the trial itself, to the jury."

Having regard to his immense experience in dealing with juries as a trial judge over many years, great importance should, in my view, attach to the views expressed by Carney J. in *Director of Public Prosecutions v. Haugh* [2000] 1 I.R. 184 where the focus of his judgment on the powers available to a judge in the context of a criminal trial under s. 15 (3) of the Juries Act 1976 prompted Carney J. to state as follows (at p. 192):-

> "This is a new provision and nothing comparable appeared in previous juries' legislation. It has two purposes. Firstly, it

> acts as the final filter to weed out from the jury panel any person who might be disqualified or ineligible to serve. We are not in the instant case concerned with that aspect of the section. Secondly, it seeks to ensure that the jurors empanelled will be disinterested and unbiased in the broadest sense of the term.
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> So that potential jurors will know whether they have a duty to volunteer information as to the particular circumstances, e.g., knowledge of the accused, the alleged victim, a witness or employment in a company robbed or defrauded, it is necessary for the trial judge to make a brief statement of the nature of the case and who and what is involved. This brief statement is of necessity tailored to the facts of the particular case and I can see no reason why the trial judge should not invite any potential jurors who feel they could not give the first notice party a fair trial based exclusively on the evidence adduced and the trial judge's legal directions to indicate that."

Having given various examples of how potential jurors following a s. 15(3) direction tend to volunteer information across a spectrum of considerations, Carney J. continued (at p. 193):-

> "Jurors in my experience in the Central Criminal Court are not inhibited about disclosing in public reasons why they should not be called on to serve in a particular case and the matters which they disclose frequently go outside the matters which have been put to them in the s. 15 (3) direction. Section 15 (3) of the Juries Act 1976 is the statutory scheme designed by the Oireachtas in the first instance as the final filter to eliminate disqualified and ineligible jurors and secondly to eliminate biased jurors in the broadest sense of that term and it works well."

This important interactive role of judge with jury was the subject matter of the following remarks by Blayney J. in *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465 (at p. 472):-

> "In a criminal trial the members of the jury are made very aware of the heavy responsibility they have as the judges of the guilt or innocence of the accused. It begins with their individually taking an oath to 'well and truly try the issue whether the accused is guilty or not guilty of the offence charge in the indictment preferred against him and a true verdict give according to the evidence. They are then reminded by the trial judge in his charge at the end of the case that they must decide the case only on the evidence before them; that they must put out of their minds anything they may have heard or read about the case from any other source, and that they must not allow themselves to be swayed by sympathy but decide the case on the facts. What must be borne in mind also is the impact made on the jury by hearing the witnesses in the case, by having the evidence at first hand presented to them. Are they going to permit their assessment of that evidence to be influenced by a vague recollection of something they read in a newspaper some months before, particularly when to do so would be to disregard their oath and to disregard the clear directions given to them by the trial judge?"

Like Carney J., I believe that the jury system in our criminal courts works well to ensure that the administration of justice is properly achieved. I thus took the view in the *Redmond* case that cases where adverse publicity might be so prejudicial that no unbiased jury could be found to deal with the case, at least at the proposed time of trial, would be very much the exception rather than a common occurrence. Indeed, I noted in the *Redmond* case that it was not "lightly to be assumed that the Director would press for a trial at such a time and in such circumstances". My view has not changed from that which I then expressed in saying (at p.144):-

> "I see no difficulty whatsoever preventing a judge from discharging his duties in most cases by warning a jury panel of a particular risk, in this case prejudicial publicity, and then inviting self-disqualification of any potential juror who feels he or she cannot deal fairly with the case. Is it to be supposed that a jury panel will not take to heart a clear warning given by a trial judge in such circumstances? The entire conduct of trials within the jury system proceeds on the assumption that juries will take seriously directions and guidance given to them by the trial judge. It is wrong, as was stressed by Denham J. in *D. v. Director of Public Prosecutions* to impute naivety to jurors, and the jury system is a robust and enduring system which has served the community well over many hundreds of years."

I do not believe that the system of trial by judge and jury requires over-zealous policing by superior courts in the manner of those fastidious parents who prevent grown children from climbing trees or walking a short distance to their local school. Some risk is an integral part of human existence and efforts to eliminate all risk in any area of human activity are often counter-productive. Our courts are well served by trial judges with practical experience of inter-reaction with jurors to ensure justice is done. That judge is the person best placed to assess whether an impartial jury can be empanelled and to give appropriate warnings and directions to that jury. Excessive willingness to halt or prohibit trials suggests a lack of confidence in trial judges and in the common sense of jurors which, if based only on fears that the slightest damage warrants prohibition, can serve only to altogether undermine faith in our criminal trial process. I view with some alarm and dismay the increased frequency with which applications to halt or prevent trials before they ever reach a trial court are now being brought

In the comparatively recent case of *Rattigan v. Director of Public Prosecutions* [2008] 4 I.R. 639 the main judgment of the Supreme Court was that delivered by Geoghegan J. He again emphasised that having regard to the public's right to secure a prosecution, especially in serious crime, a court should be slow to stop a trial and explained that statement as follows (at para. 50):-

> "What I mean by that is that a court will only stop a trial if it is satisfied that the normal safeguard procedures in a trial, including the making of appropriate directions, will not, in fact, achieve a fair trial. In practice, this will rarely be the case. As far as adverse pre-trial publicity is concerned, the so called fade factor is most important. If a reasonable time has elapsed between the publicity and the trial, the risk is altogether smaller and this will be especially so if a trial is in a city such as Dublin and not in a small town where a crime has been committed. There cannot be complete avoidance of the risk because even in a case where eleven out of the twelve jurors may never have noticed particular names when reading an article, if they did read it or equally probably may have forgotten the names, there may still be one single juror who did know who the accused was and who may remind his or her fellow jurors of the offending article. Quite frankly, every eventuality cannot be catered for. It should also be borne in mind that in the case of a serious crime such as murder, where the trial lasts several days or perhaps more, the dangers of an unfair result based on pre-trial publicity will normally reduce as time goes on. By that time the jury will have become accustomed to their judicial role explained to them *ad nauseam* by the trial judge and counsel on both sides. Furthermore, it must always be borne in mind, as it has been in so many decisions, that there is no evidence to suggest that, in general at least, jurors do not exercise their function properly and with the required independence of mind."

I accept and fully share those views which exhibit a high degree of common sense and practicality.

DECISION

While some of the focus of submissions made to the Court by counsel on behalf of the applicant centred on whether certain evidence might prove inadmissible at the hearing, it seems to me that the issue to be addressed and resolved turns less on testing of the strength of the prosecution case, than on the impact on potential jurors of what in this case consists of both factual publicity and emotional publicity. It is undeniable that there has been extensive publicity of both kinds in this instance.

I propose to evaluate and assess, as best I can, the potential impact of such material in the context of the empanelling of a jury in the second quarter of 2014 to hear and determine this case.

Turning in the first instance to the comments made by Kelly J. in the Commercial Court, it must be permissible for a judge to include some indications of approbation or reprobation for a party in favour or against whom findings are made in court. The public, I believe, need to believe that a strong and independent judiciary will articulate rulings and judgments in a manner which provides reassurance that the interests of justice are given due regard. That may often justify, or even require, a weighted and proportionate measure of criticism of a particular party. Judges in the ordinary course are nonetheless careful to refrain from comments which go beyond what is appropriate in the particular context, particularly when, as in this case, it was apparent that there was a real possibility that a criminal prosecution might follow. While the particular literary allusion, even if only understood by those who had read the book in question, was better not made, it was balanced by the judge's express reference to the fact that the material constituted only "*prima facie* evidence" of wrongdoing on the part of the applicant. Furthermore, any prejudicial effect which may be said to have arisen has in my view been long cured by the operation of a 'fade factor'.

In the same way, the chapter from Ms. McDonald's book, written with the benefit of her considerable experience of covering proceedings in the Four Courts, would, if read by a potential juror on the eve of the trial, undoubtedly have a significant impact upon the thinking of that juror. However, the book in question was published in September, 2010 and there have been a plethora of other books since that time about the collapse of the Irish economy, the end of the Celtic Tiger and references to well known figures in Irish society who supposedly caused or contributed to that catastrophe of life in modern Ireland.

The Court has been furnished with no information as to the circulation figures for the book and overall I do not see it as contributing in any significant way at this remove in time to the apprehensions expressed on behalf of the applicant in the making of this application.

The huge volume of adverse and highly critical newspaper articles fall into a different category from those already considered. Many of the media articles pore gloatingly over the details of the applicant's ruin, exhibiting a high level of *schadenfreude* in the applicant's current plight and circumstances.

It goes without saying that in any liberal democracy, the press and other media must be free to investigate and expose wrongdoing and one would have to query whether national newspapers and television outlets would have any worthwhile function, beyond reporting on sports events or the screening of game shows, if deprived of that central and vital role. However, a point can arise in reporting supposed wrongdoing where factual publicity yields to emotional publicity of an unpleasant and prejudicial nature, which I believe, taking the totality of the printed material, has occurred in this case. If a trial had been scheduled to commence now in the immediate present, I believe it could be characterised as carrying with it a significant (as distinct from an artificial or fanciful) risk of being unfair, notwithstanding careful directions and/or warnings from the trial judge. I say this notwithstanding my firm conviction that warnings from trial judges do carry enormous weight with juries, something the applicant, by implication at least, also recognises, having regard to the importance attached by him to remarks made by the trial judge in the civil proceedings even now long after those civil proceedings have been concluded.

The TV3 broadcasts took place in the previous year and it must be questionable how much remains in the mind of the viewer after a short period of time has elapsed. Many ongoing drama series seem to require reminders at the outset of what happened in previous episodes, something which may suggest that the memory of viewers for previously seen material is decidedly limited. However, and even allowing for the fact that E3 enjoys only limited viewing figures, I think the television broadcasts, taken in conjunction with the huge volume of printed newspaper articles, are such as to suggest a trial in present circumstances would constitute an appreciable risk of an unavoidably unfair trial having regard to the legal tests outlined about.

I would thus have reservations about a trial proceeding in the immediate future. That said, I see no reason why, after a reasonable interval of time, a trial, suitably managed by a judge who would give all necessary warnings and directions, could not take place.

In the case of this particular application, counsel for the applicant indicated that, if his application for a permanent prohibition was unsuccessful, he would in the alternative seek as long a stay as possible to allow the "fade factor" to operate.

On the unchallenged evidence before the Court, a trial is unlikely to occur before the second quarter of 2014. Counsel for the applicant stressed that if an earlier trial date became available due to the adjournment or non-commencement of some other lengthy case, the present case might be leapfrogged to an earlier hearing date.

In those circumstances I will direct a stay on the actual trial of the applicant for twelve months from today's date. This need not hold up or otherwise affect the making now of arrangements for the holding of the trial in 12 months time. I do not believe any of the material relied upon the applicant in making this application justifies granting any more extensive relief, and certainly not the total prohibition of the trial sought on his behalf. However, that is not to say that the applicant would be precluded from bringing a further application if, apart from reports of this judgment and decision, there were to be a significant recrudescence of adverse publicity between now and a trial scheduled for the second quarter of 2014.