Neutral Citation Number: [2005] IEHC 180

THE HIGH COURT

[2005 No. 1842P]

BETWEEN

DENISE COGLEY

PLAINTIFF

AND
RADIO TELIFIS EIREANN

DEFENDANT
[2005 No. 1835P]

BETWEEN

JOHN AHERNE GENEVIEVE AHERNE AND SOVEREIGN PROJECTS LIMITED

PLAINTIFFS

AND
RADIO TELIFIS EIREANN

DEFENDANT

Judgment of Mr. Justice Clarke delivered 8th June, 2005.

1. Both of the above proceedings were commenced on Friday 27th May, 2005 and relate to what was, at that time, an intention on the part of RTE to broadcast a programme on Monday the 30th May concerning a nursing home at Leas Cross. The plaintiff in the first proceedings ("The Cogley Proceedings") is a Director of Nursing at the Leas Cross Nursing Home which is situated in Swords, Co. Dublin. She is a registered general nurse and holds a degree in Business Studies and Languages from Dublin City University. She has worked as a nurse since qualifying in 1992 apart from a break while she was completing her degree during which time she worked as an agency nurse. From 2003 until November 2004 she worked with Parexel Clinical Pharmacological Unit in Harrow in the United Kingdom, initially as a senior research nurse and, subsequent to a promotion as a Recruitment and Screening Manager. In the latter part of 2004 she decided to return to Ireland for personal reasons. She applied for and was appointed to the position of Assistant Director of Nursing at Leas Cross taking up duties on 8th November, 2004. She was promoted to the position of Director of Nursing when the existing holder of that office resigned. She took up her appointment as Director of Nursing in the latter part of March 2005. As it is material to the issues in the case it should be noted that Ms. Cogley was, therefore, a nurse in Leas Cross for less than seven months prior to the events which give rise to these proceedings and was Director of Nursing for approximately six weeks.

2. The plaintiffs in the second proceedings ("The Aherne Proceedings") are the owners and occupiers of the nursing home and carry on the business of a nursing and retirement home at the Leas Cross premises having established same in April 1998.

The Initial Applications

3. Having issued separate proceedings on the 27th May the plaintiffs in both proceedings applied ex parte to the court on that day. The plaintiff in the Cogley proceedings simply sought short service of a motion seeking interlocutory injunctions which short service was ordered to enable the motion to come before the court on the following Monday (the 30th May) in time to allow the interlocutory application to be heard prior to the time when the broadcast then intended by the defendant was due to go out (at approximately 9.30 on Monday evening). Nothing furthers turns on that application.

4. The plaintiffs in the Aherne proceedings however, sought an interim order which I declined. I did, however, direct short service of a motion for an interlocutory application which again came before the court on Monday the 30th in time to enable a decision to be made prior to the intended time of broadcast. As both applications related to the same intended programme they were heard together.

5. I should, however, explain more fully the reasons why I felt it inappropriate to grant an interim injunction in the Aherne proceedings. Later on in this judgment I will deal in more detail with the balancing of rights required where a party seeks to restrain the publication of material. In addition to the jurisprudence of the courts in this jurisdiction it is now also necessary to consider the position pursuant to the European Convention on Human Rights in relation to the grant of what are, in the jurisprudence of that court, referred to as prior restraint orders (which are orders which restrain in advance the broadcast or publication of material). However it is clear that there is an obligation on a court only to grant such orders after what is described as "careful scrutiny". Given that obligation it seems to me that a court should be reluctant to grant interim orders which would have the effect of restraining in advance, publication in circumstances where the intended publisher has not had an opportunity to be heard. For those reasons it seems to me that where it is at all possible the court should attempt to afford the defendant at least some opportunity to put before the court its case prior to making any form of restraint order. There will, of course, be cases where, for one reason or another, that is simply not possible. The time between the initial application to the court and the intended publication or broadcast may, in practice, be too short. In such circumstances the court may still have to consider granting an interim order but apart from the general considerations (which are dealt with in more detail later in the course of this judgment) which the court must keep in mind in granting any order of prior restraint this court should, in my view, in addition at an interim stage have regard to the question of whether the fact (if it be so) that there is not time to put the defendant on notice can, in any way, be attributed to a default or delay on the part of a plaintiff. Thus if a plaintiff delays in applying to the court in a manner which effectively precludes the court from ensuring that the defendant is given an opportunity to be heard prior to any order being made, that fact of itself must be taken into account by the court as a significant factor which would lean against the grant of an interim order. Furthermore any delay on the part of a plaintiff which, while not so severe as to preclude the court from affording the defendant an opportunity to be heard prior to the consideration of the making of an order, nonetheless places the defendant in a position where he may be prejudiced in the presentation of his case at a hearing designed to determine whether there should be prior restraint is also a factor that will have to be taken into account in appropriate cases. I should add that it does not seem to me, on the facts of this case, that either of the plaintiffs were guilty of any such delay in all the circumstances of the case.

6. The question of urgency also arose in the course of this hearing. It was contended by both plaintiffs that there was no urgency in the matter by virtue of the fact that the programme could be broadcast at some other time. It seems to me that in such circumstances the court must have regard to two different types of urgency. The first is the question of whether a short delay in a broadcast or publication may not be necessary to ensure that that proper scrutiny should be exercised at an interlocutory stage in determining whether a contested broadcast or publication should go ahead. No application for such a short delay was made in this case and it should also be emphasised that the court should not lightly interfere with an intended time of broadcast or publication without substantial reasons. In this case I do not believe that such a short delay would have been justified nor do I believe that there is any real likelihood that this judgment could have been altered had such a delay occurred. Nonetheless it should be noted that in an appropriate case it may be that the balance of justice would require a very short restraining order to enable proper analysis to be

engaged in at the interlocutory stage.

7. The sort of delay that is likely to be encountered prior to trial and subsequent to an interlocutory order is, however, an entirely different matter. The reality is that the broadcast of a programme some significant period after its intended original date amounts to a significant interference in both the freedom of expression of the broadcaster concerned, and, in cases where the issue arises, in the public interest in the timely dealing with the matters raised in the broadcast. In that sense it seems to me that the grant of an interlocutory injunction would give rise to a significant detriment to the defendants by imposing an appreciable delay in the time at which the material could be broadcast.

The Programme
8. It was made clear at the hearing, from the affidavit of Eddie Doyle, the Executive Producer concerned with the programme in question, that RTE intended to broadcast a current affairs programme in the "Prime Time Investigates" series on the subject of the standard of contemporary nursing home care in general and the management and operation of the Leas Cross Nursing Home in particular. The defendant ("RTE") in both proceedings contends that the programme involved the coverage of a number of areas of significant and legitimate public interest. In the course of his affidavit Mr. Doyle exhibited a copy of the programme intended to be broadcast and I was invited by counsel for the defendant, without objection from counsel for the plaintiffs in either proceedings, to view the programme. I did so. There can be little doubt but that the programme makes very serious allegations indeed about the manner in which the nursing home at Leas Cross was operated over a significant period of time. It is also clear that the programme can, on one view, be regarded as being critical of Ms. Cogley. However for reasons which I will explain more fully when dealing specifically with her case it may also be said that, on another view, the programme may be said to be more understanding of her position. It should also be noted that a significant amount of the footage included in the broadcast would appear to have been filmed secretly. It seems that an experienced care worker was engaged by RTE to seek and take up a job at Leas Cross. On the evidence before me at this stage it would appear that, after a period of approximately two weeks working at the Nursing Home, the person in question, in conjunction with the programme makers, decided that, by virtue of the seriousness of the situation, it was appropriate that he be equipped by RTE with a concealed camera. A significant amount of footage ensued some of which was included in the intended broadcast. A significant amount of the remainder of the broadcast involved expert commentary on the footage both shown and unshown. In the context of those background facts it is next necessary to examine the respective claims made in the proceedings.

The Claims
9. Both plaintiffs sought, ultimately, the same relief. They sought to restrain the broadcast of the programme in question. However they did so on somewhat different bases. It is necessary, therefore, to consider each of the claims as made.

10. In the Cogley proceedings the plaintiff based her claims squarely on defamation. She, therefore, contended that the court should grant an interlocutory injunction to prevent the broadcast of the programme so that she might not be defamed.

11. The plaintiffs in the Aherne proceedings adopted a somewhat different course. They relied upon the fact that in the course of the programme a significant volume of material is shown which was obtained on foot of the use of a secret camera in the circumstances referred to above. Thus, it is contended, this material was obtained in breach of the plaintiffs right to privacy and its publication should be restrained. It should also be noted that the plaintiffs in the Aherne proceedings did not disavow a defamation leg to their case. However, relying upon the fact that a copy of the intended programme was only made available to them in time for it to be viewed on the morning of the hearing, the plaintiffs in the Aherne proceedings indicated that the case was not originally made in defamation because they did not know, with any precision, the detail of the content of the programme. In those circumstances it seems to me that it was appropriate that I should also consider whether it was likely that the plaintiffs in the Aherne proceedings would have been able to maintain a claim to restrain the programme on the basis of defamation.

Defamation
12. The law in relation to the grant of an injunction at an interim or an interlocutory stage for the purposes of restraining potentially defamatory material has been the subject of a number of determinations of the courts in recent years. From the perspective of those who might seek such orders the high water mark would appear to be *Reynolds v. Molocco and Others* (Unreported, High Court, Kelly J. 11th December, 1998). It is clear from the judgment in that case that a plaintiff must not only show that he or she "has raised a serious issue concerning the words complained of" but that it must also be shown "that there is no doubt that they defamatory" (pages 6 to 7). This principle is derived from a long line of authority both in the United Kingdom and in this jurisdiction to the effect that an injunction will lie only in "the clearest cases" *Sinclair v. Gogarty* [1937] I.R. 377.

13. It should be noted that one of the key issues in *Reynolds v. Molocc*o was as to whether the mere assertion by a defendant that he intended to raise a plea of justification was, of itself, sufficient to prevent a court from granting an interlocutory injunction (a proposition for which there was some authority in the United Kingdom). What Kelly J. determined in *Reynolds v. Molocco* was that it was necessary for a defendant to put forward some basis which was credible and potentially sustainable to suggest that the plaintiff might not succeed at trial. On the facts of that case Kelly J. considered in some detail the article intended to be published and concluded that it necessarily bore an innuendo in relation to the plaintiff concerning the availability of drugs at a nightclub premises run by him which was defamatory. Having considered the evidence put forward by the defendant Kelly J. was not satisfied that the defendant had any possibility of successfully pleading justification. Nor were there, apparently, any other defences available to the defendant on the basis of the case made at the interlocutory stage. In those circumstances Kelly J. was satisfied that the plaintiff was bound to succeed.

14. It seems clear, therefore, that the first question that needs to be addressed in any interlocutory application in which a plaintiff seeks prior restraint on the publication or broadcast of material, on the grounds that it is defamatory is as to whether on the evidence available at the interlocutory stage, it is clear that the plaintiff will ultimately succeed at a trial. For reasons which have been fully explored in the content of interlocutory injunctions generally (from the decision of the Supreme Court in *Campus Oil v. Minister for Industry (No 2)* [1983] I.R. 88 onwards) it does not seem to me to be appropriate to ask this court at an interlocutory stage and where it will, necessarily, have available to it only a limited opportunity to consider the merits of a case, to attempt to weigh the likelihood of a plaintiff succeeding or failing. Similarly it does not seem to be appropriate to invite the court to weigh the likelihood of the defendant succeeding in maintaining any defence in defamation proceedings. Thus the plaintiff will fail to cross the first hurdle if, on the basis of the argument and materials before the court, it appears that there is any reasonable basis for contending that the defendant may succeed at the trial of the action. The defendant may succeed in defending the action for any one of a number of reasons. For example the words or materials intended to be broadcast or published may not be found to be defamatory in the first place. Though defamatory the words may be shown, to the extent that they are defamatory, to be justified. There may on the facts of appropriate cases be possible defences of qualified privilege or, possibly, a public interest defence although the availability and parameters of such a defence in this jurisdiction have yet to be clearly established. I am satisfied that the reference in the authorities to a clear case means a case where it is clear that the plaintiff will succeed and where, therefore, it is

equally clear that none of the possible lines of defence which may be open to a defendant could reasonably succeed. Kelly J. in *Reynolds v. Molocco* did not depart from that principle. He rejected the proposition that a mere assertion of an intention to justify was, of itself, sufficient.

15. Before departing from the principles it does seem to me that it is also necessary to note that notwithstanding the conclusions reached by Kelly J. in *Reynolds v. Molocco* in relation to this first question he nonetheless felt that it was appropriate for him to consider whether it was, nonetheless, an appropriate exercise of his discretion to grant the injunctions sought. In coming to that view Kelly J. noted that damages were the ordinary and appropriate remedy for defamation and that an injunction was not. The special circumstance which seemed to have acted most strongly in favour of the exercise of the discretion to grant an injunction in that case was the conclusion reached by the learned trial judge about the financial standing of the defendant and the "virtual impossibility of ever recovering any sum awarded". It would therefore appear that even in a case where it can be clearly shown that the defendant would have no defence the court retains a discretion which can be exercised having regard to all the circumstances of the case.

Application to Cogley case

16. In analysing the case made on behalf of Ms. Cogley it should be noted that the programme does make clear that she has only held the office of Director of Nursing for six weeks. While it is contended on her behalf that it is likely that that fact was only added to the programme as a means of reducing the risk of it being defamatory (and, by inference, that the defendants were not aware of that fact until it was drawn to their attention on behalf of Ms. Cogley) nonetheless the programme which it is now intended to broadcast does contain that information. It should also be noted that two separate extracts from the programme which were filmed secretly show Ms. Cogley exhorting members of staff at general staff meetings to improve their standards. It is open, therefore, on one view, to consider the programme as one which depicts Ms. Cogley as someone who has been placed in the very difficult situation of attempting to deal with a nursing home in which very low standards have applied for a significant period of time. While all of the secret filming would appear to have occurred during a time when she, Ms. Cogley, was in charge, much of the remainder of the programme concerns interviews with the relatives of former residents whose experiences date back long before Ms. Cogley was involved.

17. Three specific complaints are relied on to seek to establish that the programme is defamatory of Ms. Cogley. In fairness to her counsel it should be pointed out that he, like counsel for the plaintiff in the Aherne proceedings, only had the opportunity to view the programme on the morning of the hearing. He only had, when the matter was initially called at 10.30, the opportunity to have viewed a portion of it. As it was necessary, for logistical reasons, to put the case back to 2 o'clock counsel had the opportunity to view the remainder during that interval. He did, however, indicate that having seen the programme he would, had time permitted, have sought to put in a further affidavit.

18. In any event the three specific items complained off were as follows:-

> 1. That the programme suggests that Ms. Cogley was engaged in a deception as to the weight of a patient so that Health Board inspectors would not be aware that the patient had not been weighed.
>
> 2. It is contended that, though not named specifically in this regard, the programme contains a suggestion that Ms. Cogley must necessarily have been involved in a situation where a patient whose family had paid for fulltime care had not, the programme contended, been given such care.
>
> 3. Finally insofar as the entire tenor of the programme maintains serious accusations about standards in Leas Cross it is contended that such are necessarily defamatory of Ms. Cogley.

19. In relation to the weight issue the relevant part of the programme contains secretly filmed comments made by Ms. Cogley in circumstances where, it would appear, the charts of the relevant patient did not contain a weight and she is shown discussing with the filmer the likely weight of the patient concerned. There then follows the comment of an expert who is critical of the fact that there was apparently and allegedly an insufficient understanding of the importance of weight loss in the management of elderly patients suffering in the manner concerned. It is, of course, impossible at this stage to judge whether the film shown, taken with and the comment of the expert, fairly and properly reflect the true situation. It may be, as the plaintiff contends, that she will be able to satisfy a jury that having regard to all of the background facts relevant to the management of the patient concerned and the appropriate meaning of the parts of the broadcast relating to that issue, the programme contains an unjustified imputation against her professional competence. It would not, however, be possible at this stage to conclude that she would necessarily succeed in so doing.

20. In relation to the second issue the programme shows a discussion between the filmer and a senior nurse (not Ms. Cogley) during which the senior nurse appears to indicate that she had sought on the occasion in question (but failed to obtain) a care worker to provide the full time care of the patient concerned. Again it may turn out to be the case, when all of the relevant background is put before a jury, that the implications of the relevant part of the broadcast reflect, in an unjustifiable way, on the competence of the plaintiff. It must again, be concluded that such an outcome is not clear.

21. In relation to the third issue, the same comment can be made. There can be little doubt that the programme contains accusations of the highest degree of seriousness as to the standards which operated within the nursing home concerned. For the reasons indicated above it is not at all so clear that, at least in a great many respects, a reasonable viewing of the programme would cause a viewer to conclude that Ms. Cogley was at fault. Even to the extent to which a reasonable viewer might infer that the programme contends that Ms. Cogley is at fault, it is by no means clear that, in the light of all the evidence that is likely to be before such a jury, the jury will necessarily conclude that any imputation of fault is not justified.

22. Before passing from an analysis of the programme in respect of Ms. Cogley it should also be noted that a great deal of the programme consists of either interviews with the relatives of persons who were patients at the home, the secretly filmed footage obtained in the manner described above, and the comments of experts. It seems unlikely, therefore, that it can be denied that the events shown on the secretly filmed footage actually occurred. It may, of course, be that Ms. Cogley will be able to persuade a jury that the way in which that film was put together and edited with the comments of experts amounts to an unfair presentation of the picture to such an extent that she may be able to succeed. However I do not believe a court could, at this stage, conclude that such an outcome, on the materials currently available, is now clear.

23. On the basis, therefore, of the established jurisprudence it does not seem to me that the plaintiff in the Cogley proceedings has crossed the first threshold and therefore I refused her application for interlocutory relief.

The Aherne Proceedings

24. It is now necessary to turn to the Aherne proceedings. As was pointed out earlier these proceedings are largely based upon a contention that key aspects of the programme (that is to say the secretly filmed footage), were obtained in circumstances which amounted to a breach of the plaintiffs right to privacy and were also unlawful as having been obtained while the person concerned was a trespasser. It is also necessary to consider the contention of these plaintiffs to the effect that there is a breach of the right to privacy of others (most especially patients).

25. That the plaintiffs have a right to privacy is clear. Firstly s. 3 of the Broadcasting Authority (Amendment) Act 1976 amends the Broadcasting Authority Act 1960 by the inclusion of a provision (s. 18(1B))to the effect that "the authority shall not, in its programmes and in the means employed to make such programmes, unreasonably encroach on the privacy of an individual."

26. It is also clear from *Kennedy v. Ireland* [1987] I.R. 587 that a right to privacy is one of the personal rights of the citizen guaranteed by, thought not specifically mentioned in, the constitution.

27. However it is also clear from *Kennedy* that the right to privacy is not an unqualified right but is subject to the constitutional rights of others and to the requirements of public order, public morality and the common good. It should also be noted that the express recognition of an obligation to respect the privacy of others contained in the Broadcasting Acts referred to above is also not unqualified in that it places an obligation on the Authority not to "unreasonably encroach" on the privacy of an individual. Thus it is clear that while persons such as the plaintiffs in the Aherne proceedings have a constitutional right to privacy and an arguable entitlement to ensure that the Authority does not unreasonably interfere with their privacy in the course of making and broadcasting programmes, those rights are not unqualified. It is, therefore, necessary to address how the right of privacy may be balanced against other competing rights and in particular how an assessment of the situation in respect of such competing rights should be made at an interlocutory stage such as this.

28. In my view a useful starting point for the purposes of this case seems to me to be to distinguish between a right of privacy in the underlying information whose disclosure it is sought to prevent on the one hand and a right to privacy which does not extend to that underlying information but where it is contended that the methods by which the information has been obtained amount to a breach of privacy on the other hand.

29. There are certain matters which are entirely private to an individual and where it may validly be contended that no proper basis for their disclosure either to third parties or to the public generally exists. There may be other circumstances where the individual concerned might not, having regard to competing factors, such as the public interest, which may be involved, be able to maintain that the information concerned must always be kept private but may make complaint in relation to the manner in which the information was obtained.

30. It seems to me that different considerations apply most particularly at an interlocutory stage, dependent on which of the above elements of the right to privacy is involved.

31. In this regard I have also received assistance from the decision of the Court of Appeal in the United Kingdom in *Douglas and Others v. Hello! Limited* Times Laws Reports 16th January, 2001. That case differs from the current case in many respects. It amounted to a dispute as to whether the magazine OK! had exclusive rights to the publication of photographs taken at the wedding of the plaintiffs (Michael Douglas and Catherine Zeta Jones). Hello! had obtained possession of unauthorised photographs taken at the wedding and were about to publish them. In deciding not to grant the interlocutory relief sought, notwithstanding that it appeared that the unauthorised photographs had been taken in breach of the obligation of some person, whether guest or intruder, the court would appear to have had regard to the fact that while the plaintiffs had an arguable case that their right to privacy had been infringed it was necessary to balance that right with the right of freedom of expression. However the court placed reliance on the fact that the jurisprudence of the European Convention on Human Rights acknowledged different degrees of privacy. The more intimate the aspect of private life being interfered with, the more serious must be the reasons for interference. *Dudgeon v. United Kingdom* (1981) 4 EHRR 149. The fact that the plaintiffs in *Douglas* had in fact allowed significant publicity to attach to their wedding lessened the right of privacy. It was also clear, as was noted by Lord Brooke, that there was no significant public interest issues involved and that that was a factor.

32. It is clear, therefore, that the weight to be attached to the undoubted right of parties to privacy can vary significantly from case to case.

33. It is also necessary to have regard to the fact that the plaintiffs in the Aherne proceedings placed reliance on the right to privacy of others (most particularly patients) whom, they contended, have had their rights to privacy potentially infringed by the methods adopted in the taking of the secret film and whose right to privacy would be infringed in a much greater way should the broadcast containing such film be permitted. However in that regard the state of the evidence at present is as contained in para. 10 of the affidavit of Mr. Doyle which notes that the programme in the form in which it is intended to be broadcast seeks to protect the privacy interests of patients by obscuring their identities through a technical process known as pixilation, or by obtaining the consent of the patients families to the proposed broadcast, or both. On the basis of the evidence before me I have no reason to believe that such measures will not effectively protect the privacy rights of the patients concerned. On that basis I am not persuaded that I should take into account any privacy rights other than those of the plaintiffs. In saying that I would wish to emphasise that should it transpire that appropriate measures were not, in fact, taken by the programme producers for the purposes of giving reasonable and adequate protection in all the circumstances of the case to those who may have appeared on the film nothing in this judgment should be taken as implying that such parties would be debarred from seeking a remedy in the court. The extent to which it might, in those circumstances, be open to RTE to place reliance on the public interest involved in the broadcast of the programme would be a matter to be determined in such a case based on all the relevant circumstances.

34. So far as the right to privacy of the Aherne plaintiffs themselves is concerned it seems to me to fall into the second of the categories referred to above. It can be hardly be said that any right to privacy which the Ahernes or their company may enjoy in relation to the conduct of their nursing home business is such as would preclude information about the conduct of that business which tended to suggest that there were serious irregularities in the manner in which it was being conducted, from being broadcast. However the manner in which secret filming occurred in this case gives rise to more significant questions.

35. In that regard I have obtained particular assistance from the decision of the Court of Appeal in New Zealand in *TV3 Network Services Limited v. Fahy* (1999) 2 NZLR 129. In many respects *TV3* bears significant resemblance to this case. TV3 equipped a woman who had made accusations against a medical practitioner with a concealed video camera so that it might film an appointment which she had made to see the doctor who was the subject of misconduct accusations. The most significant difference between TV3 and the current case is that the television station involved had, in that case, already broadcast a programme making accusations of sexual misconduct against the doctor concerned prior to the secret filming. The secret filming therefore took place in the context of a

situation where the doctor concerned was already the plaintiff in defamation proceedings. However many of the general principles identified by the judgment in that case are equally applicable to circumstances such as exist in this case.

36. In relation to the status of the woman who was equipped with the concealed camera the court came to the following view:-

> "This brings us to the third ground, trespass and invasion of privacy. Trespass is a civil wrong and entering and remaining on Dr. Fahey's premises for the purposes of confronting him with allegations of sexual and professional misconduct and surreptitiously recording the conversation could scarcely come within the terms of the normal implied licence to attend at a doctor's surgery. Clearly TV3 encouraged and facilitated X's action. As to the privacy implications discussed in *Todd*, The Law of Torts in New Zealand (2nd Ed. 1997) at p. 951, in terms of the Broadcasting Act 1989, TV3 was and is responsible for maintaining in its programmes and their presentation standards which are consistent with the privacy of the individual (s. 4(1)(c)) but it is not under a civil liability in respect of any failure to comply with any provisions of the section (s. 4(3)).

37. In circumstances where the programme proposed to be broadcast may have been obtained in breach of the plaintiffs rights, the court, when considering the grant of an injunction, is required to weigh and balance the competing rights and values at stake. In that assessment the context and circumstances in which the impugned methods were employed, any special public interest considerations for broadcasting the programme, and the adequacy of damages as an available remedy for any wrong proved at trial, are amongst the considerations which must ordinarily be weighed" (p. 135).

38. The court then went on to apply those principles to the facts of the case before it.

39. On the basis of the above authority, which I find persuasive, it would seem that the plaintiff has at least made out an arguable case to the effect that the circumstances in which the surreptitious filming within Leas Cross occurred may amount, *prima facie*, to a trespass and breach of privacy. The implied entitlement of the individual concerned to be present as an employee would not be such as would be likely to encompass the conduct which actually occurred.

40. However it seems clear from *TV3* that the mere fact that information may, arguably, have been obtained in breach of an individual's rights is not, of itself, necessarily decisive. What also needs to be weighed in the balance is the importance of any public interest issues which arise and also the extent to which damages may be an adequate remedy.

The Public Interest

41. I should emphasise that at this stage anything which I say concerning the content of the programme should not be construed as amounting to a finding of fact by the court or that any facts alleged have been established. It will necessarily be the case that at an interlocutory stage a court which is asked to assess the extent of the legitimate public interest in a particular broadcast will have to have regard to the necessarily limited information that will be available to it at that stage.

42. However subject to that caveat it seems to me, having viewed the programme, that the following issues of very significant public importance indeed are potentially raised by the programme:-

> (a) whether the standards applied at the Leas Cross Nursing Home fall, to a very marked degree, short of the standards that could be reasonably be expected in such a home;
>
> (b) the extent to which, in addition to its ordinary regulatory role, the above matters ought to be of concern to the authorities charged with the administration of the health service by reference to the fact that, it would appear, a significant portion of the funding of the patients who reside at the home is provided out of public funds;
>
> (c) the extent to which the existing regulatory regime in respect of such homes has been properly administered by those charged with that task; and
>
> (d) whether that regulatory regime is, in itself, sufficient to allow for the proper regulation of the nursing home sector.

43. It should also be taken into account in assessing the importance of the public interest issues involved that those whom it may be said would suffer should the contentions of the programme be borne out are an extremely vulnerable section of the community who have a limited (or in many cases no) voice of their own.

44. In all those circumstances it seems to me that the issues raised in the programme are those of the highest public interest and that, therefore, a very significant weight indeed needs to be attached to those matters in weighing the rights and values involved at this stage.

45. It should be noted that one of the underlying reasons for the reluctance of the courts in this jurisdiction to grant injunctions at an interlocutory stage in relation to defamation stems from the fact that if the traditional basis for the grant of an interlocutory injunction (i.e. that the plaintiff had established a fair issue to be tried) was sufficient for the grant of an injunction in defamation proceedings public debate on very many issues would be largely stifled. In a great number of publications or broadcasts which deal with important public issues persons or bodies will necessarily be criticised. There will frequently be some basis for some such persons or bodies to at least suggest that what is said of them is unfair to the point of being defamatory. If it were necessary only to establish the possibility of such an outcome in order that the publication or broadcast would be restrained then a disproportionate effect on the conduct of public debate on issues of importance would occur. In that regard it is important to note that both the constitution itself and the law generally recognises the need for a vigorous and informed public debate on issues of importance. Thus the constitution confers absolute privilege on the debates of Dáil and Seanad Éireann. The form of parliamentary democracy enshrined in the constitution requires that there be a vigorous and informed public debate on issues of importance. Any measures which would impose an excessive or unreasonable interference with the conditions necessary for such debate would require very substantial justification. Thus the reluctance of the courts in this jurisdiction (and also the European Court of Human Rights) to justify prior restraint save in unusual circumstances and after careful scrutiny. Similar considerations also apply to a situation where a party may contend that there has been a breach of his right to privacy but where there are competing and significant public interest values at stake. It is for that reason that I have distinguished between a right to privacy which subsists in the underlying information which it is sought to disclose on the one hand and information which might legitimately be the subject of public debate on an issue of public importance (albeit private to some extent) but where there may be a question as to the methods used to obtain that information on the other hand.

46. I would wish to emphasise that the balancing exercise which I have found that the court must engage in is not one which would

arise at all in circumstances where the underlying information sought to be disclosed was of a significantly private nature and where there was no, or no significant, legitimate public interest in its disclosure. In such a case (for example where the information intended to be disclosed concerned the private life of a public individual in circumstances where there was no significant public interest of a legitimate variety in the material involved), it would seem to me that the normal criteria for the grant of an interlocutory injunction should be applied. In such cases it is likely that the balance of convenience would favour the grant of an interlocutory injunction on the basis that the information, once published, cannot be unpublished. It is also likely, in such cases, that damages would not be an adequate means of vindicating the right to privacy of the individual.

47. However, as I have indicated, where, as here, the information concerned is one which, on its face, appears important to an informed public debate on an issue of significant public importance different criteria, it seems to me, apply.

48. Finally in considering whether the test adopted by the Court of Appeal in New Zealand is the appropriate test to be applied in this jurisdiction I have given consideration to the argument of counsel for the plaintiff in the Aherne proceedings which sought to distinguish the situation in New Zealand from that which pertains in this jurisdiction by reference to both the constitutional recognition of the right to privacy and the express statutory obligation on RTE to respect privacy.

49. However it seems clear from the passage from *TV3* referred to above that the jurisprudence of the New Zealand courts also recognise a right to privacy and, as with the courts in this jurisdiction, the courts in New Zealand are called upon to engage in a balancing of rights where rights come into conflict. Similarly the passage quoted above makes clear that the relevant New Zealand legislation places an obligation on broadcasters to respect privacy. Finally it seems clear from the judgment taken as a whole that the overall approach of the courts in New Zealand to what is described in the judgment as "prior restraint" is broadly similar to the established approach of the courts in this jurisdiction. In all those circumstances it seems to me that the New Zealand Court of Appeal, in *TV3*, was engaging in an exercise which involved considerations very similar to those which would apply in this jurisdiction and was operating within a legal framework which, in turn, was very similar. In the circumstances I find the authority persuasive and would propose adopting the tests identified as being the appropriate criteria to be applied for the grant of interlocutory relief in this jurisdiction in circumstances such as this. The matters which need to be considered are, therefore:-

1. A consideration of the context and circumstances in which the impugned methods were employed;

2. Any special public interest considerations in favour of broadcasting the programme; and

3. The adequacy of damages as an available remedy for any wrong proved at trial.

Application to the Facts of this Case

50. The Court of Appeal in *TV3* noted that on the facts of that case that the broadcasting station "may well have had mixed motives in encouraging and assisting X" (X was the person who had conducted the secret filming). The mixed motives included the fact that TV3 was, itself, already the subject of a defamation suit brought by the doctor involved. It was also noted that film of the type available to TV3 (and also RTE in this case) adds drama to any screening of the interview. It also noted that, in particular, where there were public interest issues involved and where there was a significant risk that a programme which contained allegations similar to those shown in a secret film would have its credibility challenged that there may be a public interest in the screening of the film and that the obtaining of surreptitious film may, in those circumstances, be an understandable pre-emptive course of action.

51. I am satisfied that similar considerations apply in this case. Doubtless the availability of the secret film could be said to add drama to the programme. It is equally true that having regard to the very serious accusations made in respect of the management of the nursing home concerned it would be likely that a programme which contained those accusations, but was not supported by the surreptitious film, would be challenged. In those circumstances it seems to me that it would be appropriate in all the circumstances of this case to also describe the inclusion of surreptitious film in the Leas Cross programme as "an understandable pre-emptive course of action".

52. The fact that it may be understandable does not, of course, mean that it necessarily follows that it is justified or that it being understandable is decisive in relation to balancing the rights and interests involved in a prior restraint application. It is next, therefore, necessary to consider the public interest involved. For the reasons indicated above it seems to me that legitimate public interest issues of a very high weight are raised by this programme and that in any balancing exercise very significant weight indeed must be attached to this aspect of the case. It should be emphasised that on similar facts but in circumstances where the material sought to be broadcast did not involve issues of significant public interest the balancing exercise with which I am involved might well result in the balance favouring prior restraint.

53. Finally it is necessary to consider the adequacy of damages. As was noted in *TV3*:-

> "If TV3 establishes the truth of what is to be published, there could be little room for a significant award of damages for any trespass as such. What is more, in such circumstances, damages would clearly be an adequate remedy. If TV3 fails to prove truth, the circumstances in which the defamatory material, or part of it, was obtained would be relevant to the amount of damages, both compensatory and potentially of an exemplary nature".

54. It seems to me that exactly similar considerations apply here. If the accusations contained in the programme which it was intended would be broadcast by RTE are ultimately borne out to be correct then any breach of privacy involved in obtaining confirmatory information which establishes the truth of significant accusations in the legitimate public domain would necessarily give rise to small, or even nominal, damages which damages would clearly be an adequate remedy.

55. It should be noted at this stage that any publisher or broadcaster who employs such methods and who fails in persuading a court at trial as to the truth of the matters concerned exposes itself to a more significant risk in the event that the material broadcast proves to be defamatory.

56. Finally I should not leave this judgment without quoting with complete approval the final paragraph in *TV3* and indicating that it too represents the position in this jurisdiction. The New Zealand Court of Appeal concluded as follows:-

> "Our decision in this case should not be seen as supporting any general proposition that the ends of news gathering justify the means. If information has been obtained in circumstances which are at least arguably unlawful that would be an important factor to weigh in the balancing exercise involved. Such unlawfulness may amount to an offence, or it may

constitute a civil wrong. The more serious the breach, the stronger will be the case for restraining use of any material obtained as a result. The courts will be careful to ensure that the rights of others are properly weighed and that the media is not simply provided with an incentive to engage in and benefit from unlawful conduct whenever it claims it is acting in the exercise of freedom of expression".

57. I would only add that any claim to an entitlement to broadcast or publish material which has, arguably, been unlawfully obtained, on the basis of a legitimate public interest will necessarily result in the court exercising significant scrutiny over the public interest asserted. I am mindful of the fact that it is all too easy to dress up very many issues with an exaggerated or unreal public dimension. However on the facts of this case and for the reasons which I have set out earlier I am more than satisfied that RTE has shown that there are very real, significant and weighty public interest issues involved. For those reasons I refused to grant an interlocutory injunction which would have the effect of restraining the broadcast.

Trespass

58. As an additional head of claim in the Aherne proceedings, the plaintiffs sought an injunction to restrain further trespass on the plaintiffs premises. It seems to me that different considerations apply in respect of this aspect of the case. It may be that RTE will be able to persuade a court at trial that there was a sufficient justification for their actions to be able to resist a claim in trespass. It might even be that RTE would be able to persuade the court that no trespass in fact occurred in all the circumstances of the case. However it is clear that the plaintiffs in the Aherne proceedings have made out an arguable case that such trespass occurred. An injunction which would restrain future trespass would not have an effect equivalent to prior restraint. Therefore it seems to me that the ordinary principles for the grant or refusal of an interlocutory injunction should be applied to this aspect of the case.

59. The starting point must, therefore, be a consideration of whether there is any risk of future trespass. While it was argued by counsel for RTE there was no evidence of any such risk I cannot agree. The fact is that issues such as those raised in this programme have, by virtue of the very fact that they involve an issue of the highest public importance, a tendency to remain matters of active public debate for an appreciable period of time. In those circumstances it is by no means inconceivable that the issue may be revisited in broadcasts by RTE. There would not, of course, be anything inappropriate in such an approach. However it might well be that in the context of such future programme a temptation to use the same methods might arise. Pending the establishment after a full trial of the lawfulness or otherwise of the use of such methods it seems to me that the balance of convenience would favour restraining RTE from engaging in any further trespass on the premises of the plaintiffs in the Aherne proceedings. As is always the case at an interlocutory stage nothing in that determination should be taken as amounting to a final ruling as to the appropriateness or otherwise of any of the actions which have in fact been engaged in.