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Judgment: approved by the Court for handing down | *Delivered:* **16/10/2015**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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KL and NN

Plaintiffs:

and

SUNDAY NEWSPAPERS LIMITED

Defendant:

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STEPHENS J

Introduction

[1] The plaintiffs, a married couple, who for the purposes of this judgment I shall anonymise by the cyphers "KL" and "NN" (which are not their initials) bring this action against the defendant, Sunday Newspapers Limited, the publishers of the Sunday World. The plaintiffs allege that in a series of newspaper articles published by the defendant in 2011 and 2012 the defendant libelled the first plaintiff by alleging that he was a conman and breached not only his privacy rights but also the privacy rights of his wife, the second plaintiff, and their children. The plaintiffs also allege that the defendant is threatening to publish further articles along the same lines as the previous articles. I have anonymised this judgment which deals with the procedure to be followed. If at the hearing of the substantive application or at the trial I consider that anonymity should not be maintained, then an unanonymised version of this judgment will be delivered, which was the procedure I adopted in *McAuley v Sunday Newspapers Limited and another* [2015] NIQB 74.

[2] This action was commenced by Writ of Summons issued on 12 June 2015, using the initials of the plaintiffs as opposed to their names, thereby seeking to maintain their anonymity, but without applying for, or obtaining, any order of the court permitting them to do so. The identity of the plaintiffs, and accordingly the requirement on them to use their full names in the Writ, is an integral part of civil

proceedings: see paragraph [17] of *X v Dartford and Gravesham NHS Trust* [2015] 1 WLR 3647; [2015] EWCA Civ 96, *Re A Police Officer's Application (leave stage)* [2012] NIQB 3 and *JIH v Stock News Group Newspapers* [2011] 1 WLR 1645. The requirement for the plaintiffs to use their names can also be discerned from Order 6 Rule 1 of the Rules of the Court of Judicature (Northern Ireland) 1980 which provides that every Writ must be in form 1, 2, 3 or 4 in Appendix A as is appropriate. Each of those forms requires the plaintiffs' first and surnames to be inserted; see 6/1/14 of *The Supreme Court Practice 1999* and the equivalent provision in *7APD.4 Civil Procedure 2015*. The defendant objects that the plaintiffs did not follow the correct procedure in that no application was made to the court for anonymity and reporting restriction orders but rather the plaintiffs unilaterally anonymised the Writ. The defendant also contends that as a matter of substance anonymity and reporting restriction orders are not appropriate in this case. Accordingly, the issues for determination include consideration of the appropriate procedure to be followed by the plaintiffs seeking anonymity and reporting restriction orders together with the appropriate principles to be applied in determining whether, on the facts of this case, such orders should be made. In the event I have decided that the appropriate procedure has not been followed and this judgment deals solely with procedure. The substantive application is to be relisted.

[3] Mr Girvan appeared on behalf of the plaintiff and Mr Lockhart QC and Mr Scherbel-Ball appeared on behalf of the defendant. I am grateful to counsel for their comprehensive written and oral submissions.

Procedure

[4] Mr Girvan stated that the plaintiffs faced the dilemma that if they issued the Writ using their full names and disclosing their identities and thereafter successfully applied for anonymity and reporting restriction orders their identities could still become known by virtue of the provisions of Order 66 Rule 5(1) which permits any person on payment of the prescribed fee to search for, inspect and take a copy of the Writ. The Writ would still contain their full names. That if the Writ was subsequently amended by deleting their names and replacing them with cyphers, this would ordinarily be by striking through, rather than redacting, the original names, so that they could still be discerned. That in any event their names would still appear in the court list when the plaintiffs applied for an anonymity order. Mr Girvan contended that absent a procedure which would not undermine the plaintiffs' anonymity, the plaintiffs were entitled to and had issued the Writ using their initials rather than their names.

[5] Mr Girvan also contended that the law prescribed no rules limiting a person's liberty to change his name and that the plaintiffs may assume any name that they wish in addition to, or in substitution for, their original names. Accordingly, he contended that the plaintiffs were at liberty to assume their initials as their names and issue the Writ using their initials. In support of that contention Mr Girvan relied

on *AB Limited and others v Facebook Ireland Limited and a person or persons adopting the pseudonyms Ann Driver and Alan Driver* [2013] NIQB 14.

[6] Mr Girvan stated that the procedure that was adopted by the plaintiffs of issuing a Writ using their initials was appropriate if, as was the position in this case, the plaintiffs at the same time as issuing the Writ brought an application before the court by way of what was termed an *ex parte* docket or an "*ex parte* Notice of Motion" (sic) with an affidavit sworn by the plaintiffs' solicitor seeking an interlocutory injunction preventing the defendant from publishing any sensitive personal data or private information relating to the plaintiffs and in the affidavit, which is not a public document and a copy of which could not be obtained under Order 66 Rule 5(1), made known to the defendant the identity of the plaintiffs.

[7] Mr Girvan accepted that at no stage have the plaintiffs applied to the court for an anonymity order or for a reporting restriction order and have not brought definition to either of the orders which they seek. However, he drew attention to an undated skeleton argument which followed the Writ, which referred to the question of anonymity but which did not amount to an application to the court, which did not set out the order that was being sought and which did not address the question of a reporting restriction order.

[8] Mr Lockhart contended that the plaintiffs' approach to anonymity amounted to an abuse of the rules of court. He pointed out that no application had been made for anonymity in the plaintiffs' Writ, "*ex parte* Notice of Motion" (sic), *ex parte* docket or in the affidavit supporting the application for an interlocutory injunction. He contended that the plaintiffs had simply ignored the rules of court by unilaterally anonymising themselves and that there was no such application as an "*ex parte* Notice of Motion."

[9] It is correct that an individual may assume any name that he pleases in addition to, or in substitution for, his original name. However, there is no evidence that the plaintiffs have in fact assumed their initials as their names or that they have become known by their initials. Indeed, if they had become known by their initials, the whole purpose of achieving anonymity by using their initials would have been defeated. I reject the contention that the plaintiffs had assumed their initials as their names and accordingly reject the contention that without any order of the court they could issue the Writ using their initials. It is not consistent with the principle of open justice, with the freedom of expression of others, or with the Rules of the Court of Judicature (Northern Ireland) 1980 for the plaintiffs to have used their initials as opposed to their first and surnames on the Writ. Absent any order of the court granting anonymity and reporting restrictions the plaintiffs should not have issued the Writ using their initials. Indeed, in the events that occurred and given that there were no such orders, there was nothing preventing the defendant from publishing the fact that the plaintiffs, naming them, had issued proceedings using their initials. The whole object of the exercise could have been defeated.

[10] The question then becomes one as to whether, and if so how, the plaintiffs could have applied for anonymity and reporting restriction orders prior to the issue of the Writ. In the event, I consider that the answer to the question as to whether they could apply for such orders prior to the issue of proceedings is clear in that they could and should have done so. I also consider that the procedure to be followed should be based on Order 29 Rule 1 of the Rules of the Court of Judicature (Northern Ireland), section 11 of the Contempt of Court Act 1981, section 12 of the Human Rights Act 1998 and should follow the guidance issued in England and Wales in 2011, suitably adapted to Northern Ireland and considered in the light of the decision in *A (Respondent) v British Broadcasting Corporation (Appellant) (Scotland)* [2014] UKSC 25.

[11] In *R (Osborn) v Parole Board* [2013] UKSC 61; [2013] 3 WLR 1020 at paragraphs [55] to [61] Lord Reed, giving the judgment of the Supreme Court, set out the relationship between the Convention and domestic law stating that it would be an error in approach to suppose that because an issue falls within the ambit of a Convention guarantee, it follows that the legal analysis of the problem should begin and end with the Strasbourg case law. That properly understood, Convention rights do not form a discrete body of domestic law derived from the judgments of the European court. That as Lord Justice-General Rodger once observed, "it would be wrong … to see the rights under the European Convention as somehow forming a wholly separate stream in our law; in truth they soak through and permeate the areas of our law in which they apply": *HM Advocate v Montgomery* 2000 JC 111, 117 and 2000 SLT 122." I will accordingly start with the common law principles.

[12] The general principle of open justice is a part of our constitutional law but there has always been a common law power capable of further development to derogate from it. The courts have an inherent jurisdiction to determine how the principle of open justice should be applied. The inherent power to control its own procedure includes the long recognised power to permit the identity of a party or a witness to be withheld from public disclosure where that is necessary in the interests of justice: see *A (Respondent) v British Broadcasting Corporation (Appellant) (Scotland)* [2014] UKSC 25. Furthermore, section 11 of the Contempt of Court Act 1981 provides:

> "In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

As was stated in *A v BBC* "section 11 does not itself confer any power upon courts to allow "a name or other matter to be withheld from the public in proceedings before the court", but it applies in circumstances where such a power has been exercised. The purpose of section 11 is to support the exercise of such a power by giving the court a statutory power to give ancillary directions prohibiting the publication, in

connection with the proceedings, of the name or matter which has been withheld from the public in the proceedings themselves. Section 11 thus resolves the doubt which had arisen following the case of *R v Socialist Workers Printers and Publishers Ltd, Ex parte Attorney-General* [1974] 1 QB 637 as to the power of the court to make such ancillary orders at common law. The directions which the court is permitted to give are such as appear to it to be necessary for the purpose for which the name or matter was withheld. I consider that the plaintiffs in this case could and should have applied prior to the issue of the Writ for anonymity and reporting restriction orders relying on the common law powers of the court and upon section 11 of the Contempt of Court Act 1981.

[13] In addition to invoking the common law powers the plaintiffs could and should have brought an application for anonymity and reporting restriction orders prior to the issue of proceedings relying upon Order 29 Rule 1(3) of the Rules of the Court of Judicature (Northern Ireland) 1980, section 6 of the Human Rights Act 1998 and Article 8 of the Convention. Order 29 Rule 1(3) enables a plaintiff to make an application for an injunction before the issue of the Writ where the case is one of urgency. Both anonymity orders and reporting restriction take the form of prohibitory orders. The power of the High Court to make anonymity and reporting restriction orders also arises under section 6 of the Human Rights Act 1998 read in conjunction with section 91 of the Judicature (Northern Ireland) Act 1978 which latter provision enables the court to grant injunctions: see paragraph [30] of *Re Guardian News and Media Ltd* [2010] 2 AC 697 at 716; *In Re British Broadcasting Corporation* [2010] 1 AC 145 paragraph [57] and *In Re S (a Child)* [2005] 1 AC 593 at paragraph [23]. On the basis of those authorities I consider that anonymity orders and reporting restriction orders are injunctions and that an application can be made under Order 29 Rule 1(3) prior to the issue of proceedings or alternatively under section 91 of the Judicature (Northern Ireland) Act 1978 which expressly provides that the High Court may at any stage of any proceedings grant a mandatory or other injunction in any case where it appears to the court to be just and convenient to do so for the purposes of any proceedings before it and, if the case is one of urgency, the court may grant such an injunction before the commencement of the proceedings. The urgency in cases such as this arises not only because of an imminent threatened event occurring, namely publication, but also because if the proceedings were issued in an unanonymised form the purpose of an anonymity order could be defeated so that there is an urgent need for anonymity.

[14] Another method of bringing the matter to the court prior to the issue of proceedings can be discerned from paragraph [26] of the decision of the Supreme Court in *Shahid (Appellant) v Scottish Ministers (Respondent) (Scotland)* [2015] UKSC 58. Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. That is a duty imposed on the court by primary legislation. If issuing proceedings with the names of the plaintiffs attached interferes with Convention rights such as those in Articles 2, 3 or 8 then the duty on the court, as a public authority, is to act in a way which is compatible with the Convention right. If the precise mechanism by which

the duty is to be performed is open to argument, then either the Rules of the Court of Judicature (Northern Ireland) 1980 should be read down so as to be consistent with Convention rights, or it may be that the relevant rule is simply to be disregarded in so far as it is inconsistent with those rights. The practical result is the same in either case.

[15] As is apparent I consider that the plaintiffs could and should have applied for anonymity and reporting restriction orders prior to the proceedings being issued. The procedure to be followed depends on the degree of urgency and, for instance, the Convention right which is engaged. One can envisage circumstances in which Article 2 is engaged where considerable thought should be given to the security of the individuals the subject of the proceedings and particular additional care should be given to the appropriate procedure.

[16] The general procedure for applying for anonymity and reporting restriction orders should closely follow, suitably adapted to the procedure in Northern Ireland, the Practice Guidance issued by Lord Neuberger of Abbotsbury MR, as Head of Civil Justice, entitled "*Interim Non-Disclosure Orders*" [2012] 1 WLR. 1003, [2012] EMLR 5, which came into effect on 1 August 2011 considered in the light of the decision in *A (Respondent) v British Broadcasting Corporation (Appellant) (Scotland)* [2014] UKSC 25. The guidance sets out recommended practice regarding any application for interim injunctive relief in civil proceedings to restrain the publication of information: an interim non-disclosure order. It also provides guidance concerning the proper approach to the general principle of open justice in respect of such applications and explains the proper approach to the model interim non-disclosure order a copy of which is attached to the guidance. It also sets out the law as at 1 August 2011.

[17] Amongst other matters paragraph [30] of the guidance emphasises the obligation on the applicant to make full, fair and accurate disclosure of all material information to the court. It states:

> "Particular care should be taken *in every application* for an interim non-disclosure order, and *especially where an application is made without notice*, by applicants to comply with *the high duty to make full, fair and accurate disclosure of all material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case*. The applicant's advocate, so far as it is consistent with the urgency of the application, has a particular duty to see that the correct legal procedures and forms are used; that a Written skeleton argument and a properly drafted order are prepared personally by her or him and lodged with the court before the oral hearing; and that, at the hearing, the court's attention is drawn to unusual features of the evidence adduced, to the applicable law and to the formalities and procedure to be observed including how, if at all, the order submitted departs from the model order" (emphasis added).

The obligation in *ex parte* applications to proceed "with the highest good faith" and to make full and frank disclosure of all material facts arises because the court is asked to grant relief without the person against whom the relief is sought having the opportunity to be heard. The guidance makes it clear that in relation to applications for orders such as anonymity and reporting restriction orders the obligation applies in relation to *every application* regardless of whether it is *ex parte* or on notice. Anonymity and reporting restriction orders affect the public who are not represented in court and also affect other media organisations and those who wish to use social media. The obligation of full and frank disclosure continues to apply given the public interests in play even if the application is on notice and I consider that it continues to apply even if an interim order is made so that if further information that could lead to the order being set aside becomes available to the applicant then the court and the parties should be informed.

[18] Paragraph 17 of the guidance adapted to the procedure in Northern Ireland requires the plaintiff to prepare in advance of the proceedings (a) a draft Writ; (b) an affidavit justifying the need for anonymity and reporting restriction orders; (c) legal submissions; and (d) a draft order.

[19] An issue has arisen as to whether there is a burden of proof on the party applying for anonymity and reporting restriction orders. Open justice is a fundamental principle and the general rule is that hearings are carried out in, and judgments and orders are, public. Such orders are an exception to that rule. In the case of *A Police Officer's Application (Leave Stage)* [2012] NIQB 3 McCloskey J, when considering applications for anonymity and reporting restriction orders, stated that where:

> "an issue of this kind falls to be determined, there is no true lis inter-partes and the court should approach the matter in the round, forming an evaluative judgment that is as fully informed as possible in the circumstances."

Accordingly, McCloskey J concluded that the court would be in error to determine such issues on the basis of burden and standard of proof. I agree that there is no true *lis inter-partes* given the public interest in play but the guidance states that the burden of establishing any derogation from the general principle of open justice lies on the person seeking it and that it must be established by clear and cogent evidence. In support of those principles reference is made in the guidance to *Scott v Scott* [1913] AC 417 , 438–439, 463, 477; *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103 , paragraphs [2]–[3]; *Secretary of State for the Home Department v AP (No 2)* [2010] 1 WLR 1652 , paragraph [7]; *Gray v W* [2010] EWHC 2367 (QB) at [6]–[8]; and *H v News Group Newspapers Ltd* [2011] 1 WLR 1645, paragraph [21]. I consider that applications which seek derogations from open justice, must be supported with clear and cogent evidence and that the burden is on the party seeking the orders. I

also consider that the supporting affidavit should be as comprehensive as is consistent with the urgency of the application.

[20] The affidavit supporting the application for anonymity and reporting restriction orders should be the affidavit of the plaintiff unless the urgency of the application only enables an affidavit to be sworn by another duly authorised on his or her behalf. However, if that is the case then an undertaking should be given that an affidavit will be sworn by the plaintiff. That is the practice adopted in relation to judicial review applications: see *In the Matter of an Application by Emen Bassey* [2008] NIQB 66, *In Re Cullen's Application* [1987] NIJB 5 and *XY'S Application* [2015] NIQB 75. Given the public interests in play in relation to the granting of anonymity and reporting restriction orders a similar practice should be followed in relation to any application for such an order.

[21] The plaintiffs in this case used their initials to commence proceedings but if anonymity or reporting restriction orders are to be made I consider that the better practice is to use a cypher given the risks of jigsaw identification.

[22] The guidance also contains a draft order which in relation to anonymity includes the following:

> "(a) the plaintiff be permitted to issue these proceedings naming the plaintiff as "AAA" and giving an address c/o the plaintiff's solicitors;
>
> (b) there be substituted for all purposes in these proceedings in place of references to the plaintiff by name, and whether orally or in writing, references to the letters "AAA" ."

The full draft order is set out in the guidance.

Conclusion

[23] The plaintiffs have chosen an incorrect procedure. The Writ was issued without first seeking anonymity and reporting restriction orders. There was no application for such orders. The affidavit supporting the application for an interim injunction has been sworn by the plaintiffs' solicitors rather than by the plaintiffs. There is no draft of the anonymity and reporting restriction orders. The position should now be remedied by taking all of these steps. I have set a timetable for the application to be lodged by the plaintiffs and for the hearing of the substantive application for anonymity and reporting restriction orders.

[24] The defendant, as one would have expected, did not take any advantage of the fact that no such orders were in place when the proceedings were issued. It could have, but did not, publish anything at that stage for which it is to be commended. It has also agreed that pending the hearing of the substantive application it will not publish any report of these proceedings and will not publish

any article about the plaintiffs or either of them or their children. On an interim basis that maintains the Article 8 rights of the plaintiffs and of their children in these proceedings as between the plaintiffs and the defendant. However that does not bind the public at large. I consider that there is sufficient reason to make interim anonymity and reporting restriction orders until the substantive application can be heard and determined but I give liberty to apply, which application can be made not only by the parties but also by others including, for instance, other media organisations.