THE SUPREME COURT

Supreme Court Record No: 2017/68
Court of Appeal Record No: 2016/372
High Court Record No: 2016/638 SS

Clarke C.J.
O'Donnell J.
McKechnie J.
MacMenamin J.
Finlay Geoghegan J.

BETWEEN

DAVID WALSH

APPELLANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY,
THE DIRECTOR OF PUBLIC PROSECUTIONS,
THE COURTS SERVICE,
JUDGE ALICE DOYLE AND
THE GOVERNOR OF CORK PRISON

RESPONDENTS

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 25th day of February, 2019

Introduction:

1. Contempt of court is ancient: the court's jurisdiction likewise. Over two hundred and fifty years ago in a seriously enlightened piece, Wilmot C.J., despite, "examining very carefully" the material at his disposal, could not identify its precise origin or source, its antiquity was so great. It is as old as the common law itself: its birthplace is beyond that and has existed since the first version of a public adjudication process. In effect, it attaches to the very process line which delivers the rule of the law. It is regarded as a co-traveller with the common law, rather than simply an aspect of it. It became highly developed early on. Halsbury's First Edition (1909 Vol. VII pgs. 280 *et seq*) verifies this. The law in Ireland was that of England and Wales for centuries before Ireland obtained her independence: it continued to be part of our law pre and post 1922 and 1937. It has never fallen foul of either the Constitution or Strasbourg. The centre of gravity in *Walsh* and in the joined case of *Tracey v. District Judge McCarthy* ("*Walsh & Tracey*") is not the Constitution, but rather the Convention, *i.e.* Article 6 thereof, and even then, only an aspect of it. It is perhaps surprising, given that the often-considered current practice has

never been constitutionally condemned, that on such a ground (Article 6 basis), such far reaching adjustment is now being suggested by this Court. For my part, I very much doubt the necessity for it. A heightened consciousness amongst judges with a renewed sense of the obvious are well capable of preserving the existing *modus operandi* in a manner which is Convention compliant.

2. As all observers of this area of the law will know, there are several different species of contempt: further within each such area there are multiple ways in which one can offend. Although subject to some criticism, indeed as severe as saying that it was, "unhelpful and at most a meaningless classification" (*Jennison v. Baker* [1972] 1 All E.R 997 at 1002), I find usefulness in the distinction between civil and criminal contempt. That view of Lord Salmon, as he then was, is an overreach, if intended for all purposes; in any event it must be seen in an English context where statute has much intervened. From my standpoint, I believe that the different classification helps to understand the court's reaction, at least its first line response, which is by far the most important one.

3. O'Dálaigh C.J., has said that civil contempt is coercive in purpose, whereas criminal contempt is punitive in motive: (*Keegan v. de Búrca* [1973] 1 I.R. 223 at 227). That statement, despite the views of Hardiman J. (*Irish Bank Resolution Corporation v. Quinn* [2012] IESC 51 (Unreported, Supreme Court, 24th October, 2012) at pg. 16 of his judgment), now requires adjustment. As several subsequent decisions show, there can also be a penal element in civil contempt where the conduct or behaviour, in addition to having an *inter partes* impact, is grossly offensive to the administration of justice so much so that the courts of themselves must have a say (*Shell E&P Ltd v. McGrath & Ors* [2006[IEHC 108, [2007] 1 I.R. 671, *Dublin City Council v. McFeely* [2012] IESC 45, [2015] 3 I.R. 722). Incarceration does not necessarily have to follow, a fine or even a much lesser sanction may suffice. Such approach is focused on the "public interest" aspect of justice. In *Irish Bank Resolution Corporation v. Quinn & Ors* [2012] IESC 51, Fennelly J., in his judgment with which three other members of the court agreed, having acknowledged that even on the civil side a court may sanction in defence of its own authority, went further than Finnegan P. did in Shell, and said that there exists "a wide range of convincing authority for the proposition that the inherent jurisdiction of the court to act in protection of its own orders is as ample as the occasion may require" (pg. 30). So at least at a general level the vested power so arising is fulsome.

4. When I refer to the term "punitive" in the context of criminal contempt, I should immediately add, lest there be any doubt, that both the meaning and use of the term, is wholly different from that which is normally associated with a sentence following conviction for a criminal offence. In the latter context, society punishes a convicted person for a crime against another whether of his person, property, rights or possessions: in addition, punishment is its headline purpose. In a contempt situation "the other party" is the integrity of the justice system. However one may parse individual judgments, the end point of having control is because the conduct in issue, has already or is capable of hurting the justice system. It's that which intervention seeks to correct: punishment, if required, is solely to that end (*Attorney General v. Connolly* [1947] I.R. 213 at 218).

5. The protection aspect of contempt has nothing to do with criticism *per se* of any particular system or any particular judge who operates it. The latter, both system and judge, must and in many instances should, welcome assessment of what they do: provided it does not illegitimately undermine the system, such fault finding cannot be condemned. Several cases have so acknowledged and have readily upheld the right of the public to disagree, even emphatically so, with process and judgment alike (*The State (DPP) v. Walsh & Conneely* [1981] I.R. 412 at 421) ("*Walsh & Conneely*"). It is when the line is traversed that the jurisdiction responds.

6. As a further preliminary matter, it is essential to point out that the doctrine and its evolution over so many centuries is totally unrelated to "the person": he/she who presides as a judge. It is "the chair" upon which justice rests and not he who sits upon it. It is the process and not the actors: it is the institution and not the individual. It is for society's benefit and that of the rule of law, it is not for self-righteousness or egotistical glory. So many cases have confirmed this. Individual judges are not the focus: their personal dignity is not what is at stake. Lord Blackburn in *R. v. De Castro*, known as "*Skipworth's case*" ((1873) L.R. 9 Q.B. 230) was at pains to point this out. Judges should never feel the victim. If any one of us who occupies such position should so believe, we are quite wrong, and almost inevitably will get it wrong. To that extent the term "contempt of court" is misleading (*Johnson v. Grant* [1923] S.C. 789 at 790). Our client is not ourselves but the seat of justice.

7. Contempt jurisdiction at its heart is one of the bedrocks of the rule of law, of providing justice and how that can best be delivered: how it is administered for the exclusive good of all society. No individual can be allowed to step that down: for if that should happen "justice for all" becomes perilous.

8. Common to all forms of contempt is the jurisdiction for court intervention and how such is moved. When the conduct complained of amounts to a breach of the general criminal law, recourse evidently could be had to that process: such however was not essential. Even then, courts have always had power to deal with contempt in a summary way: that is, by way of attachment and committal (O. 44 of the Rules of Superior Courts). No form of plenary proceedings was required. Save for contempt in facie curiae, this is how such matters were always dealt with.

9. As there are many forms of contempt, most with much variation and many variables, I propose, purely for convenience, to describe them, save as otherwise indicated, as loosely being "offensive to justice". As it happens, the *Walsh & Tracey* cases involve criminal contempt which like all others come in many forms. These include acts done or words spoken, out of court (i) which may prejudice a pending trial ("constructive contempt"), (ii) which endangers public confidence in and interferes with the due administration of justice ("scandalising the court"), (iii) disobedience to a writ of *habeas corpus* and (iv) a breach of the sub judice rule, to name but some. It is however another member of that family that we are directly concerned with: that which is committed in court and in the face of the court.

10. All such contempts are a common law offence (formally indictable misdemeanours) and such were punishable by both imprisonment and fine, without statutory limit. (*In Re Davies* [1888] 21 Q.B.D. 236: - quoting 4th ed. Blackstone, 337).

11. Curiously but with an obvious explanation, case law has never been preoccupied with this type of contempt, at least up to recently: the overwhelming discussion has related to contempt outside of court. There is a self-evident reason for this, which I will come to in a moment (paras. 42 and 43 *infra*). Even though quick and scant, the following truncated journey is I think helpful to understand the conclusions which I have reached.

12. Previously I have mentioned Wilmot C.J., but only in passing: however, his views on the origin and source of contempt law and the court's powers to respond, have long since been regarded as authoritative on the question: *R. v. Almon* [1765] Wilm 243 ("*Almon's Case*"), has been cited with unconditional approval in this and other common law jurisdictions, for a great many years: (*The Attorney General v. O'Kelly* [1928] 1 I.R. 308, is in point). After its publication, the first judicial recognition of the judgment came some 20 years later (see para. 13) in *R. v. Clement* [1821] 106 E.R. 918, however the reference to it was fleeting. Following that, a true endorsement came in *R. v. Gray* (1900), 2 Q.B. 36 at 40-41, and ever since it has scarcely been judicially doubted: but in some academic quarters it has been challenged (see Sir John Fox, '*The King v. Almon'* (1908) 24 L.Q.Rev. 184, 266 and other similar articles). According to Palles C.B., however, the passage which I am about to quote was never in fact delivered as part of a judgment (*General v. Kissane* [1893] 32 L.R. IR. 220 at 271): I will now explain why.

13. The story behind *Almon's* Case and the reason for Wilmot C.J.'s judgment never having been delivered is actually quite fascinating, regretfully however, only a very brief explanation is possible here. Contempt proceedings against John Almon began in January 1765, following his publication of a series of anonymously authored pamphlets which were severely critical of Chief Justice Lord Mansfield. The author, who called himself "The Father of Candor", cautioned against Mansfield's perceived lack of respect for settled precedent, his judicial innovation but also and perhaps more severely, accused Mansfield of being arbitrary, officious and politically biased. At the hearing, once arguments had been delivered and after some deliberation between the judges, including Wilmot C.J., it became clear that the prosecution was bound to fail, this due to reasons relating to the form and title of the proceedings. A second writ of attachment was brought some four days later; however by this point, Almon had fled from London. By July of that year, the government had changed hands and those closer to Almon's alignments were in power, thus any prosecution against him was entirely dropped. Therefore, the judgment which Wilmot C.J. seemingly wrote after hearing arguments in relation to the first writ of attachment was never delivered and a second hearing never followed. In 1802, some ten years after his death, his son published Notes of Opinions and Judgements Delivered in Different Courts [1757-1770] thus we have the written text.

14. The origin of Wilmot's celebrated opinion, which has been not only embraced but endorsed in numerous cases since then, is evidently complex and the proceedings which

led it were arguably politically charged and politically driven. It centres around the particular form of contempt known as 'scandalising the court', which has been controversial since its inception. However, and I think the more important point to glean from this brief view of the historical roots of *Almon's Case*, is that the most significant passages from Wilmot C.J.'s judgment, in my view, relate to the court's power to deal with contempts generally and the intersection of that power with the common law. The court's jurisdiction to deal with contempt is in many ways coequal with the common law, not simply because of its antiquity, but also because it plays such a crucial role in the preservation of law and justice and the integrity underpinning both.

15. In any event, Wilmot C.J., (Common Pleas) had this to say:-

> "The power, which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution: it is a necessary incident to every Court of Justice, whether of record or not to fine and imprison for a contempt of the Court, acted in the face of it."

He continued:-

> "And the issuing of attachment by supreme courts of justice…for contempts out of court stands upon the same immemorial usage as supported the whole fabric of the common law. It is as much as the *lex terrae,* and within the exception of Magna Carta, as the issuing of any other legal process whatsoever. I have examined very carefully to see if I could find any vestiges or traces of its introduction, but can find none. It is as ancient as any other part of the common law; there is no priority or posterity to be discovered about it; and therefore cannot be said to invade the common law, but to act in an alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society… It is the constitutional remedy in particular cases, and the judges in those cases are as much bound to give an activity to this part of the law as any other part of it."

He continued:-

> "I am as great a friend of trials of facts by a jury…as any judge…but if, to deter men from offering any indignities to courts of justice and to preserve their lustre and dignity, it is part of the legal system of justice in this kingdom that the court should call upon delinquents to answer for such indignities by attachment, we are as much bound to execute this part of the system as any other." For a further version of this quotation, see *Attorney General v. O'Kelly* at p. 313.

To challenge the authority of this viewpoint at this stage is to challenge the authority of the multiple decisions all of which both followed and applied it.

16. In 1838, Baron Parke re-echoed the above, very much emphasising the power of the court to vindicate its own authority by punishing contempt complaints within or out of

court, with the jurisdiction to do so standing upon "immemorial usage". (*Miller v. Knox* (1838) 132 E.R. 910). Some fifty years after Miller, and more than a century after *R. v. Almon*, Lord Blackburn, said very much the same thing. Although acknowledging, that in some cases there may be a role for the criminal courts, he immediately cautioned however: if such recourse had a dissuasive effect on self-intervention, he could see "the due administration of justice being hampered and thwarted". The learned Lord continued:-

> "For that reason, from the earliest times the Superior Courts…have always had power to deal summarily with such cases. When an action is pending in the court, and anything is done which has a tendency to obstruct the ordinary course of justice, or to prejudice the trial, there is power given to the courts by the exercise of a summary jurisdiction to deal with and prevent any such matter which should interfere with the due course of justice and a power has been exercised. I believe from the earliest time that the law has existed." (*Skipworth's case*" [1873] L.R 9 Q.B. 230)

17. In *Attorney General v. Kissane* [1893] (32 LR. IR 220 at 271) ("*Kissane*"), Palles C.B. agreed with the essence of what is above quoted and stated. Having reviewed the authorities at least one question was settled in his view: it was that contempt on the criminal side was and should be regarded as a criminal offence. That gave rise to a follow-on argument, namely that if such be correct, why the more normal process of criminal prosecution, with its attendant safeguards should not be adhered to. Side by side with this viewpoint, was a challenge to the suitability of using the attachment and committal process to address such issues. Right throughout such controversy however, the courts have steadfastly maintained their right to sustain their own dignity and authority: such frontline defence has never, as such, been breached. (paras. 33 & 34 *infra*)

18. So leading up to the 1922 Constitution, both the substantive law on this subject and the corresponding power of the court, had roots so well historically ingrained that all of their essential terms were widely respected as a matter of course: the situation was may I say, considered clear cut and decisive.

19. Some of those who objected to the summary process, gained renewed energy with the passing of the 1922 Constitution. Articles 72° and 73° respectively read:-

> "72. No person shall be tried on any criminal charge without a jury save in the case of charges in respect of minor offence triable by law before a court of summary jurisdiction and in the case of charges for offences against military law, triable by court martial or other military tribunal.
>
> 73. Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát Eireann) at the date of the coming into operation of the Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by an enactment of the Oireachtas."

20. In "The Nation" newspaper, published on 18th February, 1928, the editor, one Sean T. O'Kelly, published a piece containing a note headed "Contempt for Free State Courts" with an accompanying article entitled "Judges Insolent to Jurors". This was a reference to a jury hearing which had taken place so as to determine whether three accused persons, who had refused to plead, did so of malice or by visitation of God. That all could speak was not in doubt. Notwithstanding, the jury in respect of one person and a second jury in respect of two others, failed to agree. The judge, when discharging them, remarked that on foot of the evidence they must have acted in disregard of the oath which they had taken. The article in question related to these events (*Attorney General v. O'Kelly* [1928] 1 I.R. 308) ("*O'Kelly*").

21. The A.G. sought an order for attachment against the then editor, who by way of preliminary objection argued that the court had no jurisdiction to entertain such application, as the charge he was facing was criminal in nature: therefore by virtue of Article 72° of the Constitution, he was entitled to a trial by jury. The High Court, Sullivan P. and Hanna J. disagreed, and in the process expressed complete satisfaction with the court's existing jurisdiction in contempt proceedings. Meredith J., who agreed on the jurisdictional point, disagreed however as to outcome for reasons which are no longer of any relevance to this area of the law. In effect on the major issue, the decision was a unanimous one.

22. The learned President identified three forms of contempt: that in the face of the court, words spoken or acts done which did or were calculated to interfere with a pending trial, and thirdly, material which if published was likely to endanger public confidence in the administration of justice. The challenge as mounted, was in respect of the third category.

23. Two points I think stand out from his judgment, as explaining the conclusion reached. One was that even at the time when an accused person was not a competent witness, he could nonetheless, if facing a contempt charge, give evidence on his own behalf and could be compelled to answer interrogations: this suggested that such proceedings should not be regarded as "a trial of a criminal charge" (Article 72°). Secondly, the learned President had regard to Article 64° of the Constitution which, broadly speaking, was similar to Article 34° of the 1937 Constitution: the provision dealing with the administration of justice. The courts therein referred to, included the High Court, which obviously was a Court of Record: such courts in his view, in accordance with long established law, had an inherent jurisdiction to attach, commit and sanction for contempt. He relied on *Cox v. Hakes* ((1890) 15 A.C. 506) as a construction tool for this constitutional interpretation (para. 32 *infra*).

24. The other point of note from the discussion was that the laws in force in Saorstát Eireann, on the date when the Constitution took effect, were continued in force unless inconsistent with the Constitution or until the Oireachtas should intervene. This provision (Article 73°), which had the effect, inter alia, of endorsing the extant jurisdiction on contempt, was however subject to the Constitution, including evidently, Article 72°. Notwithstanding, when both of these Articles were considered in conjunction with Article 64, the learned

judge was satisfied that the historical contempt jurisdiction was not abrogated by Article 72°: in his view, such was confined to the general body of criminal law. Therefore, the common law jurisprudence, regarding contempt, survived that Constitution, and in its integrity, at least *pro tem*, remained intact.

25. Linking *O'Kelly* with *Attorney General v. Connolly* [1947] I.R. 213 ("*Connolly*") is the judgment of *In Re Earle* [1937] I.R. 485, where the contempt preferred was a defiance to comply with a habeas corpus order. The facts, of a family dispute, can be disregarded. The divisional court really did no more than reiterate what the law in practice was. Even if a contemnor could be tried under the criminal code, nonetheless such did not "negative the existence of a power in the court itself to punish summarily a person who interferes with or obstructs the course of justice in a manner which is so compendiously described as contempt of court. Whatever the source of the exercise of judicial power…to fine and imprison by summary process contempts in or out of court may be, whether in a moral usage as asserted by Wilmot in *Almon's case*, and those great Judges and commentators who followed him, or a gradual process of development, the existence of such a power…must now be recognised as part of the law of the land" (p. 493-4). The decision in *O'Kelly*, in its treatment of Article 72° of the 1922 Constitution was fully endorsed.

26. A similar issue arose in *Connolly*. The contempt in this case was by way of a newspaper article, being that of prejudicing a murder trial about to start in the Special Criminal Court: from any viewpoint if sustained, its content clearly scandalised the process of justice (para. 9 *supra*). One issue which arose, whether an application could be made before the High Court to protect the integrity of an inferior court, is not of concern to us. The second involved an examination of a number of constitutional provisions to see whether the respondent's submission that Article 38° applied, was sustainable.

27. The resulting exercise clearly shows that pre-1922, the Irish courts had consistently followed its neighbouring jurisdiction in how contempt allegations were dealt with. *R. v. Dolan* [1907] 2 I.R. 260, is typical, with the decision of the King's Bench Division illustrating quite clearly that the court's reasoning was founded, almost essentially if not exclusively, on UK authority. Therefore, Irish law coincided with that of UK law. *O'Kelly* made it clear that such did not offend the 1922 Constitution: the only question therefore was whether such laws were carried forward by Article 50° or, being inconsistent with some other provision of the Constitution, were not so. The battleground was based on Article 38.5°.

28. Gavan Duffy P., even describing *O'Kelly* as a "remarkable judgment" would not however have followed it unless on close analysis it was in his view correctly decided. Without hesitation he was satisfied that the case law showed that the courts, not only had the power but indeed the duty, to step in and stop what he described as "any attempt to pervert the proper flow of justice", however and in whatever way attempts were made to do so (*Daw v. Eley* L.R. 7 Eq 49 at 59, and *In Grays' Case* [1900] 2 Q.B. 36). Although Article 38° was wider in scope than its counterpart under the 1922 Constitution, nevertheless he believed that *O'Kelly* still represented good law. The learned President

could see nothing in the Constitution to deprive the court of a jurisdiction which had vested in it from, in his words, "time immemorial". The right of free speech (Article 40 6.1°) was no answer: fair criticism is perfectly acceptable (para. 5 above) but it cannot trump the authority of the court. Neither do Article 38° rights have that effect. Accordingly, there was no constitutional impairment in the continuation of the contempt jurisdiction as it had previously existed for centuries.

29. Although neither *O'Kelly* or *Connolly* were decisions of this Court, given that each was a divisional chamber of the High Court, presided over by the then President and were unanimous on the point at issue, one might have thought that that particular controversy had been settled. Not so. It surfaced again in *The State (DPP) v. Walsh & Conneely* [1981] 1 I.R. 412 ("*Walsh & Conneely*"), in which two judgments were given. Both O'Higgins C.J. and Henchy J., whilst obviously respectful of precedent, nevertheless decided that, as the matter was of such significance, it should be considered afresh. Whilst their analysis differed in some respects including that on the Article 38.5° issue, nonetheless both judgments can be taken as supporting the previous case law, even if Henchy J. entered a caveat, not of materiality at this point, but potentially of relevance elsewhere. (para. 35 infra)

30. O'Higgins C.J. was entirely satisfied that both pre and post the foundation of the Irish Free State, the courts in Ireland exercised summary jurisdiction in respect of all forms of criminal contempt. Contempts committed in *facie curiae* were dealt with by the court or judge concerned, while constructive contempts were dealt with by a divisional bench of the High Court. In this regard the Irish courts followed the law set down in a long line of decisions in the English courts.

31. Following the enactment of the 1937 Constitution and in light of the law then existing and thereafter made, the Chief Justice could not conceive of any exception to the court's summary jurisdiction as it previously was. His views on this and the Article 38° issue can be summarised as follows: -

- If Article 38° was the sole provision involved, contempt proceedings, being criminal in nature, could be said at least at a *prima facie* level, to be a trial "…on any criminal charge…": thus a jury trial.

- However, such an approach would be erroneous: the whole Constitution must be viewed as one in this respect, in particular Article 6.2°, Article 34° and Article 35°, must be referred to.

- Article 6.2° assigns the exercise of the judicial power to the judiciary: Article 34° mandates that justice shall be administered by judges duly appointed under the Constitution and finally, Article 35.5° confers on all judges such independence as is required in the discharge of their judicial function.

- When so viewed, how could judges dispense justice if powerless to protect their independence and the judicial role. It is inherent in their very existence that they

should have power to deal with acts which obstruct or interfere with this role, and with conduct which undermined it. Unless such power was readily available, justice could not be administered fairly.

- For this purpose there can be no distinction between forms of contempt as the appellant argued for: Article 38.5° does not apply.

- Equally so, the distinction sought to be drawn where time for intervention was essential and where it was not, was entirely unjustified. The backdrop to the court's jurisdiction in all cases is to preserve its dignity, its authority and its respect, which are so critical for the administration of justice.

- If a distinction should exist, it would mean that in respect of those cases exempt from the process, the DPP's intervention would be required (Article 30.3°). As this office holder is independent in the exercise of his/her functions, but if anything when acting does so on behalf of the executive, it could be that the most flagrant obstruction or interference with justice could go unchallenged.

- On that ground alone Article 38.5°, even in isolation could not be read in the manner as suggested by the appellant.

- If the power as described did not exist or was restricted or otherwise conditioned, the same may well have the effect that where proceedings are so obstructed, or witnesses are intimidated, or a pending case prejudiced, or the court held up to public ridicule or contempt by baseless allegations, then in such circumstances justice could not be administered either fairly and effectively if reliance had to be placed on a third party.

In conclusion therefore, the learned Chief Justice was perfectly satisfied that the criminal contempt jurisdiction and procedure, prevailing immediately prior to 1937, was continued in full force and effect by the Constitution. It follows that when Article 38.5° is read in conjunction with the other provisions as mentioned, there is no right to a trial before a jury. Finally however, he did not rule out some possible role for a jury if a fact conflict arose, which it did not in the case at hand.

32. Henchy J., speaking for the majority, felt the question was *res integra* as to whether the High Court had jurisdiction to determine, in a summary way, an allegation of criminal contempt by scandalising the court as in that case. For such a jurisdiction the case principally relied upon was *O'Kelly,* and in particular the judgment of Sullivan P. Whilst the reasoning of the learned President was flawed in his use of *Cox v. Hakes* [1890] 15 A.C. 506, when determining whether a pre-1937 law had survived the enactment of the Constitution (*State (Browne) v. Feran* [1967] I.R. 147), that in itself did not necessarily mean that the conclusion reached should also be rejected.

33. Having conducted a widespread analysis of several cases dealing generally with contempt, all of which show that such matters have always been dealt with in a manner distinct

from the ordinary criminal law offences, that in itself however did not detract from the fact that contempt on the criminal side must be regarded in like manner. Hence in his view, Article 38.5° was in play. Otherwise, it would be invidious if the only exception in the criminal area to which that provision did not apply, was the type of contempt as mentioned. Therefore, at the level of principle, a jury trial could not be excluded.

34. However, the precise wording of Article 38.5° was of importance: it provided for a "trial with a jury" (emphasis added), hence issues of fact are assigned to that body with matters of law being for the judge. It followed therefore that where there was no factual conflict, there was nothing for the jury to decide, as the question of whether there was or was not contempt was solely for the judge: that is the judge who is otherwise vested with the jurisdiction necessary to try summarily such a contempt. Accordingly, in those circumstances the jury had no role.

35. The learned judge then went on to make some observations of note, at pg. 440 of the report: -

> "The ultimate responsibility for the setting, and the application, of the standards necessary for the due administration of justice must rest with the judges. They cannot abdicate that responsibility, which is what they would be doing if they allow juries of laymen to say whether the conduct proved or admitted amounted to criminal contempt. It may be said that it is short of ideal that a judge may sit in judgment on a matter in which he, or a colleague may be personally involved. Nevertheless, in such matters, judges have to be trusted, for it is they and they alone who are constitutionally qualified to maintain necessary constitutional standards. In upholding the current position, to the extent of saying that it is for a judge and not a jury to say if the established facts constitute a major criminal contempt, I would stress that in both the factual and legal aspects of the hearing of the charge, the elementary requirements of justice in the circumstances would have to be observed. There is a presumption that our law in this respect is in conformity with the European Convention of Human Rights, particularly Article 5 and 10(2) thereof." See also *Murphy v. British Broadcasting Corporation* [2004] IEHC 420, [2005] 3 I.R. 336.

These remarks show that although clearly recognising, the "judge in own cause" argument, he was satisfied that such a judge must also determine contempt or not and should do so by the standards which the judiciary set.

36. Some of the cases which followed are off point. *In Re Kennedy v. McCann* [1976] I.R. 382, and *In Re Hibernia National Review Ltd* [1976] I.R. 338, the court assumed rather than decided the question of jurisdiction: there is no reference whatsoever to that issue in the judgments. Finlay P., in *The State (H.) v. Daly* [1977] 1 I.R. 90 and in *The State (Commins) v. McRann* [1977] 1 I.R. 78, whilst endorsing the "historical position" as above stated, did so by way of obiter as both cases were civil in nature. Some other cases are on point. In *Dublin City Council v. McFeely* [2012] IESC 45, [2015] 3 I.R. 722 ("*McFeely*"), Hardiman J. pointed out that it was essential for the courts to possess power

to punish in a summary manner contempt of it or its orders. In the same case, Fennelly J. expressed the same jurisdiction as being "an indispensable procedural remedy" available to the courts to enforce their orders. In *Irish Bank Resolution Corporation Ltd & Ors v. Quinn & Ors* [2012] IESC 51 ("*Quinn*"), Hardiman J. re-echoed what previously had been stated by him in *McFeely*, even if he bemoaned the confusion which a failure to properly distinguish between civil and criminal contempt inevitably causes. Fennelly J. made the same point in a separate judgment (paras. 91 and 102). The distinction must undoubtedly be made and made correctly, however sympathy must be had for a trial judge: as it is not always that easy to do so.

37. I have not mentioned the facts of either *McFeely* or *Quinn*: they are complex and of no immediate relevance. What is however, is the court's insistence that given the existence of this summary jurisdiction process, and the potential consequences for the contemnor, that procedural fairness has to be meticulously observed. In *DPP v. Independent Newspapers (Ireland) Ltd* [2008] 4 I.R. 88, Fennelly J. cited with approval *O'Kelly* and *Walsh & Conneely*, as he did the historical pathway leading to what remains the current jurisdiction to this day. See also my judgment in *Laois County Council v. Hanrahan* [2014] IESC 36, [2014] 3 I.R 143, p. 157-162 for a comprehensive discussion of the distinction.

Summary of Position:

38. The courts, at least those of record, have had jurisdiction since time immemorial to protect their dignity and vindicate their authority. This was inherent in their very existence and intrinsic to administering justice. It follows from this, which I do not believe was ever doubted, that such is now to be found, at least within Article 34° of the Constitution, if not in several other provisions. This jurisdiction was invariably exercised in a summary manner. The distinction between civil and criminal contempt remains very much of value. The former is of relevance only as supporting the jurisdiction of which I speak. The latter is more in point. The procedure by which criminal contempt moved was by way of attachment and committal. Whatever form the offending contempt should take, that was the initiating process.

39. Well before and certainly ever since *Kissane*, allegations of contempt on the criminal side were regarded as criminal in nature. That was conceded by the Attorney General in *O'Kelly* and has never been doubted since. As such, focus turned on the follow-on issue: why should not such allegations be dealt with like any other criminal offence. At common law if such were the case, that would have merited a jury: it was never acceded to. Likewise, under both the 1922 and the 1937 Constitution. The courts have steadfastly refused to accept that submission. Whether this aspect of contempt can correctly be described as being sui generis, is more a matter of form than substance: more a matter of reasoning than rejection.

40. The only *caveat* to this general proposition which I can identify in the case law stems from the judgment of Henchy J. in *Walsh & Conneely,* and to a lesser extent that of O'Higgins C.J.: at its highest the jury's role would solely be to determine a factual dispute if such existed. Outside of that, it was accepted that the standards by which a contempt or no

contempt should be determined, and whether in any given case a contempt had in fact been established, were matters of law and thus solely for the judge.

41. Not all forms of contempt, on either the civil or criminal side, are the same. As the case law above shows, *Miller v. Knox* and *Kissane* both dealt with the refusal of a constable to aid a local sheriff in executing writs of *fieri facias*: In *Skipworth* there was an attempt to prevent the Chief Justice from participating in a case: *O'Kelly, Connolly* and *Walsh & Conneely* were acts of scandalising the court. Specifically on the criminal side to name but some, there is contempt in the face of the court, contempt which imperils in any form the fairness of an existing trial, acts done or words spoken which undermine public confidence in the administration of justice, breach of the sub judice rule and failing to produce a body when required under Article 40.4.2° of the Constitution. The list on both sides could go on.

42. What is striking about all of this is that the debate which was had was within these and similar type cases. Save for *Keegan,* not one involved contempt in the face of the court. In all of them the summary process was by way of attachment and committal. Once the procedural safeguards attendant on such motions were adhered to, there was no objection as to how the application was dealt with thereafter: modern authority so confirm: (*McFeely* and *Quinn*). Either an individual person or the Attorney General could move: formerly a divisional court of the High Court heard such applications, now it is more likely to be a single judge. This latter comment is somewhat of an aside: the next point is for real: contempt *in facie curiae* never featured as a problem.

43. In none of the cases which I have come across, have I been able to find any submission by counsel or any comment by the court that the process dealing with an *in facie* contempt was even suspect, let alone in peril. On the contrary, in *O'Kelly* it was readily accepted that such type of contempt could be dealt with in the manner then accustomed: O'Dálaigh C.J. in *Keegan* dismissed any question of entertaining issues such as those above described, saying:-

> "The present case is one in which the defendant stood accused of criminal contempt in facie curiae and could be dealt with summarily by the court."

In *Walsh & Conneely*, O'Higgins C.J., having stated that such contempts were dealt with by the court or judge concerned, noted the acceptance that summary jurisdiction did exist in respect of criminal contempts committed in facie curiae. Henchy J. at 432 felt it important to record that it was "no part of the appellant's case that there is any constitutional restriction on the right of a judge to try a person summarily for a charge of criminal contempt committed in facie curiae, i.e. conduct so direct and immediate so as to be deemed to be in the personal knowledge of the court". So at least domestically, little concern, in fact none of a serious nature that I can detect, has been voiced in this context. Of course, it is possible to point to expressions of concern here and there: but there has been no judicial outcry in this jurisdiction demanding fundamental change, on either a constitutional basis or at all.

44. Whilst most of the discussion which has taken place has concentrated on one aspect of Article 38°, namely a trial with a jury, subs (1) states that a person cannot be tried on any criminal charge save in due course of law: not simply statute law, but much more fundamentally also on the basis of constitutional guarantees. One such requirement is that the court having seisen of a case should be independent and impartial. Another aspect of Article 38° which can also be liberally found in Article 40° is the constitutional commitment to fair procedures. If the question of fair procedures in a general sense was not as developed as it might have been under the 1922 Constitution, it has certainly gained major traction in the past fifty years or thereabouts. Every judge is utterly conscious of this requirement whenever he sits no matter at what level he/she so presides. Contempt of court is clearly included. In addition, when one adds in Article 35.2° and the oath which judges take, there cannot be any doubt but that our jurisprudential culture is imbued with judicial impartiality and independence.

45. To date I have not even mentioned the body of law which has developed on the issue of bias: both real and apparent. It goes back much further than *Bula Ltd v. Tara Mines* (No.6) [2000] 4 I.R. 412, but even that case itself gives a very clear-cut picture of the courts' appreciation of this doctrine. More recently it was reviewed by this Court in *Goode Concrete v. CRH* [2015] IESC 70, [2015] 3 IR 493. Consequently, there cannot be any question of the judicial arm of government in this jurisdiction being ignorant of, or otherwise disregarding those fundamental rights which I have mentioned. And yet, at least insofar as contempt in the face of the court is concerned, the historical position has remained. As Henchy J. said in *Walsh & Conneely*, judges must be trusted. I have found no wanting in that regard: contempt of court included.

46. In any event before looking at the Convention and the English position, could I make one further observation. Whilst it is true that from time to time all courts have to deal with contempt situations, it is I think fair to say that such are more likely to arise in the District and Circuit Court and to a lesser extent perhaps in the High Court, rather than in the appellate courts. As is common case those courts deal with a great through put of people, parties, witnesses and the general public alike, carrying at all times an extensive workload. It is therefore of the first importance that whatever the outcome of this case may be, one must be acutely conscious of the dynamic nature of how those courts operate on a daily basis. In addition, whilst one can try and imagine the scene, it is very difficult, if truth be told, to mirror image the type of experiences which, for example, Judge Doyle encountered and had to deal with the day on which Mr. Walsh was committed for contempt. Therefore, in whatever type regime may commend itself, a very considerable margin of appreciation must be afforded to such judges, who would find it difficult if not impossible to deal with threatening behaviour if in fact bound by any sort of rules to be prescriptively applied. Flexibility is essential to control.

The English Position

47. The English approach to contempt in the face, which was primarily dictated by common law rules, was quite similar to the Irish position in that certain courts had inherent jurisdiction to deal with the matter summarily. The Contempt of Court Act 1981 sought to

harmonise contempt law and bring it into line with law under the European Convention: however it does not deal with contempt in the face in any detail. As such, since then courts have insisted on several occasions that specific procedural safeguards needed to be furnished in order to protect those facing contempt in the face proceedings (*Aldridge, Eady & Smith on Contempt,* Sweet & Maxwell, p. 839). Although naturally, the circumstances will generally be that there is little time to consult authorities or give detailed consideration to the appropriate course, various rules and practice directions have been issued in recent years which set out the "ideal" procedure to be followed by judges where possible.

48. The Criminal Procedure Rules 2015: Part 48 applies to the Magistrates' Court and the Crown Court who deal specifically with criminal matters, while civil courts such as the High Court and County Court must look to the Civil Procedure Rules, 81.16 which is supplemented by Section 5 of Civil Practice Direction 81. All of these embrace basic principles of fairness and emphasise the need to take account of "Convention Rights". It must be noted also that while they streamline and standardise the procedure somewhat there is still a wide discretion afforded to judges so that they may deal with the situation as they deem necessary in order to maintain control of the proceedings.

49. As part of the process involved, the court must explain to the respondent in simple terms, the conduct in question, the possibility of imprisonment, a fine or immediate temporary detention should the court see this as necessary, as well as the fact that the respondent may take legal advice if he/she wishes. The respondent ought then be given an ample opportunity to explain the offending conduct and apologise if he or she wishes. After these steps have been taken, the court may then decide that no further action is necessary, may enquire into and adjudicate upon the conduct there and then or may postpone that step until a later date.

50. In a recent decision of the Court of Appeal, *In Re Yaxley-Lennon* [2018] 1 W.L.R. 5401, two separate instances of contempt in the face were dealt with: both had the same respondent, Stephen Yaxley-Lennon. This judgment, written by Lord Burnett, the Lord Chief Justice of England and Wales provides us with a very good sense of the ideal procedure to be followed under English law. Mr Yaxley-Lennon was first found guilty of contempt in the face by the Canterbury Crown Court, on the 8th May, 2018, when he stood by the door of the courtroom and the steps of the court filming a rape trial, footage which he later uploaded to Facebook. Once the trial judge became aware of his activity she took immediate steps to have him escorted out of the courthouse. He made comments about his intent to go the defendants' homes and continue filming. He was arrested at his home two days later and was sentenced to three months' imprisonment, suspended for 18 months with the *caveat* that should he be found guilty of contempt again he would immediately be imprisoned.

51. Very shortly after the first instance, on the 25th May, 2018, he filmed himself on the steps of Leeds Crown Court, uploading to the internet *via* Facebook livestream. The trial he spoke about had been the subject of a postponement order under section 4(2) of the

Contempt of Court Act 1981 which prohibited the publication of any report of the proceedings until after the conclusion of that trial and of a related trial which was yet to take place. The jury in the ongoing case had retired to consider their verdict. Having been alerted to his actions, the judge immediately brought Mr. Yaxley-Lennon into court and watched the video in his presence. He offered to delete the video, which the judge agreed to but also informed the respondent that he was going to pursue contempt proceedings against him, once a lawyer had been found to represent him. Proceedings began that same day, the incident itself taking place at 10:00 and the hearing beginning at 14:00. At no point did the judge set out the particulars of the alleged offence or offer the respondent a chance to accept or deny them, though he repeatedly expressed deep remorse, through counsel, for "breaching the integrity of the court". He was sentenced to fifteen months' imprisonment, reduced to ten on the basis of his immediate apparent immediate regret and acceptance.

52. His appeal was successful in relation to the first instance in Canterbury but was unsuccessful in respect of the Leeds incident. Though the judge in Canterbury had failed to adhere to a very minor technical procedural aspect by failing to produce a separate and specific written statement, he had clearly given the respondent enough time to instruct counsel and understand the charges against him. The judge in Leeds however had imposed a severe sentence, to be served immediately, without adhering to the prescribed procedures. The Lords felt it would have been sufficient for the judge to demand that the video be removed from the internet and a later date for contempt proceedings be set. It was accepted that the judge was under pressure to maintain control and prevent the trial from collapsing but also it was taken into consideration that Mr. Yaxley-Lennon had been remorseful and cooperative with the judge. This case serves an excellent example of the kind of fairness which may be expected in serious cases and the kind of discretion which a judge may have. Common sense was clearly the guiding factor for the decision of the Court of Appeal.

Article 6 of the European Convention of Human Rights ("the Convention"):

53. Article 6(1) of the Convention reads:-

> (1) In the determination of…any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"

When one adds in subs (2) and (3)(a) – (e), the resulting case law from the European Court of Human Rights (ECtHR) on the entirety of this provision is voluminous indeed. Thankfully the exercise for our purpose can be much refined. It relates solely to contempt in the face of the court. Two questions therefore arise, whether such is to be regarded as a "criminal charge" within the meaning of that term in subpara (1) and secondly, given the manner in which such issues have always been determined by our courts, is that process now sufficient to meet the "impartiality" requirement of the Article.

54. As to the first question, it is clear that in Convention law the phrase "criminal charge" has a particular meaning, which determines whether Article 6 is engaged or not. In several

cases the court has said that such issue is to be resolved by looking at three criteria: firstly, the classification of the offence in domestic law, secondly the nature of the offence and thirdly, the severity of the penalty provided for. (*Engel & Ors v. Netherlands* (App. Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) Unreported, European Court of Human Rights, 8th June, 1976). The resulting position in this jurisdiction seems well established.

55. In respect of all forms of criminal contempt, including that of the *in facie* type, Irish law has for many years regarded the same as being criminal in nature (*Kissane*): the description continues to hold good. Again, such contempts, are offences at common law (formally common law misdemeanours), and potentially can attract an unlimited fine and/or indefinite imprisonment. Needless to say, and one should immediately add, that a judge is far from being at large in the imposition of either. In any event, in light of these features I think one must assume, and on such basis I will proceed, that contempt of the type we speak, comes within the individual meaning of the relevant phrase, in Article 6.

56. Before considering *Kyprianou v. Cyprus* (App. No. 73797/01) (2005) 44 E.H.R.R. 565 and some of the cases which followed, it is instructive to look at some regimes in other countries by which the dignity and authority of the court is maintained without the remedies or sanctions involved reaching such a level as would attract Article 6(1) rights. I mention but two in which the distinction between powers of discipline and contempt should be noted.

Putz v. Austria **(App. no. 18892/91) Unreported, European Court of Human Rights 26 January, 1996**

57. Mr. Putz in criminal proceedings against him, appeared before the Wels Regional Court in Austria on several occasions in the first part of 1991. On at least two such occasions he had made serious allegations against the presiding judge, undoubtedly contemptuous and all baseless. On the first occasion he was fined 5,000ATS by the court in question, which if not paid, would convert into a three-day prison sentence. On the repeat occasion he was fined 7,500ATS, which, if not discharged, converted to a five-day term.

58. The third incident arose out of written observations which he had sent to the Court of Appeal in Linz. Though the language used, differed from time to time, the essence of the attack was the same with the presiding judge in the regional court being the target. That Court imposed a fine of ATS10,000. If the fines had not been paid the default position would kick in without further hearing: as it happened all such fines, which were described in the relevant legislation as "disciplinary" or "pecuniary" penalties, were in fact paid.

59. The Austrian law in this regard was to be found in the Code of Criminal Procedure if the offending contempt took place in court: otherwise in the Courts Act and the Code of Civil Procedure. The measures in question also conferred power on the presiding judge to maintain order during court proceedings. Furthermore, unlike the criminal law, the penalties imposed were not entered in the criminal record and were unrelated to income.

60. In Mr. Putz's application, the question which agitated the ECtHR was whether the regime above described was sufficiently criminal in nature that the safeguards in Article 6(1)

would apply. Adopting its three criteria test, the court felt that the provisions in domestic law covering disruption of court proceedings could not be shown to belong to, or be part of the criminal law. Secondly, under the heading of "Nature of the offence", it had this to say:-

> "In this respect, the situation is similar to the one in the *Ravnsborg* case. Rules enabling a court to sanction disorderly conduct in proceedings before it are a common feature of the legal system of both Contracting States. Such rules and sanctions derive from the inherent power of court to ensure the proper and orderly conduct of its own proceedings. Measures ordered by courts under such rules are more akin to the exercise of disciplinary powers than to the imposition of a punishment for the commission of criminal offences."

Accordingly, the fines in question did not, at least under that heading, attract Article 6 rights. Finally, with regard to the severity of the sentence, the court noted that a fine could not exceed 10,000ATS (for incidents which occurred inside the court), and the custodial sentence, which although it could kick in automatically without hearing if the fines went unpaid, could not exceed eight days. In respect of those which occurred outside of court, the fine could not exceed 20,000ATS and the default term of imprisonment could not be greater than ten days. Accordingly, the Court concluded that Article 6 did not apply.

***Ravnsborg v. Sweden* (App. no. 14220/88) (1994) 18 E.H.R.R. 38**

61. This case, referred to in the judgment of *Putz*, originated from proceedings initially related to non-payment of nursing home fees, specifically those of the applicant's mother and her friend, for whom he held power of attorney. The applicant brought a counter claim against the nursing home's debt collection claim. It was during the currency of those proceedings that the applicant was ordered by the District Court in Goteborg, on three separate occasions, to pay fines by way of sanction for "improper remarks" included in his written statements.

62. The fines, all of which he did pay, were each for the amount of 1,000 kronor. None of the orders, which came in the form of decisions, were preceded by an oral hearing, though the applicant requested that one be held several times. He complained to the ECtHR on more than one ground under the Convention but for our purposes we need only concern ourselves with his complaint under Article 6(1): that his fair trial rights had been breached.

63. In its discussion, the Court first considered whether the fines could be classified as being within the scope of Article 6, i.e. were they criminal in nature. As per the case-law of the ECtHR, it had regard to three limbs in order to make this determination (see *Putz v. Austria*): the classification of the offence under domestic law, the nature of the offence and the severity of the penalty.

64. Under the first limb, the Court concluded that the fines were not criminal as they were not entered onto the police register and were not income based (as were fines of a criminal nature under Swedish law). On the second limb it concluded the nature of the offence was

not criminal but rather disciplinary as it derived from the court's power and need to maintain order and control, and finally the court concluded that the degree of severity of the fines were not sufficient to classify them as criminal in nature especially given that they could only be converted into a term of imprisonment in very limited circumstances, before the District Court. Thus the Court's decision was that the applicant's rights had not been breached, his case was dismissed.

65. What emerges from both of these cases is that where the purpose of exercising sanction power is to preserve the orderly, efficient and respectful conduct of court proceedings, the same may not necessarily amount to a penalty in the pure criminal sense. Whether it will or not, will depend on the circumstances not falling within any one of the three criteria above mentioned. It should be noted however, that in neither case is there any real mention, much less discussion on, what we term contempt of court. It is therefore unclear if precisely the same regime, including the penalties and the default situation which followed, would be so classified if described in the domestic legislation as a form of contempt.

66. The court noted a number of dissimilarities between *Putz* and *Ravnsborg*. In the latter, the fine could not exceed 1,000kr and no default term of imprisonment could be imposed without a further hearing. Secondly, in *Ravnsborg* an appeal lay against a decision to impose a custodial sentence whereas in *Putz* it did not. The period of imprisonment in *Ravnsborg* could range from fourteen days to three months but in *Putz* it could not exceed ten days. However, the conclusion was that no matter how real the differences were, they were reflective only of the characteristics of the two national legal systems and such were not decisive. In both cases the penalties were designed to enable the court to maintain proper control of court proceedings.

***Kyprianou v. Cyprus* (App. no. 73797/01) (2005) 44 E.H.R.R. 565**

67. Mr. Kyprianou, acting as a lawyer when representing his client on a murder charge before the Limassol Assize Court got involved in exchanges with the court during the course of cross-examining a prosecution witness. Words were passed on both sides. Very early on, the court of trial took the view that what he had said, how he had said it, including the manner and tone of his voice, as well as his demeanour and gestures to the court, constituted contempt *in facie curiae*. On being asked whether he would like to say anything, again he referred to a piece of paper which he saw pass from judge to judge: this he described as "ravasakia", meaning a "love letter". Despite having at least two further opportunities to address the conduct in question, he did not do so. He was found guilty of contempt and sent to prison for five days, time which he served. His appeal to the Supreme Court was rejected. However, his application to the ECtHR was successful with that court finding that a violation of Article 6(1) of the Convention had taken place by reason of the court's lack of impartiality and secondly, given the disproportionate nature of the sentence, there had also been a violation of Article 10. What is really important about this decision is the court's view on the law and practice of contempt used in common law jurisdictions: in particular, that dealing with contempt in the face of the court.

68. The court's judgment focused on that aspect of Article 6(1) which guarantees to a person on a criminal charge a fair hearing by "an impartial" Tribunal: the second issue, the violation of Article 10, is not of immediate relevance. "Impartiality" in this context denotes the absence of prejudice or bias. This can be viewed in a variety of ways, but principally via either a subjective or an objective test. The subjective approach touches upon the personal conviction or interest, of the judge in any given case. Although there exists a presumption that he or she is not so affected, nonetheless, if factors such as personal hostility or ill will are disclosed, this may be sufficient to rebut that presumption. Realising that it may be difficult to establish subjective bias, the court in its various judgments tends to concentrate on the objective approach.

69. Addressing its own case law, the court discussed two possible situations in which the question of lack of impartiality may arise. One, which it described as "functional" and is not dependent on personal conduct, might occur where different roles or duties are exercised by the same person within the judicial process, either "hierarchically" or via alleged contacts with other actors in the same proceedings. Where occurring, such might objectively give rise to serious misgivings regarding impartiality. The second is personal to the judge: his words, actions, declarations and involvement are assessed to this end. There is no hard and fast divide between both: so, it may well be that an objective assessment may also disclose subjective bias. Either, when established, is fatal to that aspect of Article 6.

70. The court then firstly assessed the established facts in the case before it from an objective perspective, against a background which seems to have been quite important in their view, namely that the conduct in question was "aimed at the judges personally". That being so, the same body of judges, by thereafter taking a decision to prosecute, to try the issue, to determine guilt and to impose a sentence, were involved in a "confusion of roles". As such, they breached the *audi alteram partem* rule, and thus offended the requirement of impartiality.

71. The court then looked at the same facts via its subjective lens. In the process it identified four factors which in its view also failed this test. Firstly, the judges had used the words "deeply insulted", "as persons" by the offending conduct. Secondly, the decisive nature of language used in their decision conveyed to the court a sense of "indignation and shock" which if judicially detached, would not have been the case. In addition, that strong language included a finding that the words spoken constituted "a manifest and unacceptable contempt", which unless swift and immediate action should follow, "justice will have suffered a disastrous blow". Thirdly, the imposition of a five-day sentence further verified a deep and personal sense of hurt experienced by the judges and fourthly, a decision of guilt had been arrived at prematurely. As a result, and in view of those findings, both the objective and subjective tests enshrined in the case law to establish bias, had been met.

72. When considering the judgment, it is important at the outset to realise the following:-

(i) by reason of the countries which intervened or submitted comments, the ECtHR was fully aware of what the situation was, regarding in facie contempt in all common law jurisdictions in Europe. It set out the law and practice in Ireland, England, Scotland and Malta: the case at hand of course was from Cyprus. It therefore could have been in no doubt what the current practice and procedure was;

(ii) in light of that knowledge and understanding, the court went on to specifically state the following:-

"However, the court does not regard it as necessary or desirable to review generally the law on contempt and the practice of summary proceedings in Cyprus and other common law systems. Its task is to determine whether the use of summary proceedings to deal with Mr. Kyprianou's contempt in the face of the court gave rise to a violation of Article 6(1) of the Convention."

Accordingly, in my view therefore it is striking that it declared its ruling to be case specific: whilst the general principles so announced are of course of importance, the ratio of the judgment at least to a large extent must not be misunderstood as having widespread application throughout the common law world.

73. Another feature of the case also strikes me as having been deeply important to the court: it was its view that the contempt in question was "aimed at the judges personally…they had been the direct object of the applicant's criticisms…" (para. 127). Its discussion on the subjective test is unhesitant in verifying this. The four reasons so advanced to justify its conclusion in that regard have a deep association with "the personal affront" as it saw, which the trial court felt. With great respect, a less dogmatic view could be taken of the overall exchanges when one looks at the judgment of both the Assize and Supreme Court. Having said that they were "deeply insulted", the trial court immediately nullified any personal effect by saying that such was the least of their concern. Furthermore, if in their judicial opinion the offending conduct is serious and is to be regarded as serious, does it now follow that it cannot be so expressed without an inference being taken that the judge not in a judicial capacity, but as a person, must be personally offended. If a court is so circumscribed in how it can deal with disruptive conduct, its rulings may reduce themselves to either an empty formula or otherwise run the risk that the judge must excuse himself. May I respectfully say, whatever about the abstract correctness of this approach, it makes it very difficult in practice for the trial judge to explain the decision which he arrives at to maintain integrity.

74. Accordingly, I do not believe that *Kyprianou* has such widespread application as might be apprehended: nor does it have such a chilling effect on both the law and process by which contempt in the face of the court has been dealt with in this jurisdiction for so many years. I should add that the later cases from the ECtHR in this area, did not in any way independently reassess the law from that as set out in *Kyprianou*. In all such matters they expressly followed that decision. Therefore, whatever limitations are inherent in *Kyprianou* are also inherent in those decisions.

75. In the first instance may I reiterate a view expressed above, which I do not believe has been in any way undermined, which is that despite how historical the law and practice of contempt in this jurisdiction is, including that of *in facie* abuse, there has been not a single decision of a constitutional court which has just questioned, much less condemned, how such contempts are dealt with. I am not overlooking what Henchy J., and to a much lesser extent the Chief Justice added in *Walsh & Conneely*. Evidently, on the absence of case law thereafter, the concern so expressed has never prevented the heretofore recognised manner of dealing with such cases, from continuing. No authority to contradict this statement has been cited. Therefore, whilst constitutional requirements are frequently referred to, it must be recognised that the change of approach as envisaged, is both Convention led and Convention driven.

76. At para. 72 above, I have quoted a passage from the judgment in *Kyprianou* (para. 125), which in full knowledge of what the Irish position was, expressly declared that a court did not consider it "necessary or desirable" to review, certainly at a root and branch level, our method of dealing with contempt. It must be accepted that if the court intended its decision to have such far reaching effect, as now contended for, it surely would have said so. Not a single subsequent decision from that Court has deviated from the *Kyprianou* position. It is in this light that the following point must be considered.

77. A second key aspect of the decision related to what the court described as "the functional defect" in court procedure. If this is applied literally, it must inevitably mean that a judge, before whom a contempt in the face of the court is committed, can never adjudicate upon that complaint: this even where he or she applies all appropriate standards of fairness. The reason is that such a judge will inevitably have a role in knowing what the facts are, in initiating the process, in listening to any representations made and ultimately in adjudicating on contempt or no contempt and, if the former, what the consequences should be. Unless the contempt forum should differ from the trial forum, some interaction of these roles is inescapable.

78. To so read *Kyprianou* would have a very serious effect on the common law system. I suspect, though I cannot vouch, that it would have little or no impact on the civil law position. If this viewpoint should indeed be correct, it has in my view, on this aspect of Article 6, major repercussions for the respect which the Convention should have for such a system. That Convention is one for both systems of law and beyond. It is a Convention which in its interpretation and application must respect different traditional systems operating within those countries which are signatories to it. If it is predominantly or solely focused on one stream of jurisprudence to the exclusion of the other, it fails to represent this balance. Surely what the court is concerned with, is whether, irrespective of system type, there is in place a fair and reasonable process by which the issue can be determined. Therefore, an outright rejection of the system which heretofore has prevailed in this country on the basis of a "confusion of roles" jurisdiction, would be very disturbing indeed from my point of view.

79. In my opinion but subject to the caveat next mentioned, such an outcome was never intended by *Kyprianou*. It seems to me that subject to the fairness of the process, to be judged in the context of the overriding requirement of maintaining respect for the integrity of the court, the structure of the existing system does not fall foul of the Strasbourg case law. To hold otherwise would indeed involve a fundamental reappraisal of the Irish position. The focus which rightly so is on procedural fairness, must also however be context based: one without the other lacks traction.

80. As above indicated, a major ingredient of the court's discussion on this aspect of the case was that the contempt committed by Mr. Kyprianou was "aimed at the judges personally" (para. 127). Disregarding for a moment what that phrase means and how its existence should be assessed, it would seem to follow from my reading of the judgment that in its absence, there is no objection in principle to the same judge determining the issue when it arises. This of course, which I readily recognise and have frequently said, would be subject to contextual fairness. The latter is not quite however the point immediately at issue. It is that in facie contempt cases which are not directed to the judge personally, can be adjudicated upon by that person subject to procedural safeguards.

81. In its decision, the court assessed whether or not subjective bias exists by examining the transcript to see how the trial court responded to what the lawyer had said. The phrases in question can be seen at para. 130 of the judgment and elsewhere. Based on the language used by the Limassol Assize Court, the ECtHR concluded that the offending remarks must be seen as conveying a sense of indignation and shock, personal to the judges: as a result, the applicant should also succeed under that heading. (see para. 73 above)

82. Whilst this form of analysis raises several practical problems for the court, nonetheless most if not all can be resolved if the judge in question remains ever conscious of what I have outlined at para. 5 above. Fundamental to adjudicating on contempt must be an understanding that if he or she was not a judge, no such abuse would be made. It is solely by reason of his judicial role that such events occur. It is not the person of the judge who is being verbally accosted. It is because that person is a judge. As previously stated, the contempt jurisdiction is not to protect the person, or even in a technical sense the judge. It is to protect the master to whom we serve, namely justice. It is therefore vital that a judge should never feel the victim when confronted with such a situation. If that is clearly understood and applied, it almost certainly will lead to an appropriate handling of the issue involved. If however a judge takes it personally in the sense of who he or she is, external to the judicial role, it is far more likely that resulting complaints regarding impartiality will succeed.

83. Once that is made clear in any exchanges with the person in question, I cannot understand how it can be said that he becomes a judge in his own cause, or that he has some personal interest in that particular dispute. His interest is representative of justice, not individual to himself. Once this understanding is adhered to by the judge, then presumptively it must be assumed that he or she has not taken the offending conduct

personally. If it is otherwise and if it is based in any large measure, on the statement, act or conduct itself, then the court loses its authority and control immediately passes to the subject person. That cannot be tolerated.

84. The person or individual who would engage in highly abusive conduct towards a judge, is rarely a litigant with a single cause who loses momentary control or shows immediate but short-lived dissatisfaction with a ruling. It is far more likely that such a person will engage in conduct reminiscent to that of Mr. Walsh in the instant case. Whilst I will refer in more detail to that in a moment, it is self-evident from the transcript that unless his insistence upon representing his sister, was acceded to, he clearly had pre-planned a definite pattern of court disruption. These individuals are not numerous and when involved, show a knowledge and determination which has the capacity of seriously undermining court order and authority. In addition, they are generally well informed about the law of contempt: so if what such a person says is to be regarded as pre-eminently influential in the categorisation of a "personal attack" or not, it is almost certain that they will readily understand the more abusive they are, the better chance they have of preventing that or some other case from being dealt with, or of standing that judge down. There is no reason why this conduct would not be repeated before a second or different judge. Therefore, from my point of view, it is the reaction of the judge which is the focus of attention with the presumption which I have built in, in determining whether or not the offending conduct is so unique to that judge, that it can truly be said he or she has a personal interest in the outcome.

85. I have had the opportunity of reading in draft form the judgment of O'Donnell J., with which the other members of the court agree. Regretfully, and despite the respectful neutrality of how he has dealt with my judgment, there are some aspects of the decision that I cannot agree with.

86. Firstly, it has to be acknowledged that the indicated approach which the majority proposed to adopt, can only be described as a far reaching re-assessment of the existing position and further, its substitution by a new regime, or if not entirely new, by one so distinct from the present as to constitute a jurisprudential adjustment. There can I think be no doubt about that. Whilst there will be no useful purpose in embarking upon an extensive analysis of that decision, given the clear majority in favour of it which I fully respect, I do propose however to mention a few aspects of it so as to make some limited observations thereon.

87. Before that however may I again briefly refer to *Almon's Case* (paras. 12-15 above) as O'Donnell J. has questioned the continuing relevance of the Wilmot C.J.'s judgment since its subject matter was that particular form of contempt known as 'scandalising the court'. As I have more fully explained above and as the words of Wilmot C.J. in the passage quoted serve to illustrate; despite that being so the significance and importance of the judgment relates more to the views expressed regarding the court's power to deal with contempt generally and less so regarding any particular form of contempt. The sentiments stated by Wilmot C.J. can easily be detached from scandalising the court: over

centuries they indeed have been embraced in a separate context and now represent a foundation for much of the sound precedent which followed. As I have already said, to question the soundness of *Almon's Case* now, would be to also question the very many cases which have since endorsed and built upon it.

88. It is suggested that henceforth the court, when faced with contempt within its presence, should adopt a stepped approach, with a clear distinction between the options available in a contempt situation and those in a non-contempt situation. For short and because of their origin, I will refer to the latter as "disciplinary measures".

89. The Strasbourg Court looked at this divide line in several cases, some of the more important decisions being referred to above. These included *Putz* and *Ravnsborg* and another case, *Žugić v. Croatia* (App. No. 3699/08) (Unreported, European Court of Human Rights, 31st May, 2011). In these and related cases the basis for the distinction was clearly found within the Codes of Law, either civil or criminal, or a combination of both, in each of the jurisdictions involved. Their only interaction with Article 6, was for compliance comparative purposes. No such basis exists in this jurisdiction, unless it can be found, inter alia, in Article 34° of the Constitution. *R. v. Webb*, Ex. P. Hawker (The Times, 24th January, 1899) and *Willis v. MacLachlan* [1876] 1 Ex D 376 are not an authority for this segregation external to the law of contempt. Whilst I understand the distinction sought to be made, the legal basis therefore cannot in my view be said to have been established at least to such an extent as to put the issue beyond doubt. I note and therefore welcome the proposed involvement of the Law Reform Commission in this regard.

90. There is a certain obviousness in how such matters should be dealt with, but first can I make two points. A stepped approach has its attractions, but it cannot be prescriptive, for otherwise it becomes a trap which becomes altogether too easy to fall foul of. Secondly an overly strict or rigid separation between measures of a contempt and non-contempt variety should be avoided, as otherwise what should be a summary process could easily turn into an indictable one. In any event as I see it the following might happen. The judge might engage with the person in question and inform him that his conduct is unacceptable, that he or she should immediately desist from the same, if unheeded however a further warning(s) may be appropriate and if continued, it might be suggested that such conduct could give rise to serious consequences in the context of the contempt process: in the absence of a resolution at that point, the court may indicate that such jurisdiction is then in play.

91. If that point is reached, the court should again offer the individual an opportunity of making a statement or explaining himself, if none is forthcoming or if unacceptable, a suggestion as to legal advice, if necessary by legal aid, should follow, consideration of a "cooling off period" may be appropriate, and if the issue arises in the only case before the court or is the only case left, the session might be adjourned for a short period. If these steps should produce no resolution, then exclusion from the court is undoubtedly an option, but in many situations that may not be feasible, for example if there is resistance

or if there is no garda available: in any event if all of that fails the issue of contempt may have to be determined. The outcome, in terms of sanction, must always be proportionate to the conduct and its consequential disruption and interference to the orderly business of the court. Provided these simple measures are kept in mind, I do not believe anything further is necessarily required as an adjustment to the existing practice. Once a judge retains control, all of this can be done in a manner impeccable to the judicial function.

92. May I immediately point out that many of these are self-evident and almost certainly routinely take place today. The giving of a warning or repeat warnings, an attempt to continue with the business disregarding the conduct in question, the direct conversation with the offender that if such conduct continues there may be serious consequences for him, are all quite obvious steps. Informing the person of the conduct in question, likewise, even if in all probability the vast majority of potential offenders know very well what one is talking about. If that person should be a party or witness in an individual case, there may be an opportunity of adjourning that case. However, taking further steps, such as adjourning the entire court list should not be done unless absolutely essential. All of the parties in any given case have individual rights and those attending court will have an expectation that their cases will be dealt with. In addition, in my experience, virtually all judges dealing with offending conduct, consider that the entirety of the engagement between the person and the court constitutes one continuous hearing. Despite that being so, nonetheless care must be taken as to when and in what circumstances a judge may find or say that a person is guilty. Prematurity with this remark can lead to unnecessary difficulty. However, before condemnation should follow the entire and overall hearing must be considered. So, if per chance the judge should say that a person is guilty of contempt, and asks what is your response, I am utterly satisfied that if offered, an apology will immediately nullify any expressed views to that effect.

93. O'Donnell J. makes the point in the regime suggested by him, that entering into the contempt jurisdiction should only arise when the conduct can be said to be particularly serious, deliberate, persistent or part of a concerted activity. While I understand the purpose of grading the conduct in this way, when moving from a disciplinary sanction to the contempt area, I could easily envisage conduct which might not necessarily fit within this description, but nevertheless is of a type which requires the use of the contempt jurisdiction. Accordingly, I would consider these terms as inclusive, not exclusive and would prefer to leave all such assessment in the hands of the presiding judge.

94. In an overall sense, I have a fear or apprehension that the reconfiguration of the law, as proposed by O'Donnell J., involves a shifting of the balance to an unnecessary degree between constitutional fairness and the essential conditions which must prevail before a judge in his or her court room can administer justice. A single example demonstrates my concern. It seems that the more direct the abuse is on the person of the judge, the lesser power the judge has. Correspondingly the greater the rights the offending person has. That re-balancing for me is very troublesome. Such has no deterrent effect, but an almost encouraging one, so much so that a judge may be deliberately forced to stand down. Of course, that is not what is intended, nor do I suggest that is what is implied. But the

limited number of people who are determined to engage in this type of conduct, are well-informed and have a knowledgeable insight into the limits, and beyond, of when and how and in what circumstances their conduct will attract a sanction that has some meaningful effect on their behaviour. This case is a good illustration of the point. (Para 94 *infra*).

95. There are several other aspects of what is proposed which may be suspect, the suggestion that reliance on the DAR may be a sufficient basis to establish facts, if in controversy. How one might enquire, does the referral to the Attorney General sit with the independence of the judiciary? What about the High Court, presumably sitting in Dublin as a forum to determine certain cases? The time lag involved in all of these steps and the costs and inconvenience is inherent in them. These are only some of the aspects which give rise to concern. In my view a legislative basis would be much more satisfactory for such far reaching changes than judicial judgment. Be that as it may there is obviously much to be worked on as of now.

96. In conclusion on the general aspects of this case, I am not convinced as the discussion has unfolded, of any necessity to radically depart from what the current practice is. It is certainly not demanded by domestic law nor fuelled by judicial agitation: neither is it in my view, mandated by Convention law. Undoubtedly judges must be more conscious of fair procedure rights and also of the independence of their office. But such can be achieved without a widespread realignment of the existing law in practice. In respect of which may I say that the very existence of a well understood and speedy process by which the indignity of the court can be corrected, is in itself of enormous value. Though not quantifiable, its replacement is unlikely to have the same affect.

Outcome:

97. The learned High Court judge, certainly on his factual assessment of what occurred on the 31st May, 2016, seriously mis-imaged, mis-characterised, and also seriously understated the situation which began to unfold and thereafter which rapidly deteriorated before Judge Doyle on that occasion. The case involving Ms. Walsh was but one of many where either debt judgments were sought and/or underlying securities were being enforced. No affidavit, transcript, or written word can recreate for the reader precisely what the judge was facing, not by way of isolated incident, but by way of collective disorderly conduct. Whilst the individual role of Mr. Walsh in this overall affray cannot be precisely identified, it can without fear of contradiction be said that he was part of it, and that for a certain period of time at least was the agitating centre of this activity. What was the judge to do?

98. Can it be seriously suggested that she should have adjourned the list and resumed it on another occasion? Undoubtedly, she had both the power and duty, intrinsic to her role as a judicial person in charge of that court, to seek and if necessary, insist upon the restoration of control so that the proceedings of the court could be orderly despatched and dealt with. The steps which she took in this regard are adequately set out elsewhere, and thus I will not repeat them. However, it must be borne in mind that on at least two previous occasions, one involving a separate judge, Mr. Walsh was informed that he had no right to represent his sister, who incidentally was not in court on that day. That decision was entirely correct and fully consistent with the position adopted by all courts in

this jurisdiction. He was again told of this situation by Judge Doyle on several occasions. He openly defied her ruling by way of boastful challenge: "you have no jurisdiction". This he did by continually pressing his representation claim. The judge retired on at least two occasions so that matters might cool down. Furthermore, when the question of contempt arose, he seemed totally prepared for it: "am I being charged with criminal contempt!", in fact, he evidently welcomed the engagement by saying aloud, in the presence of those who appeared supportive, "lads, lads, I'm fine, I'm fine with this". The offer of legal aid was declined: the offer of making an apology was treated with derision. On any overall view of his conduct, one is tempted to conclude, without much coercive effort, that he anticipated and welcomed the reaction of the judge: the response of Mr. Walsh was carefully thought out well in advance.

99. In those circumstances, to suggest that this was a contempt of a "common or garden type" is seriously off the mark. The authority of the court, its very role and the performance of it by the judge, were at the forefront of this onslaught. Furthermore, if the behaviour of Mr. Walsh was not dealt with, one can only troublesomely ask what encouraging affect that would have on others who were exhibiting aggressive and boisterous behaviour on the occasion in question, even if at a general level. I have the greatest sympathy for the trial judge in such circumstances.

100. No review court, either at trial or appellate level, can fully second guess how difficult it is to restore or maintain an acceptable level of order when multiple and diverse forces are actively seeking to disturb that order and perpetuate its continuance. Whilst I evidently accept that the decision of a trial judge, and the process leading to that decision, even in such circumstances, must be susceptible to legal review, nonetheless a full understanding of the original scene cannot be lost sight of. It is much less difficult to deal with a single-issue situation of contempt or indeed even with discrete issues of contempt in a single session. The presence and agitation of multiple actors demand from all review courts, a greater understanding of what a trial judge may be compelled to do in such circumstances.

Conclusion

101. With regard to the final outcome of this case, I agree with the order proposed by O'Donnell J. in his judgment, that the appeal must be dismissed. Further, I also agree with what he proposes should follow from that order.