**THE COURT OF APPEAL**

**Neutral Citation Number: [2018] IECA 301**

**Record No. 2016/104**

**Finlay Geoghegan J.**
**Hogan J.**
**Edwards J.**

**IN THE MATTER OF A CONTEMPT OF COURT AND IN THE MATTER OF AN APPLICATION PURSUANT TO ORDER 44 OF THE RULES OF THE SUPERIOR COURTS 1986**

**BETWEEN/**

**THE PEOPLE AT THE SUIT OF**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**APPLICANT /**

**RESPONDENT**

**- AND -**

**INDEPENDENT NEWS AND MEDIA PLC, CLAIRE GRADY, STEPHEN RAE AND INTERNET INTERACTIONS LIMITED.**

**RESPONDENTS /**

**APPELLANTS**

**JUDGMENT of the Court delivered by Mr. Justice John Edwards on 30th July 2018.**

**Introduction**

1. For the avoidance of confusion, this Court will adopt the convention in this judgment of referring to the applicant/respondent simply as "the DPP", and to the respondents/appellants simply as "the appellants".

2. On the 24th of April 2015, O' Malley J in the High Court found each of the appellants herein guilty of contempt of court in publishing material in a particular issue of the Irish Independent Newspaper, that was calculated to create a real risk of an unfair trial in the case of an individual who was charged with conspiracy to defraud contrary to the common law, and with making gain or causing loss contrary to s. 10 of the Criminal Justice (Theft and Fraud Offences) Act 2001 ("the Act of 2001"), and who had been returned for trial on indictment before the Circuit Criminal Court, which trial was scheduled to commence some months later. On the same date, O' Malley J imposed an injunction restraining the first, third and fourth named appellants from publishing further material calculated to interfere with certain criminal trial processes in being.

3. On the 9th of June 2015, O' Malley J sentenced the first and fourth named appellants to each pay a fine in the sum of €50,000, the said fines to be paid within 30 days, with distress in the event of default. A fine of €100 was also imposed upon the third named appellant to be paid within thirty days with two days' imprisonment in default.

4. The appellants appealed against all of the orders of the High Court, namely the conviction, the penalties imposed and the injunction. On the 21st of December 2017, this Court, by a majority (Finlay Geoghegan J, and Edwards J; Hogan J dissenting), upheld the decision of the High Court in respect of the convictions for contempt by publication. This judgment is now concerned with the appeals against the severity of the penalties imposed upon the appellants in the High Court. It should be noted that we have been informed that no issue is taken with the fine of €100 imposed upon the third named appellant. Accordingly, this appeal relates solely to the fines of €50,000 imposed upon the first and fourth named appellants respectively.

**Relevant evidence on foot of which the appellants were sentenced.**

5. As acknowledged in my earlier judgment delivered on the 21st of December 2017 in respect of the conviction appeal, the facts of the case are fully set out in judgment of the High Court of the 24th of April 2015, and reprised in the judgment of Hogan J in this Court in respect of the conviction appeal, also delivered on the 21st of December 2017. However, it is nevertheless necessary for the purposes of today's judgment to re-iterate the salient features of the relevant evidence.

6. On the 17th of July 2014, *The Irish Independent* published a series of articles – entitled *"Anglo: the New Tapes Revealed"* (hereinafter "the publications"). The reference in the title of the publications to "Anglo" is, needless to say, a reference to Anglo Irish Bank plc (hereinafter "Anglo"), the bank centrally involved in the banking crash and whose insolvency ultimately cost the taxpayer a sum apparently in excess of €25bn. Three further sub-headings appeared on the front page: *"Recordings show how Drumm tried to gloss over perilous state of bank"*, *"Bankers laughed and joked as financial crisis engulfed economy"* and *"Drumm said he would give 'Ladybird version' of events to the Board."*

7. The reference to Drumm is a reference to Mr. David Drumm who is the former chief executive of Anglo. Although there were a number of different dimensions to the story, *The Irish Independent* managed to secure tape recordings of discussions between Mr. Drumm and the then head of Capital Markets in Anglo, Mr. John Bowe, on the 22nd of January 2008. The articles portrayed senior banking executives in a generally unflattering light, as they struggled to cope with a worsening balance sheet and huge drains in liquidity in the early part of 2008, even though the worst of the crisis was not due to hit until September 2008.

8. Many of the articles and the accompanying commentary centred on two discussions between Mr. Drumm and Mr. Bowe. In one of them, Mr. Drumm and Mr. Bowe consider the question of the re-purchase by Anglo of its own bonds at a discount. Although Mr. Bowe

objected that this might be seen as profiteering *"on the back of our clients' losses"*, Mr. Drumm suggested a strategy for purchasing small amounts *"quietly"* in the first instance. Mr. Bowe is then heard suggesting that the Bank's wealth management division *"go in and buy it so it looks like private clients…"* They then discuss the morality of such a move, but in the end Mr. Bowe suggests that the Bank should *"just take the trading profit"*. Mr. Drumm is then heard to agree, saying that it *"would be a small move on the needle on the capital and nobody would care."*

9. In another discussion, Mr. Drumm is heard to discuss with Mr. Bowe how the Bank's funding difficulties should be addressed at an upcoming Board meeting and suggesting that he would give an over-simplified version of certain movements on capital markets affecting the Bank in order to re-assure the Board members. The other transcripts of these conversations were much in a similar vein and the coarse language used reflected at once both the braggadocio and earthiness of the trading floor. Unfortunately for Mr. Drumm and Mr. Bowe, the braggadocio did not read so well when presented in the cold light of day in the aftermath of a horrendous banking crash. In these circumstances, it is hardly surprising that *The Irish Independent*'s five page commentary on these events was acerbic, bitter, unsympathetic and unforgiving.

10. In the normal course of events, and in the context of contemporary journalism, the running of this story by a major national news outlet would seem quite permissible and not open to any legal objection. *The Irish Independent* had secured a good story and was determined to exploit it for its own purposes. The major caveat, however, was that Mr. Bowe had been charged in December 2013 with offences of conspiracy to defraud and false accounting contrary to s. 10 of the Criminal Justice (Theft and Fraud) Act 2001. He (and three other Anglo executives) had, on the 17th of June 2014, just been returned for trial to the Circuit Criminal Court. A trial date had been scheduled for January 2016.

11. The charges preferred related to a particular transaction which was effected on the 30th of September 2008, carried out between Anglo and another credit institution. The prosecution were alleging that the effect of the transaction was to create a false and misleading impression of the scale of deposits held by Anglo at the time, as this date coincided with Anglo's accounting year end.

12. Following receipt of correspondence from the solicitors for Mr. Bowe (and the solicitors for another defendant, Mr. Peter Fitzpatrick) to the effect that the publication constituted a contempt of court, the Chief Prosecution Solicitor immediately wrote to the appellants protesting that this publication was a contempt of court.

13. The appellants' solicitors replied about an hour and a half later. The replying letter denied that anything in the articles or on the accompanying website interfered with the respective accuseds' fair trial rights. It was observed that nothing in the Chief Prosecution Solicitor's letter had specified what aspects of the material had amounted to an interference with the accuseds' fair trial rights. The solicitors inquired whether it was to be suggested that no articles whatever concerning Anglo were to be published while criminal prosecutions were pending.

14. Later that day, the DPP successfully applied to the High Court for short service of a Notice of Motion pursuant to Order 44 of the Rules of the Superior Courts seeking orders of attachment and, if appropriate, committal of the appellants for contempt of court by publication. Following this the appellants were informed that such liberty had been granted. The DPP then set out her position. She was not demanding that no articles about Anglo should be published, rather it was the nature and contents of these particular publications that she took issue with.

15. The contempt motion ultimately came before O'Malley J in the High Court. In a judgment delivered on the 24th April 2015, the High Court judge found that the appellants were guilty of contempt of court. (Only a redacted version of the judgment was made publicly available at the time given the fact that the trials were pending, but this Court has been supplied with the full version).

16. In essence O'Malley J. found that the publications amounted to a contempt of court because they associated Mr. Bowe with dishonest and deceitful behaviour similar to the offences with which he had been charged. At para 74, she noted *that "….I find the compelling feature to be the fact that Mr. John Bowe stands charged with offences of dishonesty and conspiracy arising from his employment as an executive in Anglo Irish. On dates after the bringing of those charges he was featured prominently in a series of articles and videos, a recurring theme of which is dishonesty, cover-up and deceitfulness amongst the executives in Anglo Irish."*

17. Following the delivery of that judgment, O'Malley J. heard submissions as to sentence. On the 9th of June 2015, she imposed the penalties indicated at the outset of this judgment. These penalties were stayed pending an appeal this Court. The appellants appealed to this Court against both their convictions and the severity of their sentences. As alluded to earlier in this judgment, this Court dismissed the appeals against conviction on the 21st of December 2017.

18. The appeals against the severity of the sentences imposed then proceeded, and in that regard an oral hearing took place on the 7th of February 2018, following which judgment was reserved.

**The Sentencing Judge's Remarks**

19. In passing sentence in the High Court on the 9th of June 2015, O' Malley J. made the following remarks:

> *"The purpose of a Court in passing sentence in this particular context is an unusual one. Most of the elements, if not all of the elements, of traditional sentencing principles are of no relevance. The primary purpose of the Court is to protect the criminal process and within that process, to protect the rights of an accused person and also to protect the rights of the people of Ireland to prosecute offences and to ensure that trials are carried through in the proper fashion.*
>
> *Part of that purpose does, in my view, require that there be a deterrent component to any sentence imposed for contempt. However, the need for contempt obviously does not blind the Court to any mitigation factors and in that respect, I will distil the submissions made on behalf of the defendants by Mr. O' Moore. I accept the submission that the Court has already found that there was no intent to interfere with the course of justice. I accept that there was a genuine belief that the publication was in the public interest. It is submitted that the defendants genuinely felt that the existence of other publications meant that the DPP felt such publications weren't inconsistent with a fair trial. For the reasons set out in the full judgment, I don't accept that as being relevant in this instance. I accept that there has not been no disruption to the criminal proceedings and, indeed, if that were to occur, obviously these defendants would be likely to be liable for the costs of any such disruption.*
>
> *In relation to the correspondence from the DPP about material published the previous year, I, again, for the reasons set out in the full judgment, I don't accept that as being of any particular relevance in the circumstances of this case. I do accept that subsequently, after the DPP has initiated complaints in respect of this material, that it was taken down and an undertaking was given.*

*I accept that there has been a full and unreserved apology to the Court, that the defendants have offered to pay the Director's costs and that they have offered an undertaking which is acceptable to the DPP and is also acceptable to the Court.*

*I have given some consideration to whether or not the fact that the defendant is the largest, or I think the largest, media owner in the State, requires any increase in the deterrent aspect of the sentence. In the absence of any authorities of guidance on this issue, I consider that it is a factor insofar as the publications were carried out for profit. We are not talking here about the parish newsletter or a student freesheet or some other publication with small, limited jurisdiction* [sic ?? 'circulation' possibly] *and little or no profit.*

*However, I don't believe that I should allow this factor to be a dominant consideration. I can't construct a scale of punishments based on the resources of the defendants and to my mind, it would be wrong to be seen to punish large publications purely because they have resources and to allow small publications go scot free because they do not. Any contempt is a grave matter. However, as I said, I accept the mitigating factors to the extent that I have indicated."*

[Commentary in square brackets per Edwards J]

20. Ultimately, O' Malley J imposed the penalties outlined at the outset of this judgment.

**Grounds of Appeal**
21. The penalties imposed by the High Court are appealed against on the following grounds:

(a) The trial judge placed undue weight on the issue of deterrence in approaching the question of sentence, and;

(b) The trial judge failed to give adequate weight to a range of mitigating factors which, in their totality, merited a much lower set of fines than those imposed.

**Appellants' submissions**
22. The kernel of the appellants' appeal, as developed in their written and oral submissions, is that the sentencing judge erred in principle in holding that established sentencing principles did not apply to the instant case. Relying on the well known authority of *The People (Director of Public Prosecutions) v M* [1994] 3 IR 306, counsel for the appellants submit that the sentencing judge fell into error in failing to ensure that the penalty was proportionate both to the gravity of the offence and to the circumstances of the offenders.

23. In that regard, the appellants complain that the sentencing judge erred in so far as she implicitly suggests that deterrence is the main sentencing consideration in cases such as the present one. Whilst conceding that some of the principles applicable to sentencing in cases of contempt by publication may be sui generis, counsel for the appellants submitted that there is no authority for the proposition that most, if not all, of what the sentencing judge characterised as *"the elements of traditional sentencing principles"* are of no relevance, as the sentencing judge contended, save for deterrence which the sentencing judge allowed as potentially having a relevance as part of the purpose of protecting the criminal process.

24. At the oral hearing, counsel for the appellant accepted that general deterrence would have been a legitimate consideration for the sentencing judge, but he argued that there was little need for specific deterrence in the circumstances of this particular case. Regrettably, he submitted, there was no differentiation between general and specific deterrence in the sentencing judge's ruling; merely a reference to a requirement, as part of the purpose of protecting the criminal process, that there be a deterrent component to any sentence imposed for contempt; leading to a concern that overall too much emphasis was being placed on undifferentiated deterrence, the likelihood (given the size of the fines) that the undifferentiated deterrent included an excessive and unnecessary specific deterrent component, and little or no regard to other core principles of sentencing such as proportionality both in the assessment of gravity and in the application of due mitigation, the need in particular to sentence for the offence as committed by the particular offender, and the striking of the appropriate balance between the widely acknowledged objectives of sentencing, being retribution, deterrence, both general and specific, and rehabilitation.

25. Related to this, and reflected in the second ground of appeal pleaded on behalf of the appellants, is the suggestion that the sentencing judge did not approach the process of sentencing in a way that took full account of all relevant mitigation.

26. In that regard the written submissions filed on behalf of the appellants particularise this complaint in five respects, as follows:

(a) The fact that the trial judge held that the appellants had no intention to commit contempt of court and therefore that the offence was committed unwittingly.

(b) The unique circumstances of the level of public debate and focus on the management of Anglo before its demise leading to the tax payer having to pay an extraordinary amount of money to bail out the bank and the public interest in legitimate reporting on that issue

(c) The fact that the articles were published at a time when the intended trial of Mr. Bowe was some 18 months away

(d) The fact that the publication of material did not reference the proceedings, did not in fact have any adverse impact on the trial and that the trial proceeded as planned

(e) The fact that the appellants acted entirely responsibly in response to the DPP's application for contempt, by immediately removing the material from the internet, immediately giving an undertaking not to republish and by offering a full and immediate apology upon conviction and offering to pay the DPP's costs of the application.

28. In relation to (a) they argue that the finding of the trial judge that the offence of contempt was not committed intentionally was not properly taken into account in assessing the gravity of the offence, and more particularly, the moral culpability of the respondents.

29. In advancing this proposition, the appellants rely on the decision of Birmingham J (as he then was) in *Health Service Executive v LN and Others* [2012] IEHC 611, where (at para 39) he held that:

> *"If, in respect of the acts intended to achieve a result, there was a belief on the part of the actor that the act could be performed and the intention or objective achieved without breaking the law, that would not serve to render the conduct otherwise unlawful lawful, but it might be highly relevant to the question of whether a court would feel the necessity to intervene and would certainly be highly relevant to the question of penalty if that stage was ever reached."*

30. In terms of the present case, the appellants submit that they had a bone fide belief that the publications were in the public interest and that they did not intend to commit the offence of contempt of court by publication. While the act of publication may have been intentional, it was neither intended nor believed that such publication would endanger the criminal process, or anybody's right to a fair trial. This lack of intention, they argue, should have been acknowledged and taken account of in the assessment of the gravity of the offence.

31. Whilst conceding at the oral hearing that the failure to adopt the two stage approach to sentencing, recommended time and again by this Court and by other appellate courts in this jurisdiction, would not automatically cause us to find an error of principle, it was submitted on behalf of the appellants that not following the recommended approach had resulted in this instance in a failure by the sentencing judge to take into account the nature and quality of the appellants' *mens rea* in committing the offence, it being a factor to which regard must be had in the assessment of gravity as it bears upon intrinsic moral culpability. The result of this, they argue, is that the sentencing judge was caused to locate the offence at too high a point on the scale of gravity.

32. In response to an observation made by a member of the bench during the oral hearing of this appeal, namely that the determination of moral culpability is but one of two components relevant to the assessment of the gravity of an offence, the other involving taking into account the harm done by the offending conduct, counsel for the appellants further submitted that the actual harm done in this case was very minimal. He stressed that, in putting forward that submission, he did not seek to gainsay that significant potential harm had been caused to the administration of justice by the publications at issue in this case. However, that potential harm had not in fact been realised. What had been apprehended had not actually come to pass. On the contrary, the publications were immediately removed from the internet once the contempt motion was issued.

33. In furtherance of their argument that the sentencing judge over-assessed the gravity of the offending conduct, the appellants drew this Court's attention, by way of a comparator, to the decision in *The People (Director of Public Prosecutions) v Sunday Newspapers t/a The Sunday World*. (High Court, McCarthy J, *ex tempore*, 16th February 2016). In that case, a national newspaper had printed articles relating to an individual who was on trial for a double-murder in Grangegorman, Co. Dublin and was subsequently convicted of contempt by publication. The individual in question, Mark Nash, had previously been found guilty of a double murder in Roscommon and had been a suspect for a murder in the United Kingdom. After Mr Nash had been charged with the Grangegorman murders but before he went on trial before the Central Criminal Court, the newspaper stated he had been convicted of murder and was a suspect in Britain. The newspaper labelled him a *"psycho"* and a *"Pulp-Fiction style killer".* After Mr Nash's trial before the Central Criminal Court had concluded, McCarthy J, on the application of the DPP, dealt with the matter as contempt by publication. He found the contempt to be of *"a very serious nature"* and imposed a fine of €75,000. Counsel for the appellant submits that it simply could not be said that the contempt in the case under appeal is of a similar order to the gravity of the contempt in that case, let alone one deserving of a sentence greater by a factor of a third.

34. In relation to item (b) on the aforementioned list, counsel for the appellant submits that the publications were published in the unique circumstances of an extraordinary level of public debate and focus on the management of Anglo before its demise leading to the tax payer having to pay an extraordinary amount of money to bail out the bank. The appellant further submits that the sentencing judge accepted the appellants assertion that they genuinely believed that the publication of the story was in the public interest, and that they were advancing their constitutional rights to freedom of expression in a manner which sought to educate public opinion. Thus, it was submitted on behalf of the appellants that this factor ought to have played a more significant role in reducing the sentence to be imposed.

35. It bears commenting upon that in essence this appears to be the same point as the "mens rea" point already alluded to. Assuming some validity in that point for argument's sake, it cannot legitimately be doubly counted.

36. In terms of items (c) and (d) on the list, counsel for the appellant submits that the sentencing judge erred in failing to give due weight to the fact that, at the time of the publications, the criminal proceedings had not been set down for hearing and the trial was anticipated to be some 18 months away. Furthermore, the fact that Mr. Bowe was charged with offences was not in any way referenced in the publication. It was submitted that while the sentencing judge did accept in her ruling that there had been no disruption to the criminal proceedings, she had *"failed to give due weight in her sentence to the totality of mitigating factors relevant to this position including the timing of the publication".* I am prepared to assume for the purposes of this review that what is meant by *"the totality of mitigating factors relevant to this position"* is the degree of harm caused by the offending conduct. In substance this submission appears to amount to a repeat of the submission already alluded to, namely that although the contempt had great potential to cause harm, relatively little actual harm was done. Again, I would caution in passing that, assuming the validity of this point for argument's sake, it must not be doubly counted.

37. In advancing the proposition that little actual harm was done, counsel for the appellant has referred this Court to Denham J's comment in Kelly v. O' Neill [2000] 1 IR 354 at 368 that *"in analysing contempt of court, the time of publication is of great importance."*

38. In respect of item (e) on the list, i.e., the appellant's response to the contempt application, counsel submits that his clients acted entirely responsibly in response to the DPP's application for contempt, by removing the material from the internet, by giving an undertaking not to republish, by offering a full and immediate apology upon conviction and by offering to pay the DPP's costs of the application. In this regard, reliance is placed upon remarks of Birmingham J (as he then was) in HSE v. LN [2012] IEHC 611, where he noted (at para 58):

> *"Indeed, it is a feature of many of the reported cases that the courts have dealt very leniently with contempt. It is not infrequently the situation that if an apology is forthcoming along with an assurance that there would be no repetition and an acceptance that an error was made that a court would not find it necessary to take any further action."*

39. Birmingham J went on to say later in the same paragraph of that judgment:

> *"It is of course the case that at the penalty stage the intention and indeed the motive of the publishing party is a relevant consideration.".*

**DPP's submissions**

40. In response, counsel for the DPP submits that the contempt in this was case was of a very serious nature. This, it was submitted, is evidenced by the findings in both the judgment of the High Court and in the earlier judgment of this Court that the publication of the articles was gratuitous and sensationalist. In the High Court, the trial judge held that a *"compelling feature"* of the case was that, at the time that Mr. Bowe was charged with offences of alleged dishonesty and conspiracy, he had featured prominently in *"a series of articles and videos, a recurring theme of which is dishonesty, cover-up and deceitfulness"* among the executives in Anglo. The trial court judge also held that the impugned publications *"gratuitously identified and associated the accused person with particular types of behaviour relevant to the charges to be considered by the jury….on a date after Mr Bowe was charged, they set out to associate him with aspects of the so-called 'Anglo morality' in a way that was capable of having a direct bearing on the crimes of dishonesty and conspiracy with which he is charged."*

41. Counsel for the DPP also highlights the similar findings of the majority of this Court in my judgment dealing with the appeal against the conviction, where I held, inter alia, (at. para 28) that the publications *"represented in effect the judgment of the appellants, commended to its readers, that certain persons, including the individual concerned, were persons without a functioning moral compass, with low ethical standards and who were in effect dishonest".* He attaches significance to the fact that both the High Court and the Court of Appeal were of the view that the story could have been reported without naming Mr Bowe and without the accompanying negative commentary.

42. The DPP further points to the fact that the publication of the Anglo tapes remained in the news headlines for a number of days, to the extent that Mr Bowe, who had no prior public profile, reached a level of notoriety as a result of the publications. The High Court judge had been of the view that the publications were calculated to interfere with Mr Bowe's fair trial rights.

43. All of these factors, it was submitted, were properly taken into account in assessing this offence as significant on the scale of gravity when selecting sentence.

44. In terms of the alleged over-reliance placed by the sentencing judge on the aim of deterrence, counsel for the DPP submits that she correctly identified the importance of deterrence in an offence of this nature. It is emphasised that while the sentencing judge noted that part of the court's primary purpose of protecting the criminal process required that there be a deterrent component to any sentence imposed for contempt, she had gone on to say:

> *"However, the need for deterrence obviously does not blind the Court to any mitigation factors and in that respect, I will distil the submissions made on behalf of the defendants …"*

45. The DPP disputes the appellants' submission that the necessity for specific deterrence in this case was minimal, stating that the conviction itself along with a nominal penalty would not have served to ensure that the appellants would not engage in such offending conduct in the future. The DPP submits that it is clear from the transcript that the sentencing judge carefully considered all of the factors relevant to sentence, including mitigating factors, and held that a fine of €50,000 for each corporate entity was a proportionate and lawful punishment. Indeed, it was submitted on behalf of the DPP that any fine lower than that which was imposed would have failed to sufficiently reflect the gravity of the offence and the legitimate underlying aim of deterrence (both general and specific).

46. In respect of the various mitigating factors in respect of which, the appellants have claimed, insufficient account was taken, the DPP submits that, whilst it was accepted by the sentencing judge that there was *"no evidence of intention on the part of the [appellants] to interfere with the course of justice"*, there was no finding that the offence was committed unwittingly. She disputes the appellant's assertion that the offence was committed *"unwittingly"*, and contends that that is the appellant's characterisation of how it was committed, not the sentencing judge's. Counsel for the DPP has argued that the contempt was only unintentional in a limited sense in that the appellants were aware that Mr. Bowe had been charged and was awaiting trial at the time of the publication of the articles and tapes. Notwithstanding this knowledge, the publications featuring Mr Bowe portrayed him as someone with a tendency towards dishonesty. The publications attracted an immediate correspondence from solicitors for Anglo executives awaiting trial, stating that the articles amounted to a contempt of court. Thus, the DPP refutes the claim that this lack of intention stemmed from an accident or a *"system breakdown"*, akin to examples cited by Birmingham J. in LN. In this regard, the DPP distinguishes the facts in LN from those pertaining in the present case, in that in LN, the contempt arose from the publication of the outcome of a childcare case, without naming the parties involved and in circumstances where the defendants did not know that to do so would amount to a contempt of court. The circumstances of the present case are, counsel for the DPP submits, readily distinguishable from those obtaining in LN in regard to any claimed lack of intention.

47. In response to the appellants' assertion that the sentencing judge failed to take adequate account of the timing of the publication, the DPP submits that it is illogical to argue that publication after a man has been charged, but at some remove in advance of the intended trial, should be treated as a mitigating factor. Rather, the DPP suggests that it is more correctly to be characterised as nothing more than a situation in which a potential aggravating factor, namely close temporal proximity to any trial, is absent.

48. In respect of the appellant's conduct since the issue of contempt was raised by the DPP's solicitors, the DPP highlights the finding of the sentencing judge that the appellants *"denied that anything in the articles or on the website interfered with the right to a fair trial. The complaint was made that the applicants e-mail did not specify what aspect of the material amounted to such interference. A question was posed as to whether the applicant was demanding that no articles whatever concerning Anglo Irish should be published while trials were pending."* Subsequently, the appellants proceeded to engage in a debate as to whether or not the articles amounted to a contempt of court which ultimately culminated in a full contempt hearing. The DPP further highlights that the offer of an apology and to pay costs was only made after the High Court judge had found them guilty of contempt.

49. In respect of the case of *The People (Director of Public Prosecutions) v Sunday Newspapers t/a The Sunday World* which was put forward as a comparator, the DPP disputes that the fine imposed in the present case was the highest one against a media entity in the history of the State, and the further suggestion that the fines in this case were disproportionate in consequence. The DPP points to the fact that that there were two separate corporate publishers (the first and fourth named appellants), with publications on two separate media platforms, and these were separate defendants who were dealt with individually, each receiving a fine of €50,000. The position therefore, is that the single defendant in the *Sunday World* case in fact received a fine that was 50% greater than the fine imposed on any single defendant in this case.

50. It was further submitted on behalf of the respondent at the oral hearing before us that any public interest in the publication of the articles in question was not justified to an extent that permitted encroachment upon the law of contempt.

51. Finally, in terms of the appellants' submission that the harm caused in this case was slight, the respondent submits that there is a distinct difference between internet and print publications and that, although the internet publications were removed once the motion issued, that they have the potential to reach a much wider audience at a much faster rate than print publications. It was also pointed out that the internet publications contained access to the audio tapes as well. Moreover, the DPP argued at the oral hearing that, in many respects, there is no way of quantifying what harm was caused by the offending behaviour at this juncture, pointing to the fact that a large fine would potentially be forthcoming in the event of the criminal trial collapsing. In that regard, however, I would comment that this judgment now post dates the trial in question which did not collapse and which resulted in the conviction of Mr Bowe. It is appropriate to view the submission on harm in that light.

**Discussion and Analysis**

**Contempt by Publication – Sentencing Principles**

52. Proceedings for the attachment and punishment (including possible committal to prison in the case of an individual rather than a corporate offender) of a person for criminal contempt of court, and in this instance we are concerned with criminal contempt of court by publication, can justifiably be characterised as being sui generis in the sense that such proceedings tend to be initiated differently. In the course of being prosecuted, such proceedings generally follow a distinctly different path to that travelled by more routine criminal proceedings, and they tend to be motivated and influenced by different considerations from those generally applicable in routine criminal proceedings.

53. The offending conduct is treated as criminal not because of any express legislative policy that it should be so treated, or because of some societal consensus reflected in the common law that it is in some respect morally reprehensible and deserving of censure and punishment on that account, but rather because it is perceived to represent a systemic danger to the administration of criminal justice.

54. The initiating party may be the court itself before which the potentially affected proceedings are pending, the prosecuting party or some other interested party such as a defendant. In the normal way ordinary criminal proceedings are commenced either by summonsing the offender to appear before the District Court, or by the formal preferment of a charge against the offender by a member of An Garda Síochána following an arrest of the suspected offender for that purpose, and the bringing of the offender before the District Court (in the first instance) on foot of that charge. Contempt proceedings are theoretically capable of being commenced in that way, but as Geoghegan J pointed out in his judgment in the Supreme Court in *Director of Public Prosecutions v Independent Newspapers (Ireland) Limited & ors* [2008] 4 IR 88 (at para 33) *"from time immemorial criminal contempt of court, if not prosecuted upon indictment in the ordinary way, has been dealt with summarily in the High Court."*

55. Here, as in most cases of this type, proceedings were in fact commenced through the mechanism of an initiating Notice of Motion pursuant to Order 44 of the Rules of the Superior Courts ("RSC") seeking, firstly, an order for the attachment of the alleged offender to answer the contempt in respect of which the order is issued, and secondly his/her committal to prison in the case of alleged individual contemnors, or the imposition of an otherwise appropriate punishment in the case of the alleged corporate contemnors. At first glance, the orders for attachment and committal envisaged by Order 44 RSC seem primarily intended to be used as enforcement tools in the context of orders of a court made in the exercise of its civil jurisdiction, i.e., to address civil contempt, rather than for the initiation of proceedings for criminal contempt. However, as was noted by the Law Reform Commission in its July 1991 Consultation Paper on Contempt of Court (LRC – CP 4 – 1991), at pp. 174-178, the line between civil and criminal contempt is often a blurred one and the authorities reviewed therein (see *In re Freston* 11 QBD 545 (1883); *Attorney General v Kissane* 32 LR Ir 220 (CA 1893); and *Smith v Molloy* 39 ILTR 221) suggest that a process of attachment can be used both in the civil context as a coercive process but also in the criminal context as a punitive or disciplinary process. The seeking of an order of attachment facilitates the bringing of the allegedly contemptuous conduct to the attention of the High Court. If the High Court is then satisfied to treat the matter complained of as a criminal contempt of court then any order of attachment issued with its leave is treated as having been deployed for punitive purposes and as operating to initiate criminal proceedings for contempt of court against the alleged contemnors. The alleged contemnors are deemed to have been charged with the contemptuous conduct they were attached to answer for, and the High Court will then proceed to try them summarily in respect of the matter(s) charged.

56. In proceedings commenced in that way, although the DPP may be involved from the outset, or become involved and assume carriage of the prosecution, there will rarely have been a prior Garda investigation. Proceedings, once initiated, are usually "fast tracked" of necessity and within limits a court with carriage of such proceedings will be able to conduct the proceedings with more procedural flexibility than it might have in trying "ordinary" criminal proceedings. Any such summary trial must still, however, be a trial in due course of law.

57. Whilst, to a greater or lesser extent, many of the public policy and public interest considerations that routinely arise in the context of "ordinary" criminal prosecutions may still be relevant in proceedings for criminal contempt by publication, there will also be additional policy considerations, both public and judicial, of which account must be taken in the conduct of such proceedings. Chief amongst these will be the need to protect the integrity of the criminal process, to protect the fair trial rights of potentially affected defendants, and to protect the right of the people of Ireland to pursue prosecutions brought in their name without external interference, and without such proceedings being potentially disrupted and/or frustrated through the exertion of inappropriate influence. Another distinctive feature of such proceedings is that there may, as in this case, also be a hybrid dimension to them in as much as injunctive relief, which is essentially a civil remedy and not normally available in criminal proceedings, may be sought and granted within the four walls of what is otherwise a criminal procedure, in order to protect a criminal process perceived to be at risk or potential risk from the impugned publication.

58. Be all of that as it may, a defendant, whether that person be an individual or corporate offender, once found guilty of criminal contempt by publication falls to be sentenced in the normal way according to the ordinary rules and principles of sentencing. The sentencing part of the process is not *sui generis* in any sense. The constitutionally mandated requirement that the sentence must be proportionate both to the gravity of the crime, and the circumstances of the individual offender, remains paramount. Public policy and individual considerations, both routine and those specific to the particular crime as committed by the offender in question, fall to be taken into account at appropriate points in the two (or more) staged sentencing process (depending on how you break it down) recommended by us and by other appellate courts in this jurisdiction.

59. That process involves having regard to the range of sentencing options and considering them as representing a spectrum of available penalties ranging from the most benign and lenient to the most serious and onerous; and having done so to locate where on that spectrum the case at hand falls to be initially located, having regard to the gravity of the offending conduct. Gravity falls to be to be assessed with reference to culpability and harm done. The determination of culpability in turn requires that regard be had (i) to the manner in which the offence was committed and the intrinsic moral culpability associated with that, i.e., whether what was done

was done intentionally, recklessly or negligently, and (ii) to specific circumstances tending to either aggravate or mitigate culpability. The product of this first stage of this process will be the so-called "headline sentence". Then in the second stage of the process there is a discounting from the headline sentence to reflect mitigating circumstances not already taken into account to yield the final sentence that is to be actually imposed.

60. Although, for the reasons set out in *The People (Director of Public Prosecutions) v Molloy* [2018] IECA 37, we have for some time been recommending that the process of sentencing be approached in that staged way, as opposed to in a wholly unstructured way based on instinctive synthesis, whatever final sentence is determined upon should, regardless of the approach adopted, be the result of the exercise of appropriate judgment in the weighing of relevant factors, and the exercise of legitimate judicial discretion in determining both the type, and level, of the penalties to apply in the circumstances of the case. The exercise of that judgment and discretion may be influenced by established principles of sentencing law, by previous judicial determinations with respect to sentencing policy as evidenced in prior case law, and by such further guidance as may be available in the form of relevant legislation, guideline judgments and legitimate comparators.

61. The process of sentencing for criminal contempt by publication, or for any other offence for that matter, does not take place in a vacuum. It takes place in pursuit of a sentencing policy objective or several such objectives. Where a matter of sentencing policy has been prescribed by the legislature, the Court must adhere to it subject to any discretion in that regard provided for in the statute. Some examples would include the presumptive mandatory minimum sentences provided for in legislation for certain drugs and firearms offences; or s.11 of the Criminal Justice Act 1984 which provides for consecutive sentencing, where possible, in the cases of offences committed while on bail, and that in any event offending while on bail is to be treated as an aggravating factor in sentencing for the offence in question; or s.29 of the Criminal Justice Act 1999 which specifies how pleas of guilty are to be treated in sentencing . For the most part, however, the legislature, beyond the specification of maximum penalties for a wide range of offences, has been very restrained in the formulation of sentencing policy and has been largely content to leave the formation of sentencing policy to the judiciary. Accordingly, such sentencing policy as exists is predominantly judicially created sentencing policy.

62. We have previously stated, in *The People (Director of Public Prosecutions) v O'Brien* [2018] IECA 2 (at para 45 thereof) and again in *The People (Director of Public Prosecutions) v D.W.* [2018] IECA 143 (at para 61 thereof ), that the paradigm for the process of sentencing that enjoys the widest currency in this jurisdiction is that it represents an appropriate balancing of the concurrent, but sometimes conflicting, penal objectives of retribution, deterrence (general and/or specific) and rehabilitation. Moreover, at the heart of this balancing exercise, is the constitutionally mandated requirement that every sentence should be proportionate, both to the circumstances of the crime and to those of the perpetrator.

63. We added in the *DW* case that:

> *"61. Retribution, deterrence and rehabilitation are therefore the main objectives that are currently pursued by the Irish Courts in the process of sentencing, and indeed this has been the position since the foundation of the State. Moreover a policy of penal welfarism, developed in the late Victorian and Edwardian eras, was adopted by the State on its foundation and has operated ever since.*
>
> *62. The fact that the Irish courts proceed on the basis that Irish penal policy is fundamentally penal welfarist in nature is today reflected in the jurisprudence that mandates individualisation in sentencing. It is not sufficient to construct sentences solely with regard to the gravity of the crime. Account must also be taken of the personal circumstances of the offender, and the sentence must be proportionate to the crime as committed by that offender."*

64. Later in the *DW* case, at paras 76 and 77 of our judgment, we went on to say that:

> *"76. … Moreover, although it must be acknowledged that Irish penal policy, as reflected in our sentencing law, is biased in favour of penal welfarism, that requires no more than that the personal circumstances of the offender should receive proper consideration and be appropriately taken into account in the process of sentencing. In terms of current jurisprudence, this idea is reflected in the frequently cited statement of the former Court of Criminal Appeal in People (DPP) v McCormack [2000] 4 IR 356 that '[t]he sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused'. Indeed, ever since* State (Healy) v Donoghue *[1976] IR 325 this idea has been recognised as having a constitutional status. In that case Henchy J opined that cumulatively Article 38. 1, Article 40.3.1 , Article 40.3.2 and Article 40.4.1 of the Constitution necessarily imply,* 'at the very least, a guarantee that a citizen shall not be deprived … where guilt has been established or admitted, of receiving a sentence appropriate to his degree of guilt and his relevant personal circumstances.'
>
> *77. That the accused's personal circumstances must be appropriately taken into account does not mean that retribution or deterrence are no longer legitimate penal objectives, or that rehabilitation is necessarily to be prioritised over retribution and/or deterrence as a penal objective. There was something of a misapprehension that the law had moved in favour of the latter idea following the decision of the former Court of Criminal Appeal in* The People (Director of Public Prosecutions) v *GK [2008] IECCA 110. However, the issue was clarified by this Court in* The People (Director of Public Prosecutions v O'Brien [2018] *IECA 2, where we said:*
>
> > *'46. In the past it has been suggested by the former Court of Criminal Appeal in The People (Director of Public Prosecutions) v GK [2008] IECCA 110 that a court in sentencing, or an appellate court in reviewing a sentence, "must examine the matter from three aspects* ***in the following order of priority****, rehabilitation of the offender, punishment and incapacitation from offending and, individual and general deterrence" (this Court's emphasis), thereby suggesting that the penal objective of rehabilitation is always to be afforded the highest priority. While we do not now think that this is necessarily a correct statement of principle, and prefer an approach in which the correct prioritisation of penal objectives is to be determined by the circumstances of the particular case based on the evidence, we readily accept that in many cases it may indeed be appropriate to prioritise the penal objective of rehabilitation. There will, however, be other cases where it may be appropriate to prioritise deterrence, or retribution and incapacitation."*

65. One of the appellants' legal submissions suggests that the sentencing judge in this case was of the belief that the only sentencing objective of potential relevance in a case such as this one, involving criminal contempt by publication, was deterrence. If that was indeed her belief, and we will examine whether that was in fact the case in the next section of this judgment, it would have been an erroneous belief. She would certainly have been entitled in the exercise of her discretion to perhaps attach greater importance to the objective of deterrence than to retribution or rehabilitation in the circumstances of the case, but she would still

have had to have regard to those objectives and to take account of them.

66. In that regard, the penal objective of retribution, in the colloquial and quotidian sense of inflicting, as a matter of justice, a measure of sanction on the offender that is commensurate with the gravity of his offence (and which is also proportionate in terms of the offender's personal circumstances) will usually be deserving of significant consideration. The penal objective of retribution can also serve to communicate the censure and deprecation of society with respect to the offending conduct. That it has been sentencing policy in earlier cases to exact retribution for criminal contempts in certain circumstances is evident from both *Keegan v de Burca* [1973] IR 223 and *The State (Commins) v McRann* [1977] IR 78.

67. In *Keegan v de Burca*, O'Dalaigh C.J., stated (at p. 227) that:

> *"The distinction between civil and criminal contempt is not new law. Criminal contempt consists in behaviour calculated to prejudice the due course of justice, such as contempt in facie curiae , words written or spoken or acts calculated to prejudice the due course of justice or disobedience to a writ of habeas corpus by the person to whom it is directed — to give but some examples of this class of contempt. Civil contempt usually arises where there is a disobedience to an order of the court by a party to the proceedings and in which the court has generally no interest to interfere unless moved by the party for whose benefit the order was made. Criminal contempt is a common-law misdemeanour and, as such, is punishable by both imprisonment and fine at discretion, that is to say, without statutory limit, its object is punitive: see the judgment of this Court in In Re Haughey. [1971] IR 217. Civil contempt, on the other hand, is not punitive in its object but coercive in its purpose of compelling the party committed to comply with the order of the court, and the period of committal would be until such time as the order is complied with or until it is waived by the party for whose benefit the order was made. In the case of civil contempt only the court can order release but the period of committal cannot be commuted or remitted as a sentence for a term definite in a criminal matter can be commuted or remitted pursuant to Article 13, s. 6, of the Constitution."*

68. O'Dalaigh CJ went on to say (at p. 228) that:

> *"The law with regard to criminal contempts is well summarised by Mathew J. in In re Davies (1888) 21 QBD 236 at p. 238 of the report, where he said:— 'It should be borne in mind that contempt of court is a criminal offence, punishable as a misdemeanour by fine and imprisonment or both: 4 Blackstone, 337; 2 Hawkins, P.C., bk. 2, c. 22. The punishment should be commensurate with the offence. It may be severe where the contempt is grave: as for instance in the rare cases where an insult is offered in court to the judge who presides, or where a deliberate attempt is made to interfere with the due and ordinary methods of carrying out the law, as in the case of Onslow v. Skipworth. (1873) LR 9 QB 230. So where a witness refuses to give evidence in obedience to a subpoena, he may be committed for contempt. The commitment in such cases is described by Willes, J., as a sentence upon a summary conviction for an offence against the law, and in the view of that very learned judge a commitment for a time certain is a correct, 'if not the only correct course': see Ex parte Fernandez (1861) 10 CBNS 3. A commitment until the offender consented to give evidence, would not, in my judgment, be the proper order to make. On the other hand, where it appears that the act done is due to a mistaken view of the rights of the offender, the punishment, where imprisonment is deemed necessary, should be for a definite period and should not be severe. We are not without guidance in dealing with cases of the description from the ordinary course of administering the criminal law according to the customs of England. It would not be right for a judge sitting in a criminal court, and compelled to sentence a prisoner, to direct that his imprisonment should continue until some condition, however reasonable the condition might be, had been complied with. A prisoner is entitled, when he has undergone his punishment, to an unconditional release.' "*

69. In *The State (Commins) v McRann*, Finlay P stated (at p.89):

> *"The major distinction which has been established over a long period and by a long series of authority between criminal and civil contempt of court appears to be that the wrong of criminal contempt of court is the complement of the right of the court to protect its own dignity, independence and processes and that, accordingly, in such cases, where a court imposes sentences of imprisonment its intention is primarily punitive. Furthermore, in such cases of criminal contempt the court moves of its own volition, or may do so at any time.*
>
> *In civil contempt, on the other hand, a court only moves at the instance of the party whose rights are being infringed and who has, in the first instance, obtained from the court the order which he seeks to have enforced. It is clear that in such cases the purpose of the imposition of imprisonment is primarily coercive, for that reason it must of necessity be in the form of an indefinite imprisonment which may be terminated either when the court, upon application by the person imprisoned, is satisfied that he is prepared to abide by its order and that the coercion has been effective or when the party seeking to enforce the order shall for any reason waive his rights and agree, or consent, to the release of the imprisoned party."*

70. An important feature of retributive action is that it is primarily reactive to the offending conduct and is calibrated towards addressing injustice by the infliction of a just measure of suffering on the offender whether in terms of deprivation of liberty, the imposition of a fine, sequestration of assets, or some other form of sanction. In so far as it has any utilitarian value, in terms of future behaviour modification, it is primarily as a means of effectively communicating denunciation.

71. In contrast, a sanction imposed in furtherance of the penal objective of deterrence is a pro-active measure in as much as it is designed to have a coercive influence, i.e., it seeks to promote future desistence, both on the part of the specific offender and others more generally, through the intimidatory effect of a current sanction. It therefore has a significant utilitarian value in terms of future behaviour modification, and clearly must be of significant potential relevance in any sentencing for the offence of committing criminal contempt by publication.

72. The penal objective of rehabilitation is also concerned with future behaviour modification, but primarily in the context of seeking to assist an offender in addressing, and where appropriate rewarding the offender for having addressed personal and environmental factors that would pre-dispose him/her/it to engagement in offending behaviour, rather than through any form of intimidation or coercion. As Thomas O'Malley points out in his well regarded work on Sentencing Law and Practice, 3rd ed, at para 19-25:

> *"Rehabilitation, which is usually associated with personal transformation, may seem irrelevant when sentencing organisational offenders. Yet reforming the corporate ethos by eradicating attitudes or practices that contributed to the offending is a valid sentencing objective. Corporate sanctions, even if chosen primarily to punish or deter, should also aim to encourage the development of an organisational culture within which compliance with the law has a high priority."*

73. In choosing an appropriate sanction, and the level at which the sanction is pitched, the sentencing court will therefore frequently have a number of sentencing objectives in mind, although it may legitimately prioritise one or more over another or others. The same sanction may concurrently serve a number of objectives. It may serve to punish and denounce. It may also serve to deter, either generally, specifically or in both ways. The same sanction may sometimes serve all desired objectives. For example, in the case of an individual offender a suspended sentence pitched at the right level so as to operate both as the proverbial "carrot and stick" may concurrently serve the objectives of retribution (in terms of censure and communication of denunciation), deterrence, and rehabilitation.

74. While there are no reported cases specifically referable to the sentencing of offenders for the crime of contempt by publication in this jurisdiction, the Court is aware of relevant case-law from other common law jurisdictions, principally Australia, which is helpful and persuasive. This jurisprudence is discussed in detail in the New South Wales Law Reform Commission Report on Contempt (at http://www.lawreform.justice.nsw.gov.au /Documents/Publications/Reports/Report-100.pdf), and also in Chapter 8 of the Judicial College of Victoria Criminal Proceedings Manual Report as of February 2018 (at http://www.judicialcollege.vic.edu.au/eManuals/VCPM/48765.htm).

75. Without referencing the specific relevant case law, it may be stated that the following have been identified as potentially relevant considerations in sentencing for contempt generally:

a. the nature and circumstances of the contempt (including the objective seriousness of the contempt);

b. the effect of the contempt on the administration of justice;

c. the contemnor's culpability as judged by his or her state of mind and intention at the time of the contempt;

d. general and specific deterrence;

e. the previous good character of the contemnor (including the absence or presence of a prior conviction for contempt);

f. the contemnor's personal circumstances and financial means;

g. whether the contemnor has exhibited contrition and made an apology;

h. denunciation of the contempt, and;

i. the passage of time since the occurrence of the contempt

76. With specific reference to contempt by publication, the Australian case-law suggests that, where the contempt occurs in the context of an ongoing trial, and the contempt has a tendency to prejudice that trial, this must be regarded as a serious contempt. A contempt of court by publication will be considered very serious where a trial must be aborted or adjourned as a direct consequence.

77. Conversely, where the contempt by publication has merely given rise to the potential for harm, but there is no evidence of actual harm having been caused, the offending will be less serious and the need for vindication of the court's authority and general and specific deterrence may be satisfied by less severe penalties than would otherwise be imposed. Accordingly, even though a contempt of court may have created risk of harm, the absence of actual harm must be taken into account when assessing the seriousness of the actual contempt.

78. The Australian case-law suggests that a contempt of court by publication (or otherwise) will be considered particularly grave where it creates a potential risk to the lives of witnesses, or has the potential to prejudice the success of a witness protection program.

79. It further suggests that, as is the case here, when assessing the gravity of a contempt by publication the court must have regard to the harm done. The scale and impact of the contempt may be assessed in part by the consequences of the contempt, such as a need to abort a trial or delay a trial. However, in fixing the level of appropriate fines a sentencing court ought not to seek to compensate the State for any losses suffered by it due to the contempt. This may exclude considerations such as seeking to recoup for the benefit of the exchequer the extra legal costs incurred by the State where a trial has had to be aborted, or postponed.

80. Additional factors that the Australian case-law suggests may be potentially relevant in cases of contempt by publication would include whether the relevant organisation had systems in place to prevent contempt; whether legal advice was sought before publication; and the general nature and purpose of the publication.

81. The existence of systems in place by a publisher to prevent contempt of court may be treated as a mitigating factor. However, the weight to be given to this factor could be diminished where the systems themselves are deficient or where the systems fail because they are not properly adhered to. Systems can be considered deficient where a publisher fails to give due priority to the need to guard against contempt, resulting in a higher likelihood of human error.

82. The Australian jurisprudence is to the effect that a decision not to take legal advice when the nature of the publication makes it obvious that it would constitute serious contempt could be considered an aggravating circumstance. On the other hand, if legal advice was taken, the nature of that advice is highly relevant. If the advice was to the effect that it was "safe" to publish the material, the court will consider this a mitigating factor. However, if the advice was not to publish or that there was a risk in publishing, a subsequent decision to publish in the face of that advice may again be seen as an aggravating factor.

83. With respect to the applicable sentencing policy objectives in cases of criminal contempt by publication, Australian case-law suggests that public denunciation of such contempt is important. That having been said, however, deterrence, both general and specific, is regarded as the principle justification for sanctioning for such contempts. Where a contemnor has committed contempt of court by publication before, there may be a particular need for specific deterrence, and in order to impress on the offender that further such actions will not be tolerated, it may be suitable under Australian law to impose a fine which will cause *"real financial pain"* for the contemnor, based on his or her specific financial circumstances.

84. Equally, Australian case-law suggests that it may be unnecessary to address specific deterrence in sentencing where actions are taken by the contemnor to reduce the impact of the contempt, to deal with those immediately responsible for it and to decrease the possibility of further breaches. Consonant with that, it is considered that where the contemnor is an organisation, there will be a

*"strong need"* to address specific deterrence where organisational structures that led to the contempt have not been addressed, or have been only partially addressed.

85. Returning to established sentencing principles in this jurisdiction, a court sentencing for criminal contempt by publication, in a case involving a media entity or entities such as the first and fourth named appellants in this case, must also have regard to those sentencing principles that particularly apply in the case of corporate defendants. A reality to be faced up to is that the court's sentencing options will be greatly reduced in the case of corporate offenders, and for all practical intents and purposes it will in most cases be confined to the imposition of an appropriate fine.

86. This Court has previously addressed the issue of the general approach to the sentencing of corporate offenders in *The People (Director of Public Prosecutions) v Cavan County Council and Oxigen Environmental Ltd* [2015] IECA 130, a case involving offences under the Waste Management Act 1996. We said in that case that:

> *"59. The exercise of sentencing corporate offenders in environmental cases should in principle be similar to the sentencing of private individuals in ordinary criminal cases, though relevant factors may receive different emphasis. Accordingly, the well established procedure of first locating the offence on the relevant scale in terms of its seriousness taking into account any aggravating circumstances and arriving at an appropriate sentence for the crime, and then factoring in any mitigating circumstances to reduce the sentence to one appropriate for the crime as committed by the particular offender should, in general, be followed.*
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> *60. When a private individual is being sentenced there is an overriding constitutional requirement that a sentence should be proportionate, requiring the striking of a balance between the gravity of the offence in the particular circumstances in which it was committed and the relevant personal circumstances of the offender. Thus, in considering any particular sentencing option, or combination of options, the Court must take due account of the extent to which the proposed measure or measures would interfere with the personal rights, including the right to liberty, of the individual and satisfy itself that such interference was necessary and proportionate to the gravity of the offence. In seeking to strike the right balance a sentencing court has to have regard to a number of legitimate sentencing objectives including retribution, deterrence (both specific and general), and rehabilitation.*
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> *61. In the case of a corporate offender, while there is no constitutional requirement of proportionality in terms of interference with personal rights and personal liberty, sentencing must nevertheless be fair to the corporate offender and be in accordance with the constitutional guarantee of due process. Accordingly, the process of sentencing a corporate offender must still take account of the gravity of the offence, including the culpability of the offender, and relevant circumstances of the entity concerned should be taken into account in mitigation. A sentencing court must still have regard to the sentencing objectives of retribution, deterrence (both specific and general), and rehabilitation but there will frequently be more emphasis on deterrence than on the other objectives.*
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> *62. That having been said, the limited sentencing options available in respect of a corporate offender mean that in reality a monetary sanction will often be the only appropriate penalty. That being so, a sentencing court will be required to avoid what Thomas O'Malley refers to as "the deterrence trap" (see Sentencing Law and Practice (Thompson Round Hall, 2006, 2nd ed., at para 19-06) of imposing a fine at a level likely to precipitate corporate dissolution. An appropriate balance must be struck between the need for deterrence on the one hand, and putting the offender out of business where that can be avoided.*
>
> *63. Equally the court must be conscious of the spill over effects of a large fine that may unjustly punish persons not directly responsible for the offence such as shareholders, employees, creditors, customers, consumers, trading partners and, in the case of a public authority that might not be put out of business by a large fine in the same way that a commercial company might, but which might have to divert resources away from other public services being provided by it, the public at large. While a large fine that causes some spill over will not necessarily be wrong in principle, a court considering the imposition of such a fine is obliged to consider the potential spill over effects and satisfy itself that the proposed measure is none the less merited and proportionate, and a failure to do so would amount to an error in principle."*

87. It is an important principle that a court, in deciding to impose a fine and in determining the level of the appropriate fine, should have regard to the offender's means. This does not mean, as the sentencing judge in the court below correctly stated, that a sentencing judge is entitled *"to construct a scale of punishments based on the resources of the defendants".* What it means is that keen attention must be paid to the need for the sentence to be proportionate both to the gravity of the offending conduct and to the circumstances of the offender, and in that regard the offender's ability to pay will be an important relevant circumstance. In *The People (Director of Public Prosecutions) v Redmond* [2001] 3 I.R. 390 at p 405, the former Court of Criminal Appeal stated that a fine, at whatever level it is pitched, *"is neither lenient nor harsh in itself, but only in terms of the circumstances of the person who must pay it".* In so far as that court may have been engaged in a consideration of the narrow issue of the proportionality of the fine imposed having regard to the offender's personal circumstances, we consider that to be a correct statement of the law, but only in so far as it goes. However, it is only represents part of the story and is not a correct statement if applied to proportionality requirements in both of the respects in which the principle must be applied. Proportionality cuts both ways and a sentencer must in addition to taking into account the offender's individual circumstances also take account of the gravity of the offending conduct. If a sentencing court does not properly take account of the true gravity of the offending conduct in setting a presumptively appropriate fine in the first instance, the ultimate sentence may indeed be either unduly lenient or excessively harsh in its own terms. The gravity of the offence will in fact set the upper limit for the appropriate fine regardless of the means of the offender. A fine which goes beyond that limit purportedly in furtherance of deterrence or some other policy objective would be unlawful because it would be disproportionate. However, even where a presumptively appropriate fine is determined upon based on a correct assessment of the gravity of the case, an offender cannot be required to pay that which is beyond his/hers/its means. The proportionality principle may therefore require some abatement of the presumptively appropriate fine based on the judge's assessment of gravity, in order to take account of the offender's ability to pay.

88. In regard to all of this, Thomas O'Malley, at para 23-04 of his previously cited work, succinctly summarises the position, in a manner we are happy to endorse, namely that:

> *"in deciding if a fine is excessive, an appellate court must consider all relevant factors, including the nature of the offence (which may not merit a very heavy fine, however wealthy the offender happens to be) and the means of the offender."*

**The sentences imposed in this case.**

89. Having considered the totality of the sentencing judge's remarks we are not prepared to conclude that there was a lack of appreciation on her part that for the most part ordinary sentencing rules apply. We are of this view notwithstanding her statements that *"Most of the elements, if not all of the elements, of traditional sentencing principles are of no relevance"* and *that "The primary purpose of the Court is to protect the criminal process and within that process, to protect the rights of an accused person and also to protect the rights of the people of Ireland to prosecute offences and to ensure that trials are carried through in the proper fashion."*

90. Notwithstanding these statements, it is clear from how she in fact proceeded that she understood the requirement that her sentence should be proportionate both in terms of reflecting the gravity of the offending conduct and in terms of taking into account the circumstances of the offender. However, the questions for us include whether she applied the applicable sentencing principles correctly, particularly with reference to the assessment of gravity; and whether, even if no obvious error of principle is capable of being identified, she was ultimately successful in arriving at a just and proportionate sentence, bearing in mind that the sentencing judge would have enjoyed a considerable margin of appreciation and that great deference must be afforded to her stated reasons. Thus, before this Court would be justified in interfering with her sentence it would have to be satisfied either that an identifiable error of principle had been established leading to an excessive sentence, or simply that the ultimate sentence was in our view manifestly too severe.

91. While it was not an error of principle, *per se*, to have failed to do so, the sentencing judge did not approach the sentencing process in the semi-structured way that we commend as best practice. She approached sentencing largely on the basis of instinctive synthesis although she does identify relevant factors that she was taking into consideration. There is little clue, however, as to quite how she took them into consideration and how they may have influenced the outcome. The unstructured approach that she opted for does not reveal how gravity was assessed, and the extent to which there was a discounting for mitigation.

92. On the assessment of gravity side of the equation, it is clear there was an appreciation that insofar as she was dealing with corporate offenders, the only realistic penalties open to her to impose were fines. Moreover, it may be inferred that she also appreciated that as the offence is a common law offence she was at large in terms of the level of fines that might theoretically be imposed; and that to that extent the spectrum available to her was open ended, although it would have been open to her in her discretion to nominate a realistic effective range for the purposes of the exercise she was engaged in, had she considered that it might be helpful to do so. She clearly had regard to the nature of offending conduct itself, and was fully alive to the policy considerations, and regarded it as being of importance, that the offending conduct was to be sanctioned because it was an attack on the administration of justice.

93. In accepting that there had been no intent to interfere with the administration of justice, and that there had been a genuine belief that the publication was in the public interest, she clearly also had some regard to the intrinsic moral culpability of the offenders in terms of how they committed the offence. It may be inferred that she was not prepared to attribute the highest level of intrinsic moral culpability to them, namely that the offences were committed intentionally, but it is unclear beyond that whether she regarded the appellants as having been reckless, as the DPP contends, in persisting with continued on-line publication, and not acting in a sufficiently timely manner to ameliorate the risk of harm created by the impugned publication, in circumstances where they had received a metaphorical *"shot across the bows"* in terms of warning correspondence received from the DPP, or whether she treated them instead as having committed the offence accidentally or *"unwittingly"* as the appellants have sought to characterise it.

94. It is clear that the sentencing judge did consider that the fact that the publication was by the largest media owner in the State, and that it had occurred in the context of commercial activities, was of some relevance. It does not appear that she regarded culpability as having been aggravated in the manner in which it might have been if there had been a cynically taken deliberate decision to publish the impugned material in the full knowledge that it was contemptuous and it was done in the naked pursuit of enhancing circulation and boosting profits. Nevertheless, it is implicit from the fact that she made reference to the fact that *"We are not talking here about the parish newsletter or a student freesheet or some other publication with small, limited jurisdiction* [sic ?? 'circulation' possibly] *and little or no profit."*, that she regarded the offending conduct of having been somewhat aggravated by virtue of the status of the offender. We consider that this was justifiable in principle on the basis that entities such as the appellants manifestly have available to them the resources to put systems in place to guard against unintentional contempt, whether that be reckless or accidental, including ready access to specialist legal advice. It is notable that reliance on legal advice was not advanced as a mitigating circumstance.

95. In considering the harm done, the sentencing judge correctly took account of the fact that, up to the point of sentencing there had been no actual disruption to the criminal process, but nevertheless recognised the existence of a degree of continuing and ongoing risk in stating *"indeed, if that were to occur, obviously these defendants would be likely to be liable for the costs of any such disruption."* We are satisfied that in making that comment the sentencing judge was not suggesting that any penalty that she might impose as a sentence would seek to recoup such theoretical costs. Rather, we believe this to have been an allusion to the possibility of the bringing of separate civil proceedings by affected parties to recoup those costs from the contemnors.

96. On the mitigation side, it is clear that there was some level of discounting for mitigation from the judge's statements to the effect that, the important need to deter contemptuous behaviour *"does not blind the Court to any mitigation factors"*, and also that *"I accept the mitigating factors to the extent that I have indicated".* The problem is that we have no clue as to how much discount was actually applied and it is very difficult in those circumstances to assess whether adequate discount was in fact afforded for mitigation in the instinctive synthesis engaged in by the sentencing judge that yielded up the final sentence figures. It cannot be ignored in that regard that a specific ground of appeal is that the judge failed to give adequate weight to the relevant mitigating factors.

97. In The People (Director of Public Prosecutions) v Flynn [2015] IECA 290 we stated:

> *"14. There is a strong line of authority starting with* The People (Director of Public Prosecutions) v M *[1994] 3 I.R. 306 ; and continuing through* The People (Director of Public Prosecutions) v Renald *(unreported, Court of Criminal Appeal, 23rd November 2001);* The People (Director of Public Prosecutions) v Kelly *[2005] 2 I.R. 321; and* The People (Director of Public Prosecutions) v Farrell *[2010] IECCA 116, amongst other cases, indicating that best practice involves in the first instance identifying the appropriate headline sentence having regard to the available range, based on an assessment of the seriousness of the offence taking into account aggravating factors (where seriousness is measured with reference to the offender's moral culpability and the harm done), and then in the second instance taking account of mitigating factors so as to ultimately arrive at the proportionate sentence which is mandated by the Constitution as was emphasised in* The People (Director of Public Prosecutions) v McCormack *[2000] 4 I.R. 356.*

*15. Two quotations are sufficient to illustrate the point.*

*16. In* The People (Director of Public Prosecutions) v M *Egan J. in the Supreme Court said at p. 315 of the report:-*

> *'It must be remembered also that a reduction in mitigation is not always to be calculated in direct regard to the maximum sentence available. One should look first at the range of penalties applicable to the offence and then decide whereabouts on the range the particular case should lie. The mitigating circumstances should then be looked at and an appropriate reduction made'*

*17. In The People (Director of Public Prosecutions) v Farrell , Finnegan J giving judgment for the Court of Criminal Appeal, reiterated yet again (at p.2 of the judgment) that:*

> *'A sentencing court must first establish the range of penalties available for the type of offence and then the gravity of the particular offence, where on the range of penalties it would lie, and thus the level of the punishment to be imposed in principle. Then, having assessed what is the appropriate notional sentence for the particular offence, it is the duty of the sentencing court to consider the circumstances particular to the convicted person. It is within that ambit that the mitigating factors fall to be considered.'*

*18. Since its establishment this Court has repeatedly and consistently sought to emphasise that this approach is regarded by it as best practice and we have sought to commend to trial judges that they explain the rationale for their sentences in that structured way, not least because a sentence is much more likely to be upheld if the rationale behind it is properly explained. Equally if this Court when asked to review a sentence cannot readily discern the trial judge's rationale or how he or she ended up where they did having regard to accepted principles of sentencing such as proportionality, the affording of due mitigation, totality and the need to incentivise rehabilitation in an appropriate case, it may not be possible to uphold the sentence under review even though the trial judge may have had perfectly good, but unspoken reasons, for imposing the sentence in question.*

*19. However, the mere fact that best practice has not been followed in terms of adequately stating the rationale behind the sentence does not necessarily imply an error of principle. At the end of the day if the final sentence imposed was correct and there was no obvious error of principle the sentence may be upheld. In the present case, however, this Court's task has been made, as already stated, somewhat more difficult by an inability to discern from the sentencing judge's ruling exactly where he started and how much discount he gave for mitigation. This creates a real difficulty in a situation where one of the grounds of appeal in effect complains that the sentencing judge over-assessed the seriousness of the case (ground no ii), and another complains that insufficient account was taken of mitigation, and specifically the plea of guilty (ground no iv)."*

98. In seeking to engage with this difficulty, which arises yet again in the present case, it is appropriate to catalogue the mitigating circumstances that the sentencing judge states that she took into account, albeit that she does not indicate the weighting she attached to individual factors (something which she would not normally be expected to do in any event), or the extent of the overall discount (something which ideally she ought to have indicated regardless of whether that figure was determined upon intuitively by application of instinctive synthesis, or in a more structured way.)

99. The sentencing judge stated that she accepted that there was no intent to interfere with the course of justice. This was a mitigating factor bearing on culpability, properly to be taken account of in the assessment of gravity. She further accepted that there was a genuine belief that the publication was in the public interest. Again, this was a mitigating factor bearing on culpability, properly to be taken account of in her assessment of gravity. She further accepted that there had been no actual disruption to the criminal proceedings to the date of sentencing at any rate. This bore on the issue of the harm done, and again was relevant to the assessment of gravity. She further noted after the DPP had initiated complaints in respect of the impugned material, that it was taken down and an undertaking was given. She further accepted that there had been a full and unreserved apology to the court, that the defendants had offered to pay the DPP's costs and that they had offered an undertaking which was acceptable both to the DPP and the court. These were matters of mitigation not bearing on culpability necessitating additional discount post an assessment of gravity. In essence they were indicative of remorse and contrition, and in that regard they were also potentially relevant to the issue as to whether, and to what extent, the penalty under consideration should be directed towards specific deterrence.

100. In fact, the only item on the list of relevant mitigating factors advanced by the appellants in their submissions to us, and reproduced at paragraph 27 of this judgment, that was not expressly referenced by the sentencing judge was the fact that the publications occurred approximately 18 months approximately in advance of when Mr Bowe was due to be tried, and was in fact tried. It is noteworthy that the plea in mitigation did not in fact rely on this. In any case, we are of the view that the sentencing judge was most unlikely not to have been alive to this detail. If the sentencing judge had been specifically reminded of the remarks of Denham C.J. in *Kelly v O'Neill* cited earlier at paragraph 37 of this judgment, she might well have referred specifically to this factor, but in circumstances where *Kelly v O'Neill* had been opened to her in extenso at the trial, we are confident that she is unlikely to have overlooked that detail and on the contrary is likely to have factored it in to her assessment of gravity as a mitigating factor bearing on the extent of harm done in terms of the creation of an ongoing risk to the criminal process, and the level of that risk.

101. It is clear, in circumstances where the great majority of mitigating factors to be taken into account were mitigating factors bearing on culpability, that the focus of this Court's review should be on the assessment of gravity, where they should have been appropriately taken into account. While there would have to have been some discount in the second stage of the process for the mitigating factors not bearing on gravity, and therefore not already taken into account, the amount of discount required in respect of those matters would have comparatively modest in our estimation. It would have been different if there had been pleas of guilty, as this would have represented a very significant additional mitigating factor not bearing on culpability. However, the appellants did not plead guilty. Therefore, the central issue on this appeal clearly comes down to whether or not sentencing judge correctly assessed the gravity of the offending conduct.

102. The major factor which appears to have influenced the sentencing judge in her assessment of gravity was her belief that the appropriate primary objective of her sentence should be to deter, both the appellants and others, from future offending of this kind. It cannot be gainsaid that deterrence is an important objective of sentencing in this type of case, but a sentencing judge pursuing that objective must still impose a sentence that is ultimately proportionate to the gravity of the offending conduct and the circumstances of the offender.

103. The problem for us in this case is that we simply do not know how the sentencing judge in fact graded the offending conduct in this case, i.e., whether she regarded it as being at the lower end of the scale of seriousness, of moderate seriousness, or as being gravely serious. Such a crime considered in the abstract, and devoid of context, has of course an intrinsic seriousness by virtue of

being an attack on the criminal process. However, notwithstanding that, there are a wide variety of circumstances in which such a crime may be committed and accordingly context is very important and is likely to influence greatly an assessment of the actual gravity of the particular crime.

104. To be fair to the trial judge, these type of cases are fortunately not very common. A consequence of that, however, is that a judge faced with having to sentence an offender in such a case may have no meaningful comparators from which to draw guidance. There are no judgments at appellate level that would serve as a meaningful comparator. We were referred to just one comparator, the *"Sunday World"* case, referenced earlier in this judgment, which was a sentencing judgment at first instance by a judge of the High Court. However, it is not clear whether it was brought to the attention of the sentencing judge. The transcript of the sentencing hearing makes no mention of it, although it is possible that a note of the judgment in that case might simply have been handed in as sometimes occurs. Be that as it may, a single comparator could have been of limited assistance, and we have only found it to be of limited assistance.

105. In our assessment, although the case had potentially very serious adverse consequences for the trial of Mr Bowe, it is highly relevant that action was taken at a point where those consequences were capable of being avoided, and were likely to be avoided. As we now know they were thankfully in fact avoided. The trial judge's acceptance that there had been no intent to interfere with the criminal process is also very significant. It is also of importance that the appellants had no previous convictions for similar offences. It seems to us that those factors alone would cause the case not to be regarded as being in the gravely serious category.

106. By the same token, although it was accepted that the appellants were ultimately genuinely remorseful, and that once proceedings were issued they took the required action and were fully compliant with what was demanded in that regard, the sentencing judge would have been justified in rejecting any suggestion that they had acted unwittingly, and as regarding them as having acted certainly very unwisely and arguably recklessly albeit with no actual intent to interfere with the criminal proceedings in question. The sentencing judgment does not indicate what in fact was the judge's view in that regard, but the level of fines imposed seems to exclude the possibility that she regarded the appellant's intrinsic moral culpability as being minimal. We consider it likely that she may have been concerned about a degree of recklessness, and that she would have been justified in that. We do not consider that this was a case that could realistically have been regarded as being at the lower end of the scale of seriousness, and that it is a matter of likelihood that it was regarded as being of moderate seriousness.

107. Assuming that to have been the case, what would have been the appropriate penalties?

108. In our assessment what was required were meaningful but proportionate fines, sufficient to mark the censure of the court and to provide a sufficient deterrent to future offending by the appellants, and to the wider publishing community. While technically there are two appellants the reality is that they represent different arms of a single media entity, and it is appropriate to consider the question of the range of appropriate fines on an aggregate basis. It seems to us that cases at the lower end of the scale of gravity involving corporate offenders might in some cases merit only a nominal penalty, but that if is considered that a case does merit the imposition of a modest financial penalty then it should in our view be sub €20,000 in today's terms. These cases were not in that category. There is no upper limit to the penalties that might theoretically be imposed in a case such as this. However, it does seem to us that at this point in time the selection of penalties of €100,000 and above, should be reserved for egregious offending of this type. Again, these present cases were not in that category. Moreover, they were nowhere close to the borderline between that category, and the remaining intermediate range, and yet the aggregate fines that were imposed amounted to €100,000.

109. We consider that the offending conduct in this case was properly to be regarded as of moderate gravity, meriting location centrally in the intermediate range we have identified in terms of potential penalties, i.e., the range between €20,000 and €100,000 and that the aggregate fines imposed were simply too high and that they were disproportionate.

110. In the circumstances we are disposed to allow the appeal, quash the sentences imposed in the court below, and to re-sentence the appellants.

**Re-sentencing**

111. In circumstances where we consider that these cases, considered together, fell to be assessed as being of moderate gravity, and more specifically mid-range in that regard, we would nominate an aggregate penalty of €60,000, or €30,000 in the case of each individual appellant, as being the appropriate headline sentence. The case was not made to us that the trial judge was incorrect in treating both appellants in the same way and we consider she was not in error in doing so in the circumstances of the case. It remains to discount from that headline figure to afford due allowance for the mitigating circumstances not already taken into account. Although arguably at the generous end of what would be our reasonable margin of appreciation in that regard, we are disposed to discount by €10,000, i.e., €5,000 in the case of each individual appellant, to reflect those mitigating circumstances.

112. The final sentences now to be imposed are fines of €25,000 in the case of each individual appellant (representing an aggregate fine of €50,000).