CONTEMPT IN A POST-PANDEMIC WORLD

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MARCH 2020: THE NEED FOR CHANGE

- From **The Law Commission's 14th Programme**, published 2021:

  '*Our previous reviews have explored specific elements of modern-day contempt… but recent high-profile cases have raised* ***a potential need for a holistic review****…*

  A wider review of contempt could consider other areas. First, the case for full codification of the law of contempt and how best to address current inconsistencies. Second, the distinction between "civil" and "criminal" contempt, which currently does not correspond to the generally accepted distinction between civil and criminal wrongs, and whether the distinction should be abolished in the context of contempt… Third, whether the concept of contempt, with its overtones of disrespect, still appropriately reflects the harms it seeks to counter'

WHAT DO WE MEAN BY 'CONTEMPT'?

- **From the judgment of Salmon LJ in** *Morris-v-Crown Office* [1970] 2 QB 114:

  "*The archaic description of these proceedings as "contempt of court" is in my view unfortunate and misleading. It suggests that they are designed to buttress the dignity of the judges and to protect them from insult. Nothing could be further from the truth. No such protection is needed.* ***The sole purpose of proceedings for contempt is to give our courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented****.… This power to commit for what is inappropriately called "contempt of court" is sui generis and has from time immemorial reposed in the judge for the protection of the public.*"

AG-V-YAXLEY-LENNON [2019] EWHC 1791

- 25 May 2018, is arrested while livestreaming from outside Leeds Crown Court, capturing Defendants in an ongoing trial (*R-v-Akhtar*). Committed to prison for contempt by trial judge, HHJ Marston.
- 1 August 2018, Court of Appeal quashes committal order made by Leeds CC. Notes that the court must take "*proper steps to set out the offending conduct, by reference to the video in question*". It also noted that other forms of contempt might be alleged, observing that "*outside references to the [RRO] there were aspects of the video which [HHJ Marson] considered amounted to criminal contempt …*" It was recognised that the case needed to be "*presented by someone other than a judge.*"'
- Remitted to be heard at the Central Criminal Court. Yaxley-Lennon released on bail.
- Yaxley-Lennon eventually re-committed, but raises lots of procedural issues around contempt.

THE CORONAVIRUS ACT 2020

- Section 85A(1) gives the court certain powers, in cases that were wholly remotely conducted, to '*direct that the proceedings are to be broadcast (in the manner specified in the direction) for the purpose of enabling members of the public to see and hear the proceedings.*'
- Section 85B of the same Act goes on to make it a criminal offence to make, or attempt to make, an unauthorised recording or transmission of such proceedings.
- Notwithstanding that warnings are given both in court and at the start of remote proceedings, members of the public can nevertheless fall foul of these provisions.

GUBAREV-V-ORBIS BUSINESS INTELLIGENCE LTD [2020] EWHC 2167

- During an ongoing libel trial, solicitors advise their clients that a livestream of the trial can be transmitted to a number of other foreign locations.
- "*In normal circumstances a judge can see and hear everything that is going on in court…. The judge can immediately see, as Warby J did in the course of this hearing, that a person sitting in court who is not a journalist appears to be tweeting on their mobile phone without first obtaining permission…. This control extends to the recording of images and sounds of what goes on in court and what is then used outside court…**Once live streaming or any other form of live transmission takes place, however, the Court's ability to maintain control is substantially diminished**, in particular where information is disseminated outside the jurisdiction, as happened in this case. The opportunity for misuse (via social media for example) is correspondingly enhanced…*

R (FINCH)-V-SURREY COUNTY COUNCIL [2021] EWHC 170

- A judicial review is brought by Ms. Finch against Surrey CC concerning conduct of an environmental impact assessment of a proposed fracking site at Horse Hill.
- The BBC wishes to cover proceedings. High Court authorises certain journalists to participate using designated Microsoft 'Teams' links, but not to record proceedings. Nevertheless, this happens and an unauthorised recording ends up on the news.
- *'It is of very limited mitigation that all the journalists were operating in a world in which Zoom or similar remote platforms had become the new normality.* ***Any competent journalist should know, without having to stop to think about it****, that court proceedings are in a different category to proceedings in Parliament or other types of meetings which would have to be held remotely because of the pandemic, such as briefings by the police.'*

LESSONS LEARNED?

Per recommendations of the Victorian Law Reform Commission, a new statutory framework would:

- Reflect that the Court's contempt powers come from its inherent powers to protect the administration of justice;
- Better define exactly *how* and *when* the Courts can use their powers;
- Define the scope of contempt powers for courts at all levels, and include the ability to refer to the Supreme Court;
- Introduce new *categories of contempt* which can then clearly spell out what kind of behaviour is likely to be treated as such, including
  Contempt by conduct that interferes with court proceedings;
  contempt by non-compliance with a court order;
  contempt by publishing prejudicial material;
  contempt by publishing material undermining public confidence in the courts; and
  interferences with/reprisals against those involved in court proceedings.
- Set out *how* contempt is to be dealt with, who can start the process and which general laws should apply.
- Try to minimise situations in which a Magistrate or Judge has to preside as witness, prosecutor and judge in the same case, especially when there are differing account