THE SUPREME COURT

Record No.

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

Between/

Denis O'Brien

Plaintiff/Appellant

And

Clerk of Dáil Éireann, Sean Barrett, Joe Carey, John Halligan, Martin Heydon, Paul Kehoe, John Lyons, Dinny McGinley, Sean Ó Fearghail, Aengus Ó Snodaigh and Emmet Stagg (Members of the Committee on Procedure and Privileges of Dáil Éireann), Ireland and the Attorney General

Defendants/Respondents

Judgment of the Court delivered by Mr. Justice Clarke, Chief Justice on the 5th March, 2019

1. Introduction

1.1 This judgment was to be delivered on the same day as the judgment of an identically constituted panel of this Court in *Kerins v. McGuinness & ors.* [2018] IESC. However, for reasons unconnected with the issues which arise in both cases, it was considered desirable to delay the delivery of the judgment in this case by 6 days until today. While there are significant differences between the two cases, there is also a common constitutional background as both appeals involve the limits of the Court's jurisdiction to deal with matters arising in the Houses of the Oireachtas in circumstances where a citizen alleges that constitutional rights have been infringed.

1.2 For those reasons, the Court considered it appropriate to put in place procedures which recognised the overlap in issues between the two appeals and the potential that the argument in either one, and the Court's conclusions on that argument, might have the potential to influence the proper resolution of the other. The detail of those procedures is set out in the judgment in *Kerins* and it is unnecessary to repeat it here.

1.3 Furthermore, for reasons which will become apparent, at least some of the conclusions reached in *Kerins* have application to the issues which arise on this appeal. As a result of the procedures just mentioned all sides to this appeal had access to the full argument in *Kerins* and had the opportunity to make such submissions as they considered appropriate in relation to any of the issues which were common to both cases. Likewise, the parties to *Kerins* had a similar opportunity. In those circumstances, it is clear that, insofar as common issues arose across both appeals, all parties to each appeal had a full opportunity to be heard so that the conclusions on those common issues are equally applicable to both cases. For

those reasons it is unnecessary, for the purposes of this judgment, to restate in any detail the argument in relation to those common issues or the reasons why those issues were resolved as they were in *Kerins*. Rather, for the purposes of this judgment, the Court will simply reiterate its conclusions in *Kerins* on those issues which are common to both appeals.

1.4 That being said, there are significant differences between the circumstances of both cases. The background to these proceedings stems from the concerns of the plaintiff/ appellant ("Mr. O'Brien") about certain statements made in the Dáil by Deputies Murphy and Doherty. While it will be necessary to set out the facts in more detail in due course, in simple terms Mr. O'Brien's complaint is that he had persuaded the High Court to grant an injunction restraining, on a temporary basis, on grounds of alleged breach of privacy, the public disclosure of certain financial information concerning his affairs. It is said that the advantage of having obtained that temporary injunction was completely negatived by the revelation in the Dáil of the information concerned.

1.5 Thereafter, Mr. O'Brien complained to the second to eleventh named defendants/ respondents in their capacity as the members of the Committee on Procedure and Privileges of Dáil Éireann (the "CPP"). An important part of Mr. O'Brien's case relates to the manner in which that complaint was dealt with. Ireland and the Attorney General were separately represented at the appeal and adopted a position on the broad constitutional issues which was the same as that adopted by the CPP.

1.6 Mr. O'Brien's case was dismissed in the High Court (Ní Raifeartaigh J.) (*O'Brien v. Clerk of Dáil Éireann & ors.* [2017] IEHC 179). As is clear from that judgment, Ní Raifeartaigh J. placed reliance on the judgment given by a Divisional High Court in *Kerins v.*

McGuinness & ors. [2017] IEHC 34, thus emphasising the material overlap between at least some of the issues which arise respectively in both proceedings.

1.7 Mr. O'Brien has appealed to this Court against the decision of Ní Raifeartaigh J. In order to set out in greater detail the precise issues which arise on this appeal it is appropriate to turn first to the facts.

2. The Facts

2.1 These proceedings arose out of earlier proceedings initiated by Mr. O'Brien against RTÉ. On the 30th April 2015, Mr. O'Brien was granted short service of a motion directed to RTÉ seeking an injunction restraining RTÉ from making any use whatsoever, and in particular making publication, of any confidential documentation or information relating to his personal banking arrangements with Irish Bank Resolution Corporation Limited ("IBRC"). That application was adjourned for hearing to the 12th May 2015. The application received widespread publicity.

2.2 On the 6th May 2015, during the course of a Dáil debate on a Private Members Motion on the sale by IBRC of Siteserv, Deputy Murphy made certain utterances, including a reference to the plaintiff by name in the context of the sale of Siteserv. She asserted certain facts in connection with loans he had with IBRC, namely that he was one of the largest debtors of IBRC, that his loans had expired and that he had written to the special liquidator of IBRC, Kieran Wallace, seeking to pay off his loans in his own time at low interest rates. The acting Ceann Comhairle made a number of interventions requesting Deputy Murphy not to use names.

2.3 The interlocutory injunction application was heard by Binchy J. in the High Court from the 12th to the 15th May 2015. An order was made on the first day of the hearing restricting the reporting of the proceedings in terms agreed by the parties. At the hearing on the 12th May 2015, Mr. O'Brien conceded that he could no longer seek relief from the Court in respect of the particular matters that Deputy Murphy had already put into the public domain through her utterances in the Dáil on the 6th May 2015.

2.4 On the 20th May 2015, Mr. O'Brien wrote directly to the Ceann Comhairle regarding the comments which had been made by Deputy Murphy on the 6th May 2015. Mr. O'Brien complained that Deputy Murphy "persisted in making false and inaccurate statements to the Dáil about my personal banking arrangements based on confidential information which she knew to have been stolen." The letter later stated, "I also wish to record the fact that no Deputy should be permitted to deliberately abuse parliamentary privilege particularly when the content of such abuse is inaccurate and is based on information or material that a Deputy knows to have been improperly obtained." Mr. O'Brien requested to be informed of what steps would be taken to ensure that "no Deputy will be allowed to deliberately and knowingly breach the privilege afforded to them by virtue of the position they hold and their presence in the Dáil chamber."

2.5 On the 25th May 2015, the Ceann Comhairle acknowledged Mr. O'Brien's letter, advising that standing order 59 was of relevance and that he had referred the matter to the clerk of the CPP.

2.6 On the 21st May 2015, the High Court, for reasons set out in a judgment (Binchy J.) (*O'Brien v. Radió Telefis Éireann* [2015] IEHC 397), granted the injunctive relief sought by

Mr. O'Brien restraining RTÉ from disclosing and in particular from making publication of any confidential documentation or information identifying or tending to identify or providing details of or relating to the Mr. O'Brien's personal banking arrangements with IBRC. In light of the concession made by Mr. O'Brien on the first day of the hearing, the order excluded those matters put into the public domain by Deputy Murphy on the 6th May. This decision also received widespread media attention.

2.7 On the same day, Deputy Murphy issued a statement on her website and on Twitter, stating:-

> "there is nothing I can say about the issues of the case because of the extremely wide-ranging injunction but what I can say is that there are very serious implications here for the freedom of the press and how we proceed on this matter is crucial for future reporting and democratic process in this country."

2.8 On the 27th May 2015, during her contribution to a motion in Dáil Éireann relating to the disposal of shares in Aer Lingus, Deputy Murphy again referred to Mr. O'Brien in the context of the proposed review into IBRC. She referred to the fact that the special liquidator assigned to conduct the review had joined Mr. O'Brien in his proceedings against RTÉ. No intervention was made by the Ceann Comhairle at any time during her contribution on this occasion.

2.9 On the 28th May 2015, during the debate on the Comptroller and Auditor General (Amendment) Bill 2015 in Dáil Éireann, Deputy Murphy again raised the issue of the review of the Siteserv sale to be carried out by the special liquidator and her view that he had an actual or perceived conflict of interest. Deputy Murphy asserted that the scope of the

proposed review was not broad enough. She asserted that the former CEO of IBRC made verbal agreements with Mr. O'Brien to allow him to extend the terms of his already expired loans and that the verbal agreement was never escalated to the credit committee for approval. Deputy Murphy further alleged that Mr. O'Brien received extremely favourable interest terms. She almost simultaneously published excerpts from her speech on Twitter over the course of 27 separate tweets. No intervention was made by the Ceann Comhairle during the course of her contribution.

2.10 On the 28th May 2015, Mr. O'Brien's solicitors wrote to the Ceann Comhairle. The letter stated that Deputy Murphy:-

> "… knowingly and gratuitously, breached the terms of a High Court injunction dated 21 May 2015, granted by Mr Justice Binchy in High Court proceedings entitled '*Denis O'Brien v Radio Teilifís Éireann'* … by revealing details of our Client's personal private and confidential banking arrangements with IBRC."

2.11 The letter continued:-

> "In our view this breach is a gross abuse of Dáil privilege and is deliberately designed to frustrate the Order of the High Court and to usurp the role of the Court."

2.12 On the 2nd June 2015, counsel on behalf of Mr. O'Brien conceded before the High Court that the terms of the injunction no longer applied to the private and confidential information which formed the subject of the utterances in the Dáil made on the 27th and 28th May 2015. The Court granted an order varying the terms of the order of the 21st May 2015 so as to exclude the content of the disclosures made by Deputy Murphy in the Dáil on the 27th and 28th May 2015.

2.13 On the 2nd June 2015, RTÉ issued a notice of motion seeking, *inter alia*, a determination as to whether RTÉ could publish certain information in respect of Mr. O'Brien's personal banking arrangements and, in the alternative, an order discharging the injunction made on the 21st May 2015.

2.14 On the 9th June 2015, during a Dáil speech on the draft Commission of Investigation (Certain Matters Concerning Transactions Entered into by IBRC) Order 2015, Deputy Pearse Doherty made certain utterances concerning IBRC and Siteserv. Deputy Doherty referred to a series of documents which had come into his possession. He said these documents showed a number of things regarding Mr. O'Brien's loan repayment arrangements with IBRC. Deputy Doherty went on to set out the details of the contents of the relevant documents. His utterances described particular written proposals concerning loan repayment arrangements, discussions with IBRC and the result of these discussions. No intervention was made by the Ceann Comhairle at any time during Deputy Doherty's contribution.

2.15 On the 10th June 2015, the CPP met to consider Mr. O'Brien's complaint regarding the utterances of Deputy Murphy on the 6th, 27th and 28th May 2015, and concluded that Deputy Murphy had not abused parliamentary privilege.

2.16 Also on the 10th June 2015, counsel on behalf of Mr. O'Brien conceded before the High Court that the terms of the injunction no longer applied to the private and confidential information which formed the subject of Deputy Doherty's utterances on the 9th June 2015. On foot of that application, the Court made an order varying the terms of the earlier order of the 21st May 2015 so as to exclude the content of the disclosures made by Deputy Doherty.

2.17 On the 15th June 2015, solicitors for Mr. O'Brien wrote a comprehensive letter to the Ceann Comhairle, complaining that they had learned of the alleged rejection of the complaint against Deputy Murphy via an article in the Irish Times on the 11th June 2015, despite the fact that no substantive response had issued to their earlier correspondence.

2.18 By letter dated the 15th June 2015, the clerk of the CPP wrote in response to Mr. O'Brien's solicitors' letters to advise that the CPP found that Deputy Murphy had not breached standing order 57(3), concerning matters which are *sub judice*, as her utterances were made on the floor of the House in a responsible manner, in good faith and as part of the legislative process. Regarding the allegation that Deputy Murphy breached the terms of the High Court injunction, the clerk of the CPP advised that any such finding was solely and exclusively a matter for the courts.

2.19 By letter dated the 15th June 2015, the clerk of the CPP also wrote directly to Mr. O'Brien to advise that the CPP concluded that Deputy Murphy did not abuse parliamentary privilege and referred to the above letter to Mr. O'Brien's solicitors.

2.20 On the 1st July 2015, the CPP met to consider the utterances of Deputy Doherty. On the 3rd July 2015, the clerk of the committee wrote to Mr. O'Brien's solicitors advising that the committee had determined that the utterances of Deputy Doherty on the 9th June 2015 in the Dáil did not contravene standing order 57, having regard to the terms and context of the utterances.

2.21 Against the background of those facts Mr. O'Brien commenced these proceedings in the High Court. It is appropriate, therefore, to next set out in brief terms the focus of the claim made to the High Court in these proceedings.

3. Mr. O'Brien's Claim

3.1 It might briefly be noted, before turning to Mr. O'Brien's claim in the High Court, that there was a substitution of different defendants to the proceedings after the initial stages of the case in that Court. The trial judge summarised this substitution as follows:-

> "At the time of the hearing, the defendants were the Clerk of Dáil Éireann (the first named defendant), the members of the Committee on Procedure and Privileges of Dáil Éireann (the second to eleventh named defendants), Ireland and the Attorney General (the twelfth and thirteenth defendants). Deputies Murphy and Doherty were never named as individual defendants. Insofar as the first defendant represents all deputies in the Dáil, as he was joined 'in a representative capacity as representing the members of Dáil Éireann', the two Deputies are represented in the proceedings indirectly by him."

3.2 The reliefs sought by Mr. O'Brien in the High Court were set out in a second amended statement of claim. Reliefs (a) to (d) related directly to the making of the utterances by the deputies in the Dáil. Ní Raifeartaigh J. described this as the first limb of Mr. O'Brien's case. In substance, the reliefs sought in that regard were: (1) A declaration that the substantial effect of the utterances made in the Dáil (as set out above) was to determine in whole or in large part a justiciable controversy then pending before the courts and that under the Constitution the determination of such justiciable controversy is the exclusive right of the courts; (2) a declaration that, by causing and permitting the said utterances to be made and by failing to enforce the provisions of standing order 57, the defendants were guilty of an unwarranted interference with the operation of the courts in a purely judicial domain; and (3)

a declaration that, in causing and permitting the said utterances to be made, the defendants had caused or permitted a breach of the plaintiff's rights pursuant to Article 40.3.1 of the Constitution.

3.3 The remaining reliefs sought related to the work of the CPP in dealing with Mr. O'Brien's complaints. This was the second limb of Mr. O'Brien's case in the High Court. The reliefs sought were as follows:-

> "A Declaration that the finding of the Committee on Procedure and Privileges of Dáil Éireann of 15 June 2015 was:
>
> i. based on an erroneous interpretation of Standing Order 57; and/or
>
> ii. made without any evidence to support the finding that Deputy Murphy had acted in a responsible manner and in good faith; and/or
>
> iii. in breach of the Plainitff's right to fair procedures.
>
> A Declaration that the finding of the Committee on Procedure and Privileges of Dáil Éireann of 1 July 2015 was:
>
> i. based on an erroneous interpretation of Standing Order 57;
>
> ii. and/or in breach of the Plaintiff's right to fair procedures."

3.4 The remaining two reliefs sought as set out in the second amended statement of claim were such further or other order as the Court saw fit and an order for costs.

3.5 It is next necessary to turn to the judgment of the High Court.

4. The Judgment of the High Court

4.1 The reasoning of the High Court is divided into two parts, corresponding with the two limbs of Mr. O'Brien's case in that Court. The first limb directly concerns the utterances made by Deputies Murphy and Doherty in the Dáil. The second limb concerns the proceedings of the CPP. Mr. O'Brien has confined his challenge in this Court to the second limb of the judgment of Ní Raifeartaigh J. However, in order to understand those aspects of the judgment which are the subject of this appeal, it is necessary to say something briefly about the reasoning of the High Court in respect of the first limb of the case.

4.2 Broadly speaking, the arguments raised by Mr. O'Brien in the High Court under the first limb were to the effect that the actions of the deputies of which he complained were such as to amount to an attack on the administration of justice. In the High Court the defendants argued that, under Articles 15.12 and 15.13 of the Constitution, the Court did not have jurisdiction to engage in an examination of utterances made in the Dáil. In response, it was contended by Mr. O'Brien that Article 15.13 was the only relevant constitutional provision for these purposes. Further, Mr. O'Brien suggested that he was not attempting to make either of the relevant deputies "amenable" to the courts for their utterances. In the alternative it was said that even if the Court disagreed with that argument, the Court was entitled exceptionally, to intervene where there had been a violation of the separation of powers in the form of a deliberate and conscious decision to flout a court order under cover of parliamentary privilege.

4.3 The High Court rejected the arguments of Mr. O'Brien under the first limb. There are two branches to the reasoning of the High Court under this limb. First, the trial judge dealt

with the separation of powers between the courts and the Oireachtas exercising its law-making function. The issue here as formulated in the High Court judgment was as to whether there was "a determination" of issues by the deputies. The High Court held that there was not. After reviewing the relevant line of authority, beginning with *Buckley v. Attorney General & ors.* [1950] 1 I.R. 67, the trial judge concluded as follows at paragraph 51:-

> "Having regard to the above authorities relating to certain types of interference with the administration of justice, I am not persuaded by the plaintiff's argument that the utterances of Deputy Murphy and Deputy Doherty in effect 'determined' the High Court injunction proceedings. What seems to me to be specifically prohibited by the *Buckley* line of reasoning is a 'determination' in the sense of a removal by the Oireachtas by means of legislation from the courts of the power to make a judicial decision on a justiciable controversy, whether by legislation directing the court to reach a particular outcome (as in *Buckley* itself), by legislation directing the court how to treat a piece of evidence (*Maher v The Attorney General & Anor*. [1973] 1 I.R. 140*, McEldowney v Kelleher & Anor.* [1983] I.R. 289), or by restricting the range of witnesses from whom it may hear (*Cashman v District Justice Clifford & Anor.* [1989] 1 I.R. 121). This is not in my view the same as an individual deputy making an utterance which thereby renders the justiciable controversy before the courts moot. On the facts of the present case, the actions of the Deputies did not purport to direct the courts how to determine the proceedings; rather what happened was that they released the information sought to be protected by the courts into the public domain, thereby rendering the judicial proceedings moot. Therefore, I do not think that this case falls within the parameters of the *Buckley* principle nor do I think that the

grounds for the first declaration sought would be made out, even if the issue of justiciability were laid to one side."

4.4 However, the trial judge noted that this did not dispose of all the issues under the first limb and that there remained the question of whether there had been an "interference" with the administration of justice and whether the courts have jurisdiction to entertain proceedings concerning the utterances. Therefore, this raised the question of justiciability. In this regard, the trial judge went on to analyse the leading Irish authorities examining Articles 15.12 and 15.13 of the Constitution and the privileges and immunities contained therein. Reference was also made to certain non-Irish authorities in this context.

4.5 The High Court's conclusions on the question of justiciability are set out at paras. 103 to 109 of its judgment. The trial judge began by acknowledging the potential for tension between the exercise of parliamentary free speech and the administration of justice, citing several examples where such a tension could arise. It is suggested by Ní Raifeartaigh J. that what happened in this instance is an example of where that tension reaches an "extremely acute point".

4.6 Turning first to the question of whether Article 15.12 of the Constitution applies to utterances in the Dáil, the High Court concluded that this is the case. Noting the novel nature of this case, in that the deputies who made the utterances are not themselves parties to the case, the High Court stated, "For this reason, it became the first Irish case where the utterance itself is directly the subject of court proceedings unaccompanied by the member who issued the utterance." The High Court concluded on this point stating:-

"It seems me that the privilege in Article 15, s. 12 must apply to the utterances themselves and on this view, the case therefore falls to be decided, strictly speaking, on the basis of the immunity in Article 15, s. 12. However, in my view Article 15, s. 13 and how it has been interpreted must also exert a considerable influence upon the interpretation of the immunity in Article 15, s. 12."

4.7 Regarding the scope of Article 15.12, the High Court concluded that the authorities show that the privilege conferred is a broad one:-

"Indeed, the words 'táid saor ar chúrsaí dlí' could not be any more absolute; the utterances are 'free from legal proceedings.' On that basis alone, I would reach the conclusion that the Deputies' utterances, the subject of the present case, cannot be the subject of the Court's adjudication and condemnation."

4.8 The High Court considered that this conclusion was bolstered by the interpretation given to Article 15.13 by the authorities:-

"In my view, having regard to the importance of the core value being protected, namely parliamentary speech, which has been described and explained eloquently in many authorities, what was intended by the framers of the Constitution in providing for both Article 15 s.12 and Article 15.s.13 was to create a basket of privileges and immunities to ensure that the courts (and tribunals) would not be involved in the exercise of analysing and pronouncing upon parliamentary speech, whether in terms of the content of the speech, or the motivation of the speaker, irrespective of how the issue presented itself to the court (or tribunal), whether via the utterance, the person of the member who had made the utterance, or both. The authorities cited above

repeatedly emphasise the unusually robust nature of the language used in Article 15 ss12 and 13 and the reasons for it."

4.9 The Court went on to state that the mere fact that the deputies themselves were not sued in the proceedings was insufficient to overcome the prohibitions in Articles 15.12 and 15.13. Furthermore, the Court held that the declaratory nature of the relief sought by Mr. O'Brien did not alter the situation:-

> "The fact that declaratory relief was sought seems to me to be merely a device to try to soften the appearance of what in fact is being asked of the Court; the Court is being asked to take parliamentary utterances and subject them to judicial determination. Therefore, the particular form of the remedy sought in this case does not, in my view, alter the fact that what is sought, in essence, is that the Court engage with parliamentary utterances in a manner which would violate Article 15, ss. 12 and 13 of the Constitution and the separation of powers more generally."

4.10 In this regard, the High Court also noted the potential for the granting of declaratory relief in the present case to have a prospective chilling effect on parliamentary speech.

4.11 Finally, the Court considered whether, notwithstanding the foregoing conclusions, there was a residual jurisdiction for the Court to intervene in an exceptional case and whether the present case was such an instance. On that question the Court concluded:-

> "None of the cases in which the exceptional jurisdiction was described concerned utterances in the Dáil, and it is doubtful as to whether this exceptional jurisdiction applies at all in this situation. Certainly there is no authority to that effect. In any event, having regard to the terms in which this exceptional jurisdiction has been

described, I am not persuaded that the present case would fall within it, even if such a jurisdiction exists with regard to utterances in the Dáil."

4.12 Therefore, on the first limb, the High Court concluded as follows at paragraph 109:-

"In all of the circumstances, I have concluded that this Court lacks jurisdiction, whether in the ordinary way or by way of exception to the ordinary rule, to make an adjudication upon the utterances of Deputies Murphy or Doherty or to grant any declaration purporting to comment or rule upon those utterances."

4.13 The High Court then turned to the second limb of the Mr. O'Brien's case, which concerned the manner in which his complaints to the CPP were dealt with by that committee. Mr. O'Brien submitted that Deputies Murphy and Doherty had not complied with standing order 57 because they had not sought permission in advance of their utterances to deal with matters that were *sub judice*. Mr. O'Brien also argued that there was no evidence for the committee's conclusion that the deputies had acted responsibly and in good faith. In response, the defendants argued that this was, again, an area of non-justiciability, relying on Articles 15.10, 15.12, and 15.13 of the Constitution. It was disputed by Mr. O'Brien that Articles 15.12 and 15.13 were of relevance to this aspect of the case. Finally, without prejudice to the justiciability argument, the CPP disputed Mr. O'Brien's interpretation of standing order 57 and contested the challenge to the committee's conclusions.

4.14 The High Court noted the arguments made by the parties in this regard. Mr. O'Brien's argument was that the proceedings of the CPP did not concern purely internal Oireachtas matters as they impacted upon, or "affected", the rights of non-member of the Houses of the Oireachtas. Therefore, it was argued, the Court had jurisdiction to review the work of the

CPP. The defendants argued that it was not possible to separate the work of the CPP from the issue of freedom of speech in parliament as it involved an adjudication on a parliamentary utterance. Furthermore, it was argued that Mr. O'Brien's reputation was not directly affected by the CPP's proceedings. The members were the only persons whose conduct and reputation could be the subject of an adverse decision by the CPP.

4.15 The trial judge then engaged in a review of the relevant authorities in this context. In particular, reference was made to *In Re Haughey* [1971] I.R. 217, *Maguire v. Ardagh* [2002] 1 I.R. 385 ("*Abbeylara*"), *Callely v. Moylan* [2014] 4 I.R. 112 and the decision of the Divisional High Court in *Kerins v*. *McGuinness and Ors*. [2017] IEHC 34 (Kelly P., Noonan and Kennedy JJ.)

4.16 First, the trial judge concluded that it was possible to distinguish the proceedings of the CPP in the present case from those under consideration in *In Re Haughey* and *Abbeylara*, and noted the emphasis in *Kerins* on the voluntary nature of the plaintiff's attendance before the Public Accounts Committee in that case. The trial judge stated:-

> "In the present case, the plaintiff has not been brought by compulsory process before an Oireachtas committee where his good name stands to be adversely affected by an adjudication or determination of the Committee in respect of certain facts. He is not 'before' the Committee at all. He is a 'non-member' whose complaint has led to Committee proceedings in respect of the utterances of two members of the Dáil. Insofar as any determination could be and was made by the Committee, it was in respect of the conduct of the member, not that of the plaintiff non-member. His interests, to use a somehow loose term, in the conduct and outcome of the Committee

proceedings were indirect rather than direct and very different in quality from the interests of Mr. Haughey and the Gardaí in *Maguire v. Ardagh*."

4.17 The trial judge noted that what was sought by Mr. O'Brien from the CPP was a form of vindication for something that had already happened, namely he sought a condemnation of the utterances of the deputies which were said to have caused damage to him. The trial judge stated that no personal right of Mr. O'Brien's fell to be adjudicated on by the CPP. The trial judge went on to state that Mr. O'Brien's position:-

> "… stands in stark contrast to the situation in the *Re Haughey* case where Mr. Haughey stood at risk of a finding that he had been involved in arms importation with the IRA and the Gardaí in *Maguire v. Ardagh*, who stood in peril of a finding that they had killed a man unlawfully. Accordingly, the essential features of the plaintiff's situation can be readily distinguished from those presenting in *Re Haughey* and *Maguire v. Ardagh*."

4.18 The High Court then went on to assess the impact of *Callely* on the issue of justiciability, noting that the proceeding being carried out by the Committee on Members' Interests of Seanad Éireann in that case were conducted under Article 15.10 of the Constitution but also under the Standards in Public Office Act 2001 and the Ethics in Public Office Act 1995. The trial judge summarised the positions adopted by this Court in *Callely* in relation to justiciability in the following manner:-

> "[A] majority of four (Murray, Hardiman, McKechnie and Fennelly JJ.) held that issues relating to the work of the Committee were justiciable, while a minority (Clarke, O'Donnell JJ. and Denham C.J.) took the view they were non-justiciable.

Fennelly J., who in a sense had the 'swing' vote on the issue of justiciability, would have found the proceedings non-justiciable had it not been for the legislative basis for the Committee's work in that case."

4.19 Therefore, the trial judge concluded that, applying the views of Clarke, O'Donnell JJ., Denham C.J. and Fennelly J. in *Callely*, the outcome in the present case should be one of non-justiciability, as it involved an Article 15.10 inquiry which neither had a legislative basis nor fell within what the trial judge refers to as "the *Haughey-Abbeylara* principle". Furthermore, the trial judge stated that the case for non-justiciability was stronger here than in an "ordinary" Article 15.10 inquiry, given the close connection between the work of the CPP and the status of utterances under Articles 15.12 and 15.13. The trial judge continued:-

"The Committee on Procedure and Privileges in the present case was reviewing and ruling upon the Deputies' utterances in the Dáil itself; if this Court were to review and rule upon the Committee's work, it would, in my view, be inevitably drawn into adjudicating on questions relating not only to the content of the utterances but also questions as to the motivation of the speakers. This is clear, for example, from the fact that the Court has been invited to determine that the Committee erred in reaching the conclusion that the Deputies acted in good faith. Judicial scrutiny of parliamentary utterances to discern the Deputies' motivation is precisely the kind of exercise that should not be engaged upon, according to *Ahern v. Mahon*, and it seems to me that judicial scrutiny of the Committee's ruling on this precise matter must be equally prohibited."

4.20 Regarding the interaction between Article 15.10 and Articles 15.12 and 15.13, the trial judge felt that it would be "artificial" to set aside those latter provisions in an Article 15.10 inquiry involving adjudication on parliamentary utterances. The trial judge held that the door with respect to justiciability in the present case was "not only closed but double-locked; first, because it is an internal inquiry pursuant to Article 15.10, and secondly, because it concerns utterances protected by both Articles 15. 12 and 15.13." The trial judge further relied on the judgment of the Divisional High Court in *Kerins*, stating that that judgment made it clear that utterances and reports of committees also fall within the immunity of Article 15.13 provided they are not within the *Haughey- Abbeylara* principle. Therefore, the High Court concluded as follows regarding the second limb of Mr. O'Brien's case:-

> "It follows that I consider all of the issues raised in relation to the Committee proceedings to be non-justiciable and in the circumstances, I think it would be inappropriate to express views on the individual complaints made in respect of the Committee's interpretation of the Standing Orders or its conclusions on the plaintiff's complaints."

4.21 The High Court finally turned to Mr. O'Brien's argument that, even if the Court found that the Oireachtas defendants were immune from liability in these proceedings, the State was nonetheless liable for damage caused to the plaintiff for failure to vindicate his personal rights. Mr. O'Brien does not seek to appeal the decision of the High Court in this regard. Therefore, it might suffice to note that this argument was rejected by the Court.

4.22 Thereafter, Mr. O'Brien sought leave to bring a leapfrog appeal to this Court. As the terms of the leave granted frames the issues which are currently required to be decided it is appropriate to turn to the grant of leave.

5. The Leave to Appeal

5.1 By determination (*O'Brien v. The Clerk of Dáil Éireann & ors.* [2017] IESCDET 100) this Court granted leave to Mr. O'Brien to appeal directly from the decision of the High Court.

5.2 The basis on which leave to appeal was described in the determination of this Court is as follows:-

> "It appears to be accepted by the respondents that the case meets the criteria of general public importance and/or the interests of justice. It is submitted by the applicant that the matter is suitable for a direct appeal in that any clarification of the existing authorities (if clarification is required) should come from this Court. Further, it seems that the case concerns a single issue of law and its parameters would therefore be unlikely to be reduced by further analysis in the Court of Appeal.
>
> In those circumstances the Court will grant leave to appeal on the grounds set out in the notice of application (subject to any possible refinement in case-management)."

5.3 The first ground set out in the notice of application was as follows:-

> "The High Court's finding with respect to the Non-Justiciability of the Committee's determinations was in error as was its consequent refusal to grant the reliefs sought on the Statement of Claim pertaining to the Committee's determinations."

5.4 The second ground related to the High Court's decision in relation to costs. That Court decided that, while the issues raised by Mr. O'Brien were novel, they were not novel enough to warrant exercising what the trial judge described as "undoubtedly an exceptional jurisdiction" to depart from the ordinary rule that costs follow the event. Therefore, the High Court judge made an order that Mr. O'Brien pay the costs of the defendants. Mr. O'Brien was granted leave to appeal against that costs order but consideration of that question was left over until the substantive appeal had been determined. Those costs issues are not, therefore, dealt with in this judgment.

5.5 Having regard to the decision delivered by this Court today in *Kerins*, and to the comments made earlier in this judgment, it makes sense to commence an analysis of the proper resolution of the issues which arise on this substantive appeal by identifying those issues which are common between this appeal and that in *Kerins* and setting out the conclusions reached by this Court in *Kerins* on those common issues.

6. The Common Issues and their Resolution

6.1 It first must be recalled that this Court, in *Kerins*, did determine that there was no absolute barrier to the justiciability of the issues which Ms. Kerins sought to raise in her proceedings. It was held that a court could review the actions of a House or Houses of the Oireachtas, or a committee appointed by a House or Houses, for the purposes of determining the lawfulness of the actions concerned. However, it was acknowledged that the privileges and immunities conferred on the Houses of the Oireachtas by Article 15 of the Constitution did place a significant limitation on the circumstances in which it would be appropriate for a court to assess the lawfulness or otherwise of the actions of parliament.

6.2 In substance, this Court held that there were two important restrictions on a court which was invited to rule on matters which occurred within the Houses of the Oireachtas. First, there are the express privileges and immunities conferred by Article 15 itself. As the Court noted, the People have excluded from the ambit of the courts certain types of complaints which a citizen might otherwise be entitled to litigate. The purpose behind those exclusions is to promote freedom of speech within the Oireachtas and to permit the Houses of the Oireachtas to conduct their legitimate constitutional business without undue interference from the courts. As noted by Ní Raifeartaigh J. in her judgment in this case, any undue interference by the courts would have a "chilling" effect both on free speech within the Oireachtas and the conduct by it of legitimate constitutional business.

6.3 In addition, this Court in *Kerins* has identified that the separation of powers identified in the Constitution requires that a court be particularly slow to interfere with matters which occur within the Oireachtas. However, the Court rejected the argument put forward on behalf of the PAC and the State respondents in *Kerins* which was to the effect that there was an absolute barrier to justiciability save in those cases where the coercive power of the State was sought to be invoked.

6.4 The particular circumstances which the Court considered gave rise to the possibility of it being appropriate for a court to intervene were the fact that the PAC, in the circumstances of *Kerins*, operated significantly outside of its terms of reference, that a relevant committee of the Oireachtas (the CPP) had also considered that the PAC was operating outside those terms of reference, and the possibility (subject to an appropriate conclusion on the facts being capable of being reached at a subsequent hearing) that it might be considered appropriate to characterise the actions, as opposed to the utterances, of the PAC

as being unfair in the sense of having invited Ms. Kerins to attend before it on one basis but having proceeded to conduct its hearing on a significantly different basis.

6.5 Against that background, it will be necessary, for the purposes of considering the issues which arise in this case, to consider whether the actions of the CPP can be assessed as to their lawfulness in the circumstances of this case.

6.6 Next, it should be recalled that in *Kerins* the Court determined that the same privileges and immunities which apply to a House or the Houses of the Oireachtas or their members apply in relation to a committee or its members where that committee has been entrusted by a House or the Houses with the task of conducting part of the constitutional remit of the House or Houses concerned.

6.7 It is, of course, the case that Mr. O'Brien no longer seeks a remedy from this Court in respect of what actually happened in the Dáil. Rather, he seeks to challenge what happened before the CPP. However, on that basis it will be necessary to consider, in the light of certain comments made in *Kerins*, whether it can properly be said that the CPP was carrying out a constitutional function of the Houses of the Oireachtas so that it and its members would attract the same privileges and immunities that would attach to the Houses themselves on the basis of the analysis conducted in *Kerins*.

6.8 In that context, it must be noted that there may be an issue as to whether there might be a constitutional obligation on the Houses of the Oireachtas to put in place appropriate measures to ensure that the constitutional rights of citizens were protected within the Houses (and in circumstances where the courts did not have jurisdiction precisely because of the privileges and immunities which the Houses enjoy). If that proposition should find favour

then it would follow that the role of the CPP in considering complaints by citizens to the effect that their rights have been interfered with by what happened in the Houses might fall to be considered as the exercise of a constitutional function of the Houses (being to put in place a mechanism to secure the rights of citizens) which had been conferred on the CPP. It will be necessary to return to this question in the course of this judgment.

6.9 Finally, there is the issue which was touched on in *Kerins*, but not determined, as to whether there might be a *Callely* type exception to the privileges and immunities of the Houses or their members in the case of a particularly egregious breach. The question noted in *Kerins* was the possibility that it might be said that a particularly egregious or persistent breach by the Houses of their possible constitutional obligation to put in place appropriate rules and enforcement mechanisms to protect the rights of citizens might lead to the issue becoming justiciable.

6.10 As that issue was also not determined in *Kerins* it will be necessary to return to it in this case.

6.11 However, there are some important features of the issues which arise in these proceedings which it is important to record and consider before going on to discuss the extent to and the manner in which the overall conclusions reached in *Kerins* impact on the resolution of this case and thereafter to discuss the proper answers to the questions which fall for determination on this appeal.

7. Some Discrete Questions

7.1 It is first important to recall that the parties to the privacy proceedings commenced by Mr. O'Brien returned to the trial judge in those proceedings (Binchy J.) for the purposes of

clarifying whether, in the view of Binchy J., the order which he had made was intended to restrain members of the Houses of the Oireachtas from disclosing any of the information specified in that order in the course of contributions in the Houses themselves. It is clear that Binchy J. indicated that his order was not intended to extend that far. However, it seems highly likely that the considerations which led Binchy J. to so indicate stemmed from the very constitutional questions which lie at the heart of these proceedings. Given the undoubted fact that there are significant immunities conferred against proceedings arising out of utterances made in the Houses of the Oireachtas, it seems clear that Binchy J. simply did not consider it appropriate that any order which he might have made should be considered to purport to interfere with the freedom of speech in the Houses guaranteed by the Constitution.

7.2 It follows that no question of contempt of court as such arises as a result of the revelation of the relevant information in the Dáil. However, that is far from the end of the matter.

7.3 As has been repeatedly emphasised by this Court, and as is reiterated in the judgment delivered in *Kerins,* the constitutional rights of citizens do not disappear at the gates of Leinster House. Rather, the constitutional architecture requires that, to the extent that the Constitution itself confers immunities in respect of court proceedings relating to what happens within Leinster House, citizens must look to the Houses themselves to vindicate their rights including, where appropriate, resolving any question of balancing rights and obligations which arise.

7.4 The fact that a court order designed to protect a constitutional right of privacy does not, in and of itself, extend to precluding utterances made in the Houses of the Oireachtas

does not mean that, in an appropriate case, there may nonetheless be an impermissible interference with the privacy rights of a citizen as a result of utterances made in the Houses. Furthermore, where such interference takes place there may at least arguably be a concomitant obligation on the Houses to have, at a minimum, mechanisms in place through which a citizen may seek vindication of any rights said to have been infringed.

7.5 However, it is also important to identify some significant areas of difference between this appeal and the *Kerins* appeal.

7.6 First, the "utterances" giving rise to Mr. O'Brien's initial concern were clearly utterances made in a House of the Oireachtas and therefore none of the questions concerning the scope of any immunity enjoyed by a committee, which are discussed in detail in *Kerins*, have any application to this appeal.

7.7 Second, those utterances were not made in the context of a situation where Mr. O'Brien had been invited to participate in a process and had accepted that invitation. Thus, the issues discussed in *Kerins* as to whether obligations lie on the Houses of the Oireachtas generally or their committees as a result of an invitation to a citizen to participate directly in their business have no application on this appeal.

7.8 In that context, it is appropriate to turn to the argument put forward on behalf of Mr. O'Brien.

8. Mr. O'Brien's Case

8.1 Mr. O'Brien seeks to argue that, for the purposes of the orders sought from this Court, Articles 15.12 and 15.13 are not engaged. First, Mr. O'Brien contests the High Court's

conclusions to the effect that, in asking the Court to review and rule on the CPP's work, the Court is drawn into adjudications relating to the content of the utterances in question as well as the motivation of the speakers. In the context of his complaint regarding the CPP's finding that Deputy Murphy had acted in good faith, Mr. O'Brien argues that he is in fact contending that there was no evidence or submission enabling the CPP to make this determination. This contention, he submits, entails looking at the work of the CPP and not the motivation of Deputy Murphy. It is submitted that a similar view can properly be taken in respect of other aspects of Mr. O'Brien's claim. It is submitted that an order to the effect that the CPP omitted to determine that Order 57(4) and/or (5) had not been abided by would not offend the separation of powers.

8.2 Alternatively, it is argued that, even if the relief sought by Mr. O'Brien would involve adjudicating on utterances, that this is irrelevant as Articles 15.12 and 15.13 do not extend to the CPP.

8.3 Having suggested that it is not clear on the authorities that Article 15.13 does in fact apply to committees, Mr. O'Brien submits that this is irrelevant in the present context as Mr. O'Brien does not know what utterances were made by CPP members in coming to their decision. Rather, it is argued that Mr. O'Brien's declaratory relief is aimed at the *decisions* of the CPP and as such these cannot constitute utterances made by a particular member of the Houses of the Oireachtas. Mr. O'Brien goes on to argue that, in any event, the grant of declaratory relief could not infringe Article 15.13 because it would not make a member "amenable" within the proper meaning of that provision.

8.4 Mr. O'Brien also submits that Article 15.12 cannot apply to the CPP itself, as distinct from the utterances which it was considering. It is argued that the reasoning of the High Court is inconsistent in relation to the distinction between Articles 15.12 and 15.13 and that it is unclear as to the basis on which that Court considered that Article 15.12 was relevant to the determination of the CPP. It is further argued that the declaratory relief sought by Mr. O'Brien is aimed at the decisions of the CPP and not at any publication or medium by which the determinations were delivered. It is contended that the letters communicating the determination could not have constituted "an official report or publication" as they were sent privately to Mr. O'Brien and were not published widely. Therefore, it is argued, they do not fall within the terms of s. 92(2)(b) of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 ("the 2013 Act"), nor Article 15.12. Indeed, Mr. O'Brien argues that s. 92 of the 2013 Act and Article 15.12 merely provide that a report is "privileged" wherever published and suggests that this does not prevent declaratory relief. Finally, Mr. O'Brien submits that, if Article 15.12 were to apply to committee determinations, this would be irreconcilable with *Haughey* and *Abbeylara*, as it would allow a committee to circumvent those authorities by "fast-forwarding" a report and then claiming immunity.

8.5 Against that background it is necessary to turn to a discussion of the issues which arise in this case above and beyond the matters considered and determined by the judgment of this Court in *Kerins*.

9. Discussion

9.1 Having regard to the argument put forward on behalf of Mr. O'Brien, it seems to the Court that it is necessary to attempt to characterise the precise legal and constitutional status

of the decision of the CPP which he seeks to challenge. As is clear, the question which the CPP was considering was as to whether Mr. O'Brien's complaint concerning the relevant deputies was well founded. Can the decision of the CPP in that context properly be characterised as an "action" of the CPP and, if so, is it potentially covered by the privileges and immunities to be found in Article 15?

9.2 First, it must be recalled that the standing orders of the Houses confer on the CPP the task of determining whether there has been a breach by a deputy or deputies of the rules and standing orders of the Houses. There is no doubt but that Article 15.10 confers on each House the power to make such rules and standing orders and the power to attach penalties for their infringement. On one view, therefore, it might be said that a complaint to the appropriate designated body (being the CPP) of a breach of rules or standing orders is a matter purely internal to the Houses which is not justiciable in the light of the majority view in *Callely*. That would certainly seem to be the case, following *Callely*, in circumstances where a deputy or senator sought to challenge the proceedings of the CPP.

9.3 As already noted, it has frequently been said that the constitutional rights of citizens do not disappear inside the gates of Leinster House. Rather, as has also been noted, it is for the Oireachtas itself to protect those constitutional rights in respect of that which occurs within the Houses. It follows that the role of protecting the rights of citizens for actions within the Houses is a constitutional role of those Houses, and one, therefore, which the Houses are bound by the Constitution to fulfil. That analysis does not, of course, answer the question of whether the courts have any role in overseeing whether the Houses have fulfilled that obligation. But the starting point has to be to acknowledge that the Houses do have a

constitutional obligation to protect the rights of citizens in respect of that which transpires within the Houses themselves.

9.4 Furthermore, it seems to the Court that it is appropriate to characterise the mechanism whereby Mr. O'Brien was entitled to make a complaint to the CPP as forming part of the constitutional response by the Houses to their obligation to protect the rights of citizens. It is, of course, the case that the consideration and determination of a complaint against a deputy or senator might be seen as only an indirect way of vindicating the rights of a citizen in an appropriate case. However, such indirect means can have particular practical importance, not least because of the fact that the existence of a mechanism whereby appropriate complaints can be considered and, if necessary, sanctions imposed, may properly be seen as part of the means by which the rights of citizens in respect of that which occurs within the Houses can be protected.

9.5 It is always necessary to be careful in pushing analogies too far. However, it is worth noting that the European Court of Human Rights in *McCann v. United Kingdom* (1996) 21 E.H.R.R. 97 determined that there was an obligation on a subscribing state to ensure that there was a proper investigation into the circumstances surrounding the death of a person allegedly involving the state or its agencies. This obligation was seen as deriving from the right to life guaranteed by the European Convention on Human Rights. Obviously, no investigation by the state could bring the person concerned back to life nor could that person, precisely because they were no longer alive, be given any direct remedy. Nonetheless, the obligation to investigate was seen as deriving from the requirement to protect the right to life.

9.6 Likewise, it can be said that the obligation to consider whether there have been breaches of the rules and standing orders of the Houses which have infringed the rights of citizens can be seen as deriving from the constitutional rights of a citizen coupled with the constitutional obligation of the Houses to protect those rights. On the basis of that analysis it is appropriate to characterise the work of the CPP, when considering a complaint by a citizen that the rights of the citizen concerned have been infringed within the Houses, as constituting part of the constitutional function of the Houses in complying with their obligation to protect those rights. On that basis, it seems to the Court that, while the work of the CPP, in respect of its own members and when acting on foot of standing orders, is not justiciable, the same considerations do not necessarily apply when the CPP is considering a complaint by a citizen where the substance of the complaint concerned is that the citizen's rights have been infringed by a House or Houses. It is important, in that context, to distinguish such a case from a case where a citizen merely brings to the attention of the CPP an alleged breach of rules or standing orders which does not affect the rights of the citizen concerned directly but might rather be described as being of a public interest nature.

9.7 From that analysis, it seems to follow that it can properly be said that the CPP, in considering the complaint of Mr. O'Brien, was carrying out a delegated function of the Dáil in protecting the constitutional rights of citizens in respect of matters occurring within the Dáil. It follows in turn from the analysis conducted in *Kerins* that the same privileges and immunities attach to the CPP as would attach to the Dáil were it considering the same matter.

9.8 The next issue which therefore arises is as to whether those privileges and immunities render the decision of the CPP non-justiciable.

9.9 In that context it is important to recall that the only complaint made to the CPP by Mr. O'Brien concerned an allegation which directly arose out of utterances made by members of the Dáil in the Dáil. It is in the context of the clear immunity from amenability conferred on deputies in respect of utterances in the Dáil that the role of the CPP in considering such a complaint must be assessed. It is true, of course, that the only consequence for a deputy of an adverse finding by the CPP would be that the deputy concerned might be subject to such sanction as the CPP might appropriately impose. It is further clear that the imposition of such a sanction is expressly permitted by the Constitution (on the basis that it is imposed on foot of standing orders and by a House or its delegated committee) and there could, therefore, be no question of such a determination by the CPP infringing any constitutional privilege or amenity in respect of utterances.

9.10 However, the broader question is as to whether a court, in reviewing the decision of the CPP in such a case, might be said to be indirectly or collaterally (and, therefore, impermissibly) considering the appropriateness or otherwise of utterances made in the Houses. Ultimately, the only consequence of a successful challenge to a decision of the CPP which, as here, exonerated deputies in respect of utterances made in the Houses, could be that the deputies would be put on risk again of being subject to an adverse finding and a sanction. It is true that any such sanction, should it ultimately be imposed after a further consideration by the CPP of the matter after its original decision had been quashed, would nonetheless be a sanction imposed in a constitutionally permissible way from within the machinery of the Houses. But it nonetheless would remain the case that part of the process which led to such an ultimate sanction would have been taken by a court rather than a House or a duly delegated committee of the House concerned. In the Court's view such a course of action

would infringe the immunity conferred on deputies in respect of their utterances in the House. To enable a court to interfere in the process whereby the utterances of deputies are assessed by the duly appointed committee of the relevant House would in substance be to allow the Court to have a role in the ultimate determination of whether those utterances were found to be impermissible and in a decision as to whether, and if so what, sanctions were appropriate. While indirect, such a course of action would amount to making a deputy amenable to a court in respect of utterances in the House. This would, in the Court's view, be a breach of Article 15.13 and would amount to an impermissible departure from the separation of powers.

9.11 It should be recalled that, in *Kerins*, the Court identified two separate but connected bases on which it may be said that a court lacks jurisdiction to intervene in respect of matters which occur within the Oireachtas. The first of those bases concerned a situation in which it was sought directly to make a member of a House of the Oireachtas amenable to a court in respect of something said in the House or in its committee or where the Court's intervention would amount to a breach of the privileges conferred by the Constitution itself. As noted in *Kerins* to do so would be a clear breach of Article 15. However, the Court went on to note that it would seem "to follow that that which cannot be achieved directly cannot be achieved by collateral means. It would clearly be impermissible to ask a court to intervene in a way which would, by necessary implication, require the Court to at least indirectly make a member amenable or breach a privilege conferred on a member. Thus, there is a clear area of non-justiciability which surrounds utterances made in the Houses or their committees or matters which are sufficiently closely connected to such utterances as to enjoy the same privileges and immunities".

9.12 While the complaint which Mr. O'Brien urges that this Court should consider does not directly involve utterances made in the Oireachtas, it follows from that passage from the judgment in *Kerins* that it is necessary for the Court to consider whether Mr. O'Brien's complaint may amount, in substance, to an indirect or collateral challenge to utterances made in the Dáil.

9.13 It should be emphasised that the only matter under consideration on the facts of this case is a decision of the CPP which involves a complaint confined to utterances made in the Dáil. It seems to the Court that a judicial decision which quashed or interfered with a determination of the CPP in such a case would necessarily amount to an indirect or collateral challenge to the utterances themselves. As noted earlier the only ultimate practical outcome of a successful challenge would be either that the CPP would be required to re-consider the matter (in the event that its decision was quashed) or might feel obliged so to do (in the event of a court declaration). In either eventuality the consequence would potentially be the re-opening of the complaint to the CPP and the possibility that a different view might be taken of the utterances of the deputies concerned. Such a process would undoubtedly involve the Court in being at least indirectly involved in the assessment of utterances made in the Houses and would, in the Court's view, clearly be in breach of the first leg of the basis of immunity discussed in *Kerins*.

9.14 It follows, in the Court's view, that the challenge to the decision of the CPP in this case is non-justiciable.

9.15 However, the Court should not be taken as reaching any decision as to whether or not decisions of the CPP might be justiciable in other circumstances. It is, for example, open to

argument that a decision of the CPP in relation to the conduct of a deputy, in circumstances where a consideration of that conduct by a court would not breach the constitutional privileges and immunities conferred by Article 15, may be justiciable. The Court would propose leaving over such a question over to a case where the nature of the matter which was being considered by the CPP was not one which so clearly involved a complaint about utterances which have the protection from amenability to the courts expressly conferred by Article 15.13.

9.16 However, as suggested earlier, in the light of the Court's finding that the decision of the CPP in a case such as this is non-justiciable, the question of whether a *Callely* type exception arises. The Court proposes to turn to that question.

10. Is there a *Callely* Type Exception

10.1 It is clear from the majority view expressed by this Court in *Callely* that there may be exceptional circumstances where the very basis of the constitutional architecture might be under threat, so that the courts, as guardians of the Constitution, may have an obligation to act in respect of matters which might otherwise be considered to be outside the scope of the courts' proper role having regard to the separation of powers. On that basis, it might be argued that a compete abdication by the Houses of the Oireachtas of their obligation to put in place measures to protect the rights of citizens in respect of that which may occur within the ambit of the privileges and immunities conferred on them could be open to challenge. However, it is clear, even on the most expansive reading of *Callely*, that a role for the courts could only arise, if at all, in truly exceptional circumstances. A *Callely* type exception could never arise simply because it was said that a House or the Houses or an appropriate

committee had been in error in the way in which they had dealt with the protection of the rights of a citizen in a particular case. To take any other view would, in substance, render the privileges and immunities of the Houses nugatory.

10.2 It follows that, even if a *Callely* exception exists, it could only apply in circumstances where there was cogent evidence that the Houses had abrogated their constitutional duty to have appropriate mechanisms in place. This might, in theory, be capable of being established because of a particularly egregious failure to vindicate the rights of a citizen without any remedial action being taken to ensure that any such failure would not be repeated. In such a case it might be inferred that the Houses truly did not intend to fulfil their constitutional role of protecting the rights of citizens.

10.3 Likewise, persistent and unrectified failures might lead to a similar conclusion. But the question has to be asked as to whether, even if the Court retains such a residual discretion, it could potentially arise on the facts of this case.

10.4 There may well be an argument that the CPP was in error in some of the ways in which it dealt with Mr. O'Brien's complaint. While the CPP was clearly correct to indicate that it had no role in determining whether someone was in contempt of court (for to do so would itself be a breach of the separation of powers), nonetheless there may well have been an issue, which the CPP did not address, as to whether it was appropriate for deputies to act in a way which might be said to have had, in substance, deprived a citizen of the benefit of an order of the Court to decide to protect that citizen's right to privacy. Likewise, it might be said that the CPP over-readily came to the view that those concerned had acted in good faith without sufficient inquiry. In making those points it must be recognised that the CPP would,

in any event, enjoy a significant margin of appreciation in deciding whether the constitutionally recognised principle of freedom of speech within the Houses of the Oireachtas outweighed any other relevant considerations.

10.5 But even if it could be said that the CPP reached an impermissible conclusion in the circumstances of this case, same would fall a very long way short indeed of demonstrating the sort of egregious or persistent failure to vindicate the rights of a citizen which might invoke a *Callely* type exception, if one can be said to exist.

10.6 The Court is not satisfied, therefore, that a factual basis has been made out for the application of a *Callely* type exception, even if one does exist in the circumstances of the role of the CPP in considering a complaint by a citizen that their constitutional rights have been infringed by utterances made in the Dáil. Given that finding, it does not seem to the Court that it would be appropriate to reach a definitive conclusion on whether a *Callely* type exception exists or, indeed, the precise parameters of any such exception if it does exist, for a conclusion on those issues could not affect the result of this case.

10.7 The Court, therefore, concludes that, even were a *Callely* exception to exist, it could not avail Mr. O'Brien.

10.8 For those reasons, the Court concludes that the High Court was correct to treat Mr. O'Brien's claim, in the circumstances of this case, as being non-justiciable and to dismiss the claim.

11. Conclusions

11.1 It is important to note both the common ground between the issues which arise in this case and those which arose in *Kerins* in respect of which judgment was delivered last week. It is also, however, important to note the differences.

11.2 Before the High Court, Mr. O'Brien sought relief in respect of two different types of claim. The first leg concerned directly statements or "utterances" made by two deputies in Dáil Éireann. The second leg concerned the manner in which the CPP dealt with a complaint which Mr. O'Brien had made in respect of those utterances.

11.3 No appeal was pursued in respect of the first set of issues so that this judgment is concerned only with Mr. O'Brien's challenge to the way in which his complaint was dealt with by the CPP.

11.4 In its judgment in *Kerins*, this Court identified two significant barriers to the justiciability of issues arising from matters which occur within the Houses of the Oireachtas. The first set of restrictions derive from the actual wording of the relevant sub-articles of Article 15 of the Constitution which confer significant privileges and immunities on the Houses of the Oireachtas and their members. As pointed out by this Court in *Kerins*, and as reiterated in this judgment, the People, by including those measures in the Constitution, have undoubtedly created an area where any rights which may allegedly be infringed can only be protected by the Oireachtas and not by the courts.

11.5 For the reasons set out in this judgment, the Court confirms the view expressed in *Kerins* that included in the matters which are immune from review by the courts are questions which relate indirectly or collaterally to utterances made in the Houses. The Court has concluded that the challenge which Mr. O'Brien has sought to bring to the decision of the

CPP involves, in substance, an indirect or collateral challenge to the utterances of the deputies themselves. The only practical consequence of a successful outcome to proceedings such as this would be that it might lead to a reconsideration by the CPP of its decision in respect of Mr. O'Brien's complaint. If that should lead to a different result, then a court would have been, at least indirectly or collaterally, involved in dealing with utterances made in the Houses. In the Court's view such a course of action is impermissible under the Constitution.

11.6 The Court has also considered whether it might be said that there is a *Callely* type exception to the general rule against non-justiciability which the Court has held applies in this case. However, the Court has indicated that, even if such an exception may exist, it could only apply in the case of either an egregious breach by the Oireachtas of its obligation to protect the rights of citizens in respect of matters which occurred within the Houses or a persistent failure to deal with matters in a way from which it might legitimately be inferred that the Oireachtas did not intend to afford appropriate protection to citizens. Neither of those situations could be said to exist on the facts of this case so that, even if a *Callely* type exception does exist, it could not avail Mr. O'Brien. For those reasons the Court proposes to leave over the question of whether such an exception exists to a case in which it might prove decisive.

11.7 However, in that same context, the Court has also noted that there is a constitutional obligation on the Houses of the Oireachtas to provide protection for the constitutional rights of citizens in respect of matters which occur within the Houses. Thus, the role of the CPP, in considering complaints by citizens, may involve the carrying out of a delegated constitutional

function by the CPP. The CPP thus enjoys the same immunities and privileges as the Houses when carrying out that role.

11.8 However, having made those observations, the fundamental point on which this appeal turns is the view of the Court that the challenge which Mr. O'Brien seeks to bring to the decision of the CPP would amount to an indirect or collateral challenge to utterances made in the Dáil, and as such that challenge is impermissible. For those reasons, the Court concludes that Ní Raifeartaigh J. was correct in her conclusion that these proceedings are non-justiciable and further correct in her decision to dismiss Mr. O'Brien's case. On that basis the appeal must be dismissed.