OUTER HOUSE, COURT OF SESSION

[2018] CSOH 69

P831/16

OPINION OF LADY CARMICHAEL

In the Petition of

THOMAS SHERIDAN

Petitioner

against

SCOTTISH CRIMINAL CASES REVIEW COMMISSION

Respondent

Petitioner: Dangerfield, Solicitor Advocate; Archer Coyle
Respondent: Moynihan QC; Scottish Criminal Cases Review Commission

21 June 2018

Introduction

[1] The petitioner seeks judicial review of a decision of the respondents to decline to refer his conviction for the crime of perjury to the High Court of Justiciary. The allegation of perjury, in respect of which the petitioner was convicted on 23 December 2010, arose from evidence he gave in civil proceedings which he brought against News Group Newspapers Ltd ("NGN"). The action was for defamation, and the evidence was given at a civil jury trial. The petitioner was formerly an MSP and the leader of the Scottish Socialist Party ("SSP").

[2] The respondents issued a decision on 31 March 2015, with a statement of reasons ("SOR"); and following further submissions a further decision on 27 May 2016 with a supplementary statement of reasons ("SSOR"). The respondents made a further decision, in relation to a discrete issue, on 1 June 2017. In relation to that discrete issue it supersedes the earlier decisions, and I deal with it separately.

Background

[3] The background to and history of the civil proceedings and of the ensuing criminal proceedings is narrated at paragraphs 1-22 of the Opinion of an Extra Division in *Sheridan* v *News Group Newspapers Ltd* 2017 SC 63. I do not repeat that narrative in full here, although I borrow from it. For the purposes of the present proceedings it is sufficient to record certain aspects of that history only. The issue for the jury was:

> "Whether the statements in the articles published by [NGN] in [various editions of the 'News of the World' ('NOTW')] falsely and calumniously said that the pursuer committed adultery (with Fiona McGuire, [AK] and other unnamed individuals); that he was a 'swinger' and that he participated in orgies; and while he claimed to be teetotal drank champagne; meaning thereby that he was a hypocrite and an abuser of his position as a party leader to the loss, injury and damage of the pursuer."

[4] NGN pled that the articles were true or at least substantially true. They were ordained to lead, and led evidence from Fiona McGuire, AK, and another woman, KT, who said that they had had extra-marital sexual relations with the petitioner. The petitioner denied those allegations. The pursuer succeeded in his action, and was awarded £200,000. NGN enrolled a motion for a new trial. NGN paid George McNeilage, a friend of the petitioner, £200,000 for a videotape ("the McNeilage tape"). Mr McNeilage claimed that it was a record of the petitioner making admissions which contradicted the evidence he gave during the jury trial.

[5] After the civil trial, Barbara Scott, a member of the SSP, passed to the police manuscript notes which she had taken at an emergency meeting of the Executive Committee of the SSP on 9 November 2004. She had been taking the minutes of the meeting.

[6] Criminal proceedings for perjury against the petitioner, and his wife, Gail Sheridan, who had also given evidence at the civil jury trial, followed. It was alleged that he had given false evidence in the civil jury trial in that, amongst other things, he had falsely denied that:

- at an SSP executive committee meeting on 9 November 2004, he made admissions about two visits to Cupid's Club;
- at the Moat House Hotel on 14 June 2002, he had sexual intercourse with a woman, PQ, while in a bedroom with another man XY;
- between 1 January 1994 and 27 September 2002, he had a sexual relationship with AK; and
- between 1 January 2000 and 31 December 2005, he had a sexual relationship with KT (a party worker).

The indictment did not contain any allegation that he had lied in his denial of sexual relations with Fiona McGuire.

[7] The petitioner was found guilty, by a majority, of the following offences:

> "(2) on 21 July 2006 … you … being affirmed as a witness in a civil jury trial of an action for defamation then proceeding there at your instance … did falsely depone [denials of the matters specified in (A) to (C), (M) and (O) below] the truth being as you well knew,
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> (A) that on 9 November 2004 at the Executive Committee meeting of the Scottish Socialist Party held at 70 Stanley Street, Glasgow you did admit to attending said Cupid's [Club] in Manchester on two occasions in 1996 and 2002 and that you had visited said club with said [AK];
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> (B) that at said meeting it was stated by said Alan William McCombes and Keith Robert Baldassara that they had previously raised the issue of you attending a sex club in Manchester and that you had admitted to them that it was true;

> (C) that at said meeting you did not deny having visited a swingers' club in Manchester; …
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> (M) that on 26 September 2002 you did attend said Cupid's in Manchester with said Andrew McFarlane, Gary Clark, [AK] and [KT] and that you had visited a club for swingers; …
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> (O) that between 1 January 2000 and 31 December 2005, both dates inclusive, you did have a sexual relationship with [KT], and that you had stayed overnight with her at [an address in Dundee]."

[8] It was a feature of the petitioner's defence in the criminal proceedings that he contended that NGN had "driven" the criminal proceedings against him. In his address to the jury, the petitioner said:

> "The Crown is supposed to prosecute in the public interest. That's what [the advocate depute] said yesterday. You may very well ask yourselves whether this prosecution was in the public interest, or was it in the interests of the News of the World?
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> [The advocate depute] yesterday tried to detach the case from the News of the World. He doesn't represent the News of the World, he told you. He represents the Crown. This case [the advocate depute] would have you believe, has got nothing to do with the News of the World. He said the result of the civil jury trial has no bearing on the case. I beg to differ, ladies and gentlemen. The News of the World are at the very heart of this case, no matter how stridently the advocate depute tries to deny it.
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> Think about this. It's the News of the World video that the advocate depute relies upon and plays to you yesterday in his summation. It's the News of the World photographs that the police and the advocate depute show to witnesses. It is the News of the World who provide names of potential witnesses to the police during their investigation. It's the News of the World who actually pay, or offer to pay, at least eight important witnesses in this case, according to the testimonies of both Bob Bird and Douglas Wight …"

[9] For the purposes of the present petition, it is necessary to note that the Crown led evidence from witnesses who worked for NGN, from witnesses who were members of the SSP, and from witnesses with whom the petitioner was said to have had sexual relations or who were said to have been present when he participated in sexual activity. A number of

witnesses who were members of the SSP gave evidence about what had happened at the emergency meeting of the Executive Committee of the SSP on 9 November 2004. That included evidence about admissions that the petitioner had made at that meeting and on earlier occasions which were mentioned at the meeting. The evidence at the trial is summarised in the SOR, and the petitioner took no issue in the present proceedings with the accuracy of that summary.

[10] The petitioner sought leave to appeal against his conviction, but that was refused at first and second sifts.

[11] During the period after the trial the Crown disclosed documents to the petitioner's agent, which had been recovered in the course of police operations post-dating the trial in connection with investigations into allegedly illegal activities by journalists. A helpful summary appears in Lord Turnbull's Opinion in *Sheridan* v *NGN* [2018] CSOH 20 at paragraphs 9-12.

The application for commission and diligence

[12] In the course of the criminal proceedings, the petitioner sought recovery of certain documents by means of commission and diligence. The havers were the Crown, NGN and the Metropolitan Police Service. Lord Brailsford heard legal argument in relation to the motion for commission and diligence on 2 and 3 March 2010, and his decision is recorded in a minute dated 30 March 2010. He also provided a note. Following amendment of the petition and specification of documents, Lord Brailsford granted the prayer of the petition, in respect of certain calls. A commissioner and interim commissioner were appointed. Some of the documents produced were redacted.

[13] It is a feature of the petitioner's submission in this application for judicial review that documents were not produced which ought to have been, and that redactions were made which ought not to have been. The respondents are said to have erred in their approach to exercising their own statutory powers to recover documents after the petitioner made an application to them. Mr Dangerfield's submission was structured largely by reference to documents which he said should have been recovered by reference to one or other of the calls in the specification of documents. It is therefore necessary to provide some detail about the application for commission and diligence.

[14] The petition seeking commission and diligence contained the following averments.

> "Most of the Crown witnesses led and relied upon by the defenders at the civil jury trial are crucial Crown witnesses in present criminal proceedings. The News of the World's or News Group Newspapers Ltd's activity has extended to extensive contact with Crown witnesses including the taking of statements and affidavits; the payment of monies or offers of payment; payment or offers of payment of expenses claims or the provision or offers of the provision of travel and accommodation to Crown witnesses."
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> …
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> Furthermore, there are grounds to suspect that the activities of the News of the World or News Group Newspapers Ltd in relation to the matters giving rise to the civil jury trial, the trial itself, their appeal, and this prosecution may have extended to an interest in covert and unlawful surveillance of the accused including the placing of a bugging device on his car and telephone interception. It is not known whether such surveillance extended to Crown witnesses." … During the Metropolitan Police's investigation into Mr Mulcaire's surveillance activities, the petitioner's name, partial address, postcode, and a mobile telephone number were found on papers recovered."

[15] On 30 March 2010 Lord Brailsford granted commission and diligence in terms of calls 1.3, 1.4, 1.5, 4, 6, 9.1 and 10 of the specification. These, broadly speaking, covered (Call 1) documents showing offers or payments of expenses, monies, gifts, hospitality, accommodation or travel by NGN to any Crown witness; (Call 4) documents showing the examination, transfer, and payment of money or provision of other benefits in respect of the McNeilage tape; (Call 6) documents tending to show surveillance of the petitioner

(references to surveillance of witnesses having been deleted from the call); (Call 9) certain documents relative to the involvement of named expert witnesses; and (Call 10) documents relative to a police investigation into leaks to the press regarding the prosecution of the petitioner.

[16] I was told that Call 2, which had related to provision of payments and other benefits to Fiona McGuire, had been withdrawn by counsel in the course of the discussion before Lord Brailsford. Various other calls had either been withdrawn or not granted. Part of Mr Dangerfield's submission was that they would have been renewed, or new calls formulated, in the light of the information that would have been received had the terms of the order for commission and diligence been complied with.

The petitioner's application to the respondents

[17] On 10 June 2014 the petitioner applied to the respondents for a review of his conviction for perjury. The form on which he made his application did not itself contain an explanation as to why he believed he had suffered a miscarriage of justice, but referred to a letter from his solicitors. It is a feature of this case that the basis of the application has been the subject of considerable later, additional, correspondence. It was also, before the decision of 31 March 2015, the subject of a meeting. In the SOR, at paragraph 34, the respondents narrated the following history, with which no issue was taken in the proceedings before me:

> "34. The applicant's grounds of review were difficult to discern from his solicitor Mr Gordon Dangerfield's initial letter and from the two folders of papers and documentation which accompanied the application, much of which related to the civil trial. At the Commission's request Mr Dangerfield provided a further letter dated 3 July 2014 setting out his grounds of review. Thereafter one of the Commission's legal officers had a lengthy meeting with Mr Dangerfield in an effort to clarify his submissions. Following up on that meeting the Commission's legal officer wrote to the applicant, with a copy to his solicitor by letter dated 11 July 2014 setting out the Commission's understanding of his grounds of review. By letter

> dated 4 September 2014 Mr Dangerfield confirmed that those were the grounds of review to which his submissions related. He informed the legal officer that he had further submissions to make in relation to those grounds of review. By letters dated 15 October and 31 October 2014 he continued to correspond with the Commission and to refer to his intention to provide further submissions following upon receipt by him of further disclosure from the Crown. By letters dated 6 November and 20 November 2014 he provided further documentation, together with submissions as to its relevance to the various grounds of review."

The SOR makes reference also to two interviews with the petitioner, in the presence of his solicitor, on 11 and 15 December 2014, directed to ascertaining the petitioner's position in relation to the evidence relied on by the Crown, and to clarification of the grounds of review.

[18] The grounds of review identified in the respondents' letter of 11 July 2014 were these.

(1) Judicial error in excluding from evidence unredacted material obtained from the means of a commission and diligence and redacted by the commissioner.

(2) Failure by the Crown to disclose the unredacted exculpatory evidence to the defence and to use its own powers to obtain or examine the evidence on behalf of the defence.

(3) Oppression and abuse of process in that

  (a) Crown witnesses Bob Bird, Douglas Wight, Keith Baldassara, Andy Coulson and others conspired to pervert the course of justice in the petitioner's trial and each committed perjury in furtherance of that conspiracy;

  (b) NGN withheld evidence in their possession, deliberately and in contempt of the order pronounced by Lord Brailsford;

(c) Lothian and Borders Police, the Metropolitan Police and the Crown concealed or wilfully failed to disclose or investigate the exculpatory evidence and conspiracies just mentioned.

(4) As a result of the wrongful exclusion of evidence, failures to disclose and oppression, evidence criminally or unfairly obtained was admitted in evidence when it should have been excluded.

(5) *Esto* that evidence should not have been excluded, the jury should have been directed further how to consider it.

(6) There was fresh evidence to show that the petitioner's claims of conspiracies involving the Scottish Socialist Party and NGN were accurate and truthful, in particular those regarding the witnesses mentioned at (3) above.

[19] On 31 March 2015 the respondents refused to refer the case to the High Court, and gave reasons for their decision. In connection with point (6) above, the respondents noted that Mr Wight, Mr Coulson and Mr Bird faced charges relating to their having given perjured evidence at the petitioner's trial regarding their lack of knowledge of phone hacking. Evidence had also come to light casting doubt on Mr Bird's evidence about the whereabouts of emails that would have supported phone hacking allegations. The respondents accepted that there was a reasonable explanation as to why that evidence was not heard in the original proceedings, as it arose out of investigations by the police in the wake of the petitioner's conviction. The respondents did not consider that the evidence was likely to have had a material bearing on, or a material part to play, in the determination by the jury of the critical issue in the trial namely whether the petitioner had committed perjury in the civil trial: *Al Megrahi* v *HM Advocate* 2002 SCCR 509 at page 585. This had to be considered in the context of the trial as a whole. The respondents must consider that the

absence of the fresh evidence may have resulted in a miscarriage of justice: *Fraser* v *HM Advocate* 2008 SCCR 407. It is not suggested in the present proceedings that the respondents misdirected themselves as to the appropriate legal tests.

[20] The respondents noted that the Crown had not relied on the evidence of Mr Wight (called by the Crown as a courtesy to the petitioner) or Mr Coulson (called as a defence witness). It had relied on the evidence of Mr Bird as to the circumstances in which he had received the McNeilage tape. Parts of paragraphs 98 and 99 of the SOR merit quotation, as much of the submission in the present proceedings, although not expressly directed at the reasoning here, was directed at undermining the conclusion.

> "98. … The fact that evidence has come to light post trial that certain Crown and defence witnesses may have committed perjury … has no bearing upon the central question for the jury, namely whether the applicant committed perjury at his civil trial in relation to (1) what he and others said at the SSP meeting of 9 November 2004, as spoken to by no fewer than 16 witnesses; (2) whether he had had a sexual relationship with KT whose evidence was corroborated by that of Ruth Adamson. Ralph Barnett and Charles McCarthy; and (3) whether he had attended Cupids' with AM, GC, AK and KT as spoken to by GC, AK, KT, and corroborated by TC, PT, Charles McCarthy, James McVicar and Nicholas McKerrell. When seen in the context of the trial as a whole the Commission does not consider that the absence of the fresh evidence at trial may have led to a miscarriage of justice (*Al Megrahi*, *Fraser*)
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> 99. The Commission has examined all of the materials submitted in support of the submissions in relation to Mr Baldassara, the majority of which relate to the civil trial. The Commission considers that they are collateral to the facts at issue in the applicant's criminal trial and would therefore have been inadmissible. In the Commission's view the applicant's submission that it may be inferred from the materials that Mr Baldassara was part of a conspiracy against the applicant and committed perjury at the applicant's criminal trial amounts to no more than conjecture. Similarly the Commission considers that the applicant's submission that Mr McCombes and Mr Baldassara collaborated with the NOTW in order to bring down the applicant is speculative. However, even if one assumes that these submissions are correct, there remains a compelling body of evidence from witnesses who had no connection with the NOTW and about whom there is no evidence of participation in any conspiracy. Therefore, when seen in the context of the trial as a whole, the Commission does not consider that the absence of any such evidence at trial may have led to a miscarriage of justice."

[21] Much of Mr Dangerfield's submission to me was directed at demonstrating that on the basis of the information available to the respondents at latest by the time of the SSOR the respondents had not been entitled to maintain the conclusions expressed in the foregoing paragraphs, because the material demonstrated that there was no witness untainted by the conspiracy and/or because additional evidence demonstrating the existence of a conspiracy would have been bound to strengthen the defence case and increase the likelihood of acquittal.

[22] The petitioner submitted further information, and the respondents granted five extensions of time for further submissions. The material submitted included an opinion and a note from senior counsel.

[23] The petitioner's agents obtained documentary material from COPFS during the period after 31 March 2015. The respondents described in the SSOR at paragraphs 2 and 3 the material submitted in the following way.

> "… Further representations were made in a piecemeal fashion, accompanied by voluminous documentation obtained by Mr Dangerfield from Crown Office, and culminating in a 51-page document entitled 'Note of Further Submissions for SCCRC on 23 December 2015' accompanied by two lever arch files of documentation and a Note from Mr Findlay QC. In the Note of Further Submissions Mr Dangerfield apologised for the form of his submissions. In the main the 'submissions' consisted of references to documents obtained from Crown Office interwoven into a narrative by Mr Dangerfield in which he purported to draw inferences from the documentation.
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> 3. Having examined all of the representations and the materials submitted by Mr Dangerfield the Commission considered that the further 'submissions' did not provide the applicant's responses to the matters addressed in the March 2015 [SOR]. Therefore the Commission decided to afford Mr Dangerfield one further opportunity in which to formulate his further submissions and provide the Commission with a more structured response to the statement of reasons."

[24] There then follows a further narrative of correspondence between the respondents and Mr Dangerfield, from which it appears that the respondents remained concerned about

a lack of focus and structure in the submissions being made to them. That culminated in a further request for time by Mr Dangerfield, including a reference to trying to secure further disclosure from COPFS. The respondents indicated that the matter would be considered at a meeting on 20 May. Mr Dangerfield asked them to postpone their decision. He submitted a further letter, dated 26 May 2016.

[25] Paragraphs 8-18 of the SSOR set out the respondents' consideration of the matters raised and their conclusions.

> "8. In the absence of properly formulated submissions from Mr Dangerfield, the Commission has considered the contents of the Opinion and Note by Mr Findlay Q.C., dated 21 May and 22 December 2015 respectively, copies of which are appended hereto, together with the letter and email dated 26 May 2016. The Commission understands the main thrust of Mr Findlay's opinion to be as follows: there is ample material now available, including material previously redacted from the notebook of Glenn Mulcaire and fresh evidence about Fiona McGuire, to suggest that the News of the World was involved in a criminal conspiracy directed against the applicant and in an attempt to pervert the course of justice; far too much important material was not placed before the jury resulting in an inequality of arms; and it is inconceivable that the foregoing material would not have had a profound impact on the jury's assessment of the credibility and reliability of the Crown case and, in particular, of Mr Robert Bird's evidence about the McNeilage tape, given the applicant's defence that he was the victim of a conspiracy against him by various members of the SSP and NGN Ltd. Mr Findlay referred to the additional material ingathered by Mr Dangerfield which, in his opinion, disclosed a systematic course of criminal conduct intended to pervert the course of justice. He opined that this material was wholly relevant to the criminal trial and ought to have been placed before the jury and not hidden by those with a motive to do so. He stated that he suspects that there may be yet more material 'lurking in the shadows' and that it is wholly in the interests of justice that this material is now examined by the Commission.
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> 9. In his email of 26 May 2016 Mr Findlay re-iterated his opinion that the applicant has been the victim of the most appalling conspiracy to pervert the course of justice; that no one can say for certain what the effect of this would have been on the trial jury; but that no fair minded person could doubt that the material which has now been disclosed ought to have been available to the defence and before the jury.
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> 10. In his letter of 26 May Mr Dangerfield stated that following upon the conclusion of the civil appeal hearing, he had consulted with Mr Findlay who suggested that he remind the Commission ahead of its Board meeting on 27 May 2016 of the most salient features of the new evidence which, it is submitted, proves

beyond any doubt that there was a conspiracy against the applicant which rendered incredible and unreliable all of the evidence and witnesses emanating from NGN Ltd and from his enemies in the Scottish Socialist Party, which is to say, effectively, all of the Crown evidence in the case. It is submitted that had this evidence of a conspiracy been before the jury it must have affected very significantly the jury's consideration of the applicant's defence of conspiracy, and of the credibility and reliability of all those who denied that conspiracy, perjuring themselves in the process. Thereafter reference is made to new evidence relating to (1) Fiona McGuire, (2) the late Paul McBride Q.C., and (3) the perversion of the course of justice and contempt of court by NGN Ltd throughout the commission and diligence process in the criminal trial whereby NGN Ltd withheld from the court evidence of various matters including the evidence of payments and offers of payments to Crown witnesses, the evidence of phone hacking and other crimes involving criminal data access and surveillance, the evidence of contacts and leaks of information between Operation Median and NGN Ltd, the use against the applicant of corrupt public officials, including police officers and police conduits, and the evidence of the deliberate altering of the 'Sheridan costs list' to delete the entry regarding the sending of Ms McGuire to Dubai 'for 10k' before the document was submitted to the Commissioner in July 2010.

11. The Commission notes that the additional material about Fiona McGuire to which Mr Findlay and Mr Dangerfield referred was to the following effect: (1) Ms McGuire, who was a crucial witness in the applicant's civil action against NGN Ltd, lied when she claimed to have engaged in sexual activities with the applicant; (2) NGN Ltd was, or ought to have been, aware that she had lied; (3) the News of the World spirited her away during the civil case to avoid her being recalled by the applicant; and (4) Mr Bird, upon whose evidence in relation to the McNeilage tape the Crown relied in the criminal trial, was involved in this attempt to pervert the course of justice.

12. The Commission notes that while Ms McGuire was a witness in the applicant's civil action against NGN Ltd, she did not feature in the charges or in the Crown list of witnesses in the applicant's criminal trial. The Commission accepts that the credibility and reliability of Mr Bird, upon whom the Crown relied, in relation to the McNeilage videotape, may have been undermined to some extent in that his denial that the News of the World carried out illegal activities could have been negated. The Commission also accepts that additional evidence could have provided some support for the applicant's contention that the News of the World were 'out to get him' before and after the civil trial. Nonetheless the Commission does not consider that the additional evidence about Ms McGuire, as outlined at paragraph 11 above, is likely to have had a material bearing on, or a material part to play, in the determination by a reasonable jury properly directed of a critical issue at trial, namely whether the applicant committed perjury at his civil trial in relation to (1) what he and others said at the SSP meeting of 9 November 2004, (2) whether he had had a sexual relationship with KT, and (3) whether he had attended Cupid's with AM, GC, AK and KT (*Al Megrahi v HMA* 2002 SCCR 509 at page 585). When seen in the context of the trial as a whole the Commission does not consider that the

absence of the fresh evidence at trial may have led to a miscarriage of justice (*Al Megrahi, Fraser v HMA* 2008 SCCR 407).

13. As stated at paragraph 6 above, the Commission considers that the allegations against the late Paul McBride Q.C. remain unsubstantiated.

14. Turning to the various materials which were, it is submitted, withheld from the court in the commission and diligence process by NGN Ltd, the Commission notes, for example, that there is no evidence that KT received any payment from NGN Ltd. The advocate depute in his speech to the jury reminded the jury of KT's evidence to that effect and of the lack of any evidence to the contrary. The advocate depute referred to the evidence of Mr Bird that he thought that there had been an offer of payment to her whereas it was KT's recollection that no such offer had been made. In the advocate depute's submission the important point was that she received no money from the News of the World and that there was no argument about that. Later on in his speech the advocate depute submitted that there was an issue about payment to AK. He also submitted that it did not follow that because someone was paid, they told lies.

15. As regards the undisclosed material about Ms McGuire and about NGN illegal practices, the Commission remains of the view, for the reasons stated at paragraph 68 of the March 2015 statement of reasons, that even if one assumes that the foregoing information would have been obtained by the defence before trial had the unredacted pages of Mulcaire's notebooks been available to them and had full disclosure been made by NGN Ltd to the Commissioner and the court, and that the information would have been admitted in evidence, it cannot be said that there exists any real possibility that the verdict would have been different. In reaching this view the Commission had regard to the strength of the Crown case, as summarised at paragraphs 12 to 25 of the March 2015 statement of reasons, with particular reference to the evidence of the numerous Crown witnesses who had no connection to the News of the World and to the reasons stated by the advocate depute in his speech to the jury, as summarised at paragraph 73 of the March 2015 statement of reasons (*McInnes v HMA* 2008 SCCR 869). Nor is the Commission persuaded that the exclusion of the redacted portions of the pages from the Mulcaire's notebook might possibly have affected the jury's verdict (*Hogg v Clark* (No.2) 1959 JC 7).

16. The Commission considers that the submissions about the phone hacking, information leaks and corrupt public officials, although grand in scale, are unspecific and, again, do not go to the heart of the matter – whether the applicant committed perjury at the civil trial.

17. Taking into account all of the circumstances of the trial, the Commission does not consider that there exists any real possibility that the verdict would have been different if the undisclosed materials had been disclosed to the defence before the trial and had been before the jury. Nor does the Commission consider that the additional information is likely to have had a material bearing on, or a material part

> to play, in the determination by a reasonable jury properly directed of a critical issue at trial, namely whether the applicant committed perjury at his civil trial.
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> 18. Accordingly, nothing in the applicant's further submissions leads the Commission to believe that there may have been a miscarriage of justice in the applicant's case."

Notes of argument and documents

[26] Before the hearing of this application, parties had produced notes of argument. The note of argument for the petitioner dealt almost exclusively with contentions as to what documents ought to have been recovered, whether in terms of the application for commission and diligence or by the respondents using their statutory powers under section 194I of the Criminal Procedure (Scotland) Act 1995. Although the note of argument does draw attention to some particular documents, there is relatively little in the written argument about why individual documents were said to be significant to the challenge made to the respondents' decisions.

[27] Most of the petitioner's contentions about the significance of particular documents became clear to me only during the oral submissions. On some occasions it was contended that a document was significant because a link could be made between it and another document. The potential significance of particular documents, particularly when taken to together, was not always apparent to me on my unguided reading even of the marked passages in the documents produced.

[28] This is a case in which I had an opportunity to read in advance the notes of argument and to look at the highlighted portions of documents. It was an opportunity which produced only a limited advantage in conducting the substantive hearing and producing this opinion, because much of the detail of what the petitioner submitted orally was not prefigured either in the petition or the note of arguments.

[29] I was given the documents and authorities in a single pdf, which I found very helpful. It was considerably easier to use the documents in this format than in what would have been a very bulky paper bundle. The documents were listed in a schedule, in groups by reference to particular calls of the specification which Lord Brailsford considered. In this opinion I refer to the documents by the numbers under which they were grouped in the schedule, and on occasion by their page number in the pdf. Where I use a pdf page number, it appears in brackets.

Submissions for petitioner: SOR and SSOR

[30] Unusually, in the context of a petition for judicial review, the submissions made for the petitioner made very little reference to the decisions made by the respondents and the reasons given for those decisions. I heard quite a wide ranging address directed at two principal areas. The first related to the respondents' approach to recovery of documents under the petition for commission and diligence; and the respondents' failure to exercise their own powers to require the production of documents. The second was that the respondents erred in their approach to the material which had been recovered, and presented to them as material which ought to have been recovered. Within that second chapter was a distinct sub-chapter in relation to material regarding the alleged conduct of Gail Sheridan's lawyers, which I deal with as such. In the SOR and SSOR the respondents treated those allegations as unsubstantiated. Further material, in the form of an opinion from counsel, then was submitted in support of those allegations, and was the subject of a further decision on 1 June 2017.

[31] The petitioner complains that the respondents, from the time of the SOR, closed their minds to the possibility that that documents which ought to have been recovered under the

petition for commission and diligence, and documents which the petitioner requested that the respondents obtain, could assist him. The expressions "disclosure" and "recovery" were used interchangeably in the written and oral submissions for the petitioner. They are not identical in meaning. Disclosure is usually employed as a term of art in relation to the duties of the Crown to provide material to the defence. I use the expression "recovery" here. The petitioner is referring to recovery by means of commission and diligence in the criminal proceedings, and to what he says is a failure on the part of the respondents to exercise their statutory powers to require the production of documents. Matters were complicated in that after the trial material was disclosed by the Crown, but the submission was, as I understood it, that the respondents should have addressed their minds to what should have been recovered by means of petition and diligence.

[32] In developing his submission about the respondents' failure to exercise their statutory power to seek production of documents, Mr Dangerfield referred to particular parts of his correspondence with them. He drew attention first to the respondents' terms of service, which included, at paragraph 7, the following:

> "Submissions: We are an independent body. We do not take instructions from you. It is not your role to direct the review of the case. We will decide how best to review your case, taking into account the submissions you made in your application."

He submitted that this indicated that the petitioner had no duty to raise with the respondents the question of recovery of documents, although he had in fact done so. The respondents could be expected to identify and pursue that line of inquiry themselves.

[33] His firm's letter of 3 July 2014 sought to articulate the grounds of appeal. These included ground 1, which was wrongful exclusion of material by the commissioner, and

ground 4, oppression and abuse of process in respect of the failure by NGN to produce documents as they required to do in the commission and diligence process.

[34] In his firm's letter dated 1 October 2014, he wrote:

> "I understand that the disclosure process is now to be handled by the Appeals section of COPFS as a result of the Commission having accepted my client's application for review and I am very much hoping that this will be a positive development in speeding up that process and facilitating disclosure at last of the hundreds of clearly relevant and exculpatory documents which have to this point been withheld by COPFS without the slightest attempt at explanation, and despite repeated requests for disclosure."

[35] In a letter dated 15 October 2014 Mr Dangerfield wrote:

> "All of the material I have produced to date, and all of the further material I shall produce, is, in my submission, relevant and impactful as evidence that my client's principal ground of defence was true, and that the denial of it by these witnesses and the Crown was false. That is to say, these various witnesses were indeed involved in these various criminal conspiracies, but for which, and but for the denial of which by them and by the Crown, my client would not have been convicted. Indeed, but for the denial of them by the police and Crown, he would never have been charged or indicted.
>
> A good deal of this same material is also relevant and impactful as evidence which was deliberately concealed by these conspiracies and/or wrongfully excluded through failure to disclose by the Crown and/or through judicial error. This aspect of my client's application of itself, in my submission, constitutes sufficient grounds for referral back to the court.
>
> A good deal of this same material is also relevant and impactful as evidence that much of the Crown evidence at my client's trial was thoroughly tainted by criminality.
> …
> I further intend, as you know, to make further submission and to produce further materials just as soon as I can. Part of my difficulty in doing so results from difficulties I am having in obtaining relevant information and disclosure from the Crown but I can well understand why you do not wish to be troubled with the ongoing details of this. I am nonetheless anxious that the Commission should make all due progress with the very substantial, relevant and impactful material submitted by me to date, as both my client and I are anxious that the present target date of March 2015 for decision should, at the very least, be met."

[36] I pause to note that none of these passages contains any request that the respondents exercise their power to seek recovery of material. On the contrary, they seem to indicate that

Mr Dangerfield was continuing to seek further material, and that he did not expect the respondents to concern themselves directly with this.

[37] Mr Dangerfield referred to a further letter, dated 11 March 2015, shortly before the SOR. He submitted that he had "naively expected" that the respondents would themselves seek to recover all the material that he had been trying to recover. He submitted that he had become anxious about the fact that the respondents were moving towards a decision and that "vast screeds" of documentation that should have been obtained had not been obtained. He wrote, enclosing an email to COPFS and schedules of documents, which were marked with Y beside documents the Crown regarded as exculpatory and N beside those not so regarded.

> "As you will see, these further documents seek further important disclosure from the Crown in addition to that sought in the various documents enclosed and detailed on the Schedules included in my letters to you …
>
> For the avoidance of any doubt, I hereby formally request that the Scottish Criminal Cases Review Commission seeks and obtains from the Crown all of the disclosure which I have myself sought in all of these documents.
>
> I appreciate that, in accordance with the Commission's unfair process generally, it is not your policy to tell me whether you will seek this disclosure or not, or to disclose in turn anything which you do obtain to me."

[38] Mr Dangerfield submitted that he had not realised until after receiving the SOR that the respondents had not recovered any documents. By the time of the SOR, although documents in the hands of the Crown had not been recovered it was clear that "the ground of application had widened out exponentially", and he was asking the respondents to recognise that by obtaining the documents that ought to have been recovered in the commission and diligence process. In particular, the respondents ought to have recovered an item numbered 308 "Sheridan costs expenses file - folder marked July 2006 to date", which had been marked as non-exculpatory on the schedule already referred to. The

respondents had ignored the request, and closed their minds to the idea that in seeking to recover documents the petitioner was engaged on anything other than a fishing expedition.

[39] A letter dated 29 July 2015 referred specifically to certain documents, in particular one discussed more fully below indicating that NGN had made a tentative approach to KT. That includes the following:

> "It is a pity that the Crown chose to withhold this vital evidence from us for some three years but now that we have it, we hope that the Commission will agree that we have a duty to pursue further disclosure based on it with the utmost rigour.
> …
> We are aware that the Commission itself has powers in this regard which it has chosen to date not to exercise. Any exercise of those powers now to help expedite matters would of course be appreciated, as it would have been at any point in the process to date."

[40] Similarly, by letter dated 24 September 2015, he wrote:

> "… disclosure in terms of the Crown schedules and our earlier requests nonetheless remains very far from complete …
>
> Again, we are at the mercy of COPFS in this regard, and again we would point out that we sincerely believed when we made our client's application to the Commission in June 2014 that the Commission itself would be able to expedite this process of Crown disclosure in the course of its own investigations. This has proved not to be the case."

[41] Further correspondence contains references in a similar vein. The greater part of the correspondence post-dating the SOR consists of representations about the significance of material the petitioner had obtained from the Crown. In oral submission, Mr Dangerfield characterised his correspondence with the respondents as amounting to a request in the following terms: "Please obtain this vast swathe of material that we know is there, which you require to do in order to ascertain what ought to have been disclosed."

[42] The first chapter of the petitioner's submissions as to the relevant law was concerned with propositions said to be derived from the cases of *McLeod* v *HM Advocate (No 2)* 1998 JC 67; *McDonald* v *HM Advocate* 2010 SC (PC) 1; and *McInnes* v *HM Advocate* 2010 SC

(UKSC) 28. The petitioner argued that the respondents erred in their approach to considering what material ought to have been "disclosed". I did not find the submissions on this point easy to follow. The argument was this.

[43] The respondents ought to have addressed the "first question set out in *McInnes*". By this Mr Dangerfield meant the first question identified by Lord Hope at paragraph 19, namely whether the material withheld from the defence was material which ought to have been disclosed. The test was whether the material might have materially weakened the Crown case or materially strengthened the case for the defence. He referred also to the very similar formulation by Lord Rodger in *McDonald* at paragraph 50. Only after that question had been answered could the second question, that identified by Lord Hope at paragraph 20 be considered. That is, whether taking all of the circumstances of the trial into account, there was a real possibility that the jury would have arrived at a different verdict.

[44] He then went on to say, in apparent contradiction to the submission that the respondents ought to have addressed "the first *McInnes* question", that the respondents should have addressed a different test, namely whether the documents sought would be likely to be of material assistance to the proper preparation or presentation of the petitioner's defence: *McLeod*, paragraph 80.

[45] Having been presented with material by the petitioner, the respondents had then erred in addressing the second question in *McInnes*, namely whether taking all the circumstances of the trial into account, there was a real possibility that the jury would have arrived at a different verdict. The respondents had worked on the basis that, in assessing that question, "tainted" witnesses could be separated from "untainted" witnesses. They had erred in doing so, because the petitioner had presented information that indicated that the "conspiracy reached everywhere".

[46] Mr Dangerfield referred also to *Bannerman* v *Scott and others* (1846) 9 D 163. It related to an application for a new civil jury trial on the basis of *res noviter veniens ad notitiam*. The new information was information which should have been produced in a diligence preceding the trial, but was not. Mr Dangerfield laid particular emphasis on the following passage in the opinion of the Lord President:

> "Now, though I certainly thought, on the trial of this cause before me, that, upon the evidence then adduced, the verdict in favour of the defenders was clearly well founded; and that, if the motion for a new trial rested on that evidence alone, it must have been refused; yet, as the case is now presented to us, I can see no legal grounds for refusing to grant a new trial. To this conclusion I am indeed irresistibly led, from considering how it was that the pursuer was deprived of the documents to which he has now obtained access; for, without imputing an intentional withholding of the various writings lately recovered, it is manifest that the persons in whose custody they were, had made an imperfect examination, down to the latest period before the trial, and certainly were not warranted in acting, however honestly it must be presumed, upon an opinion that the documents were of little importance in the cause.
>
> I don't consider that it is at all necessary, under such circumstances, for the Court to be fully convinced that this new written evidence will either, certainly or probably, lead to a different verdict. That it bears upon the question at issue is undeniable, and as to what effect is due to it, it is not at present necessary to decide; nor can the Court act upon the impression that, notwithstanding it, a similar verdict may again follow. For, besides its own weight, it is obvious, that had this been produced before the trial, it might have led the pursuer to call additional parole evidence, to support or explain the new documents; and as he has been deprived of that opportunity from no fault or negligence of himself or his agent, I am of opinion that, without at all trenching upon the principles that have guided us, and, I think, should still guide us, in granting or refusing motions for new trials, we are bound in this case to make the rule for a new trial absolute."

[47] In reliance on that passage, and passages in the opinions of Lord Mackenzie and Lord Jeffrey, Mr Dangerfield submitted that it did not matter how strong the evidence previously led might appear to be; if an order for commission and diligence were not complied with, and information subsequently emerged which ought to have been produced, the court would be likely to favour a motion for a new trial. Further, it was sufficient that there be only a possibility of a different verdict in the new trial.

[48] Although the point was not developed in much detail in oral submission, the petitioner's note of arguments referred to the decision of the Inner House in *Sheridan* v *News Group Newspapers*. His contention was that the Inner House had concluded that had they been in a position to treat the petitioner's arguments about the material presented to the court (similar to the material presented to the respondents and in this petition) as established fact, they would have had to give serious thought to the question of whether NGN should be allowed to proceed further.

[49] The petitioner's position at trial had been that all the Crown witnesses, whether they were witnesses who were SSP members, employees of NGN, or persons with whom he was alleged to have had sexual relations, were all in a single camp, directly and irreconcilably opposed to him and to witnesses who gave evidence in support of his position. The petitioner's case had been that there was a conspiracy against him. That had been a proper line of defence. Mr Dangerfield referred to a note produced by Lord Bracadale regarding a line of evidence in the course of the trial, which reflected Lord Bracadale's view that it was relevant for the petitioner to explore with Mr Bird, in cross-examination, the extent to which NOTW might have employed measures such as payments to persons for stories; hacking telephones; use of clandestine listening devices; the use of private investigators; and the use of sources within the police force. The documents the petitioner had obtained since the SOR and which had been presented to the respondents strengthened his defence in that they showed how far-reaching that conspiracy was. The material disclosed contempt of court on the part of NGN. Mr Dangerfield accepted that in the course of a criminal trial it would be open to the jury to choose to accept the evidence of some witnesses but not of others. He maintained, however, that the material he had produced would, if put before the jury, have weakened the notion that any witnesses were untainted by the conspiracy. The verdict had

been guilty by a majority, and the additional material would have had the potential to leave or raise a reasonable doubt in the mind of further members of the jury.

[50] Mr Dangerfield submitted that the primary duty on the respondents was to seek recovery, using their statutory powers, of any document covered by the calls granted by Lord Brailsford and which had not actually been produced or disclosed. The respondents had not attempted to undertake that task. He referred to a number of documents twice - first in the context of his submission that the respondents ought to have sought to recover them, and that the documents, once available, would have opened up other lines of inquiry; and second in the context of his submission that the respondents had erred, having been presented with the material, in declining to refer the petitioner's case to the High Court. As he acknowledged, there was some overlap in the submissions that he made about the documents in each of these chapters of submission. In summarising his submissions about the documents, in order to try to avoid unnecessary repetition, I have simply recorded the documents he referred to and what he said both about recovery of the documents and their significance under both chapters, without specifying which submission was made under reference to which chapter.

[51] After the respondents issued the SOR, Mr Dangerfield received disclosure of certain material on a pendrive, under cover of a letter dated 18 May 2015 from the Crown. These were produced as number 13 on the petitioner's schedule of documents.

- He drew attention to a memo from Stuart Kuttner to Mr Bird (216), which referred to money spent on "Doug Wight babysitting [Fiona McGuire] for some weeks before and during [the civil trial]." It continues, "We then had to pay for the cost of a mystery benefactor taking her to Dubai when it was feared she might be recalled to the stand." He said that it should have been recovered in the

commission and diligence process. He said that had it been recovered, it would have been inconceivable that the commissioner would have redacted the portion about Fiona McGuire, as it was evidently relevant to the defence that NGN was seeking to pervert the course of justice. Issues like that had never been considered, and the respondents had never directed themselves to the "first *McInnes* question". Mr Bird was the editor of the Scottish edition of NOTW.

- Another item disclosed was (221), which was a list apparently of expenses incurred, totalling over £51,000, including payments to Douglas Wight, Graham McKendry and Euan McColm, who were all Crown witnesses. The respondents had made no attempt to get it, although it had been on the "schedule". Mr McColm was the Scottish political editor of NOTW.
- A further memo from Mr Bird (224) referred first to "two hefty Sheridan related bills". The first was said to relate to "an emergency operation to get Fiona McGuire out of the country when it was stated in court that [the petitioner] might be recalling her to the witness box." The second related to Andy's (Coulson) awareness of "voice analysis" in the context of an "ongoing new story". Mr Dangerfield said this related to analysis of the tape provided by Mr McNeilage, and would have been covered by calls 4 and 9. It should have been sought and recovered by the respondents before issuing the SOR. Attached to it were hotel and travel bills bearing to be connected with Fiona McGuire.

[52] Under cover of a letter dated 3 September 2015 (242-245) the Crown disclosed an item described as "Blue Manila Folder" marked "Sheridan Costs/File (July 2005 to date)" ("the Sheridan costs file"). In the present process it was number 14 on the petitioner's

schedule. It contained 78 pages of material, of which Mr Dangerfield said almost all was "disclosable". He drew attention particularly to the following.

- An email dated 28 September 2006 (253) from the treasury manager of News International Limited refers to a payment of £200,000. It does not refer to Mr McNeilage, but Mr Dangerfield submitted that it related to payment for the video tape provided by him.
- Emails dated 5 March 2008 between Stuart Kuttner and Mr Bird referred to seeking to secure a "Sheridan fund in the coming budget", to "George McNeilage's £200k" and to a "£200,000 video". It should have been recovered under calls 1 and 4 in the commission and diligence process.
- The file (262-298) included various running totals of disbursements up to December 2006. They indicated what had been paid, to whom, and, by virtue of the running totals at different dates, they also provided some indication as to when payments had been made.
- An email from Mr Bird's personal assistant, dated 12 August 2006, (265) referred to a cash payment to a tipster "for next week" - a reference that Mr Dangerfield said was to the following week's edition of the News of the World. He said that it was a payment to a SSP witness, and to someone that the respondents regarded as "untainted" by NGN's conduct. He sought to link this to an article published on 20 August 2006 (595-596). The article referred to a letter sent by Charles McCarthy, an SSP activist, to 300 party members. It related that a copy of the letter was given to the NoW, but not by whom. It undermined the notion that SSP witnesses were untainted by the conspiracy at the hands of NGN.

- An email dated 20 October 2006 from Euan McColm (302) sought to justify his telephone bill by reference to a high volume of calls made during and after the civil trial. The explanation was, "Many numbers appear frequently because I was making several calls a day to a number of individuals". According to Mr Dangerfield's submission, Mr McColm was "the NGN conduit to the SSP witnesses who were collaborating with NGN and who were denying on oath that they were doing so." If the petitioner had had this email before his trial he would have sought by a further application for commission and diligence to recover itemised billing for Mr McColm's telephone with a view to discovering whether he had been in contact with the SSP witnesses, of whom the petitioner knew the telephone numbers. This item appears again in the documents in number 22.
- Emails in number 22 showed that Mr McColm was the conduit for information from the SSP (469 and following). They included an email apparently from an individual, who was the daughter of a Crown witness. It was sent to Mr McColm. It was passing on to Mr McColm gossip or discussion from what was supposedly a secure SSP website.

[53] If these items had been recovered in July 2010, there would have been a real possibility of a different verdict. It would have opened up additional lines of inquiry to counsel then instructed. She could have made further applications for commission and diligence. A number of the items referred to Fiona McGuire. Although the call relating to payments to her had not been granted, it was inconceivable that the commissioner would have redacted references to her, given that the defence was that NGN were seeking to pervert the course of justice.

[54] Mr Dangerfield went on to make submissions about other documents produced by the petitioner in the present process (numbers 15 onwards in his schedule). The respondents should have asked themselves what should have been recovered in the commission and diligence process, had the order made been complied with. The respondents should have recognised that, in the period between March 2010 and the trial, the defence would have regarded recovery of documents as an ongoing process, and would have considered renewing calls not moved or refused. He said that this would have resulted in further recovery being made in terms of calls 2 and 5, and a wider call 6, framed so as to include documents showing surveillance of Crown witnesses.

[55] Under reference to number 15, which were said to be documents that ought to have been produced in response to call 1, Mr Dangerfield drew attention particularly to the following.

- An email dated 19 July 2006 from Mr Bird to Andy Coulson (321-2), setting out a plan for items to be published after the civil jury trial. It includes a reference to KT:

  > "[KT]. We have made a tentative approach to her but very very wary at the mo of going too far with her. She was delivered to us by the SSP and if we start throwing money at her at this stage it could rebound on us with other SSP witnesses. It was made clear in court that she wasn't giving evidence for money if it became known before case was over that we had offered her a sum or she had accepted it, I don't think it would look good. But she is undoubtedly the best looking of his women and Im sure we can get something new on her/with her eventually."

  The same email, this time bearing to be sent to other recipients, and dated 21 July appeared (323) with handwritten annotations, including what might be a reference to £5,000 with a question mark beside the reference to KT. The document also appeared in number 22 (465). This was significant because it was

dated one week before Mr Bird gave evidence in the civil trial, in the course of which he gave evidence that the News of the World had not offered any money to KT to give "her account about" the petitioner. An extract of Mr Bird's evidence given on 28 July 2006 appeared at (592-3). At the criminal trial Mr Bird gave evidence that KT had been offered money and said by way of explanation that he had been unaware when giving evidence in the civil trial that she had been offered money. It was not evidence that KT was paid, but it did indicate that Mr Bird had been untruthful. The material had not been available to the petitioner when he was cross-examining KT and Mr Bird in the criminal trial. It would have been further evidence of a "conspiracy in which no witness was untouched." Mr Coulson was at the time the editor of the NOTW.

- The same document referred to "the Moat House ladies" and to the "SSP". In particular there was an arrow between handwritten references to EM and Baldassara possibly indicating that some task relative to the witness Keith Baldassara was allocated to Mr McColm. Mr Dangerfield submitted that there was "inferential evidence" that Mr Baldassara "came on board" with NGN. He suggested that with the intervention of the respondents searches could have been made of NGN's electronics for the names of particular SSP members, or the name of one with in ten words of the name of another, between particular dates, with a view to discovering evidence that SSP witnesses conspired with NGN.
- An entry on a table of payments had been deleted before submission to the commissioner. The entry read "Cost of sending Fiona McGuire away £10,000" (339). This was a reference to costs incurred in removing Ms McGuire from the jurisdiction during the course of the civil jury trial because NGN were concerned

that the petitioner might re-call her as a witness. It was a clear indication that NGN were prepared to act in contempt of court. NGN were prepared to go to considerable, and unlawful, lengths to advance their own interests, and that would permit an inference that the "taint" spread to all the Crown witnesses.

[56] The documents produced at number 16 related to phone hacking. The background was that the petitioner produced more than a thousand pages of his phone records in June 2006, in the context of the civil action. At the time the petitioner was unaware of the phone hacking activities undertaken by some journalists.

- A series of emails starting with one dated 21 June 2006 from Mr Bird (346) related to a request from Mr Bird that a number called by the petitioner be investigated. The correspondence included a reference to "satellite jiggery pokery" (ie triangulation) to try to find out where the call had been made from. They included references to the names of persons now known to be involved in phone hacking, and they disclosed that names had been attributed to various numbers. Number 16 also included documents recovered not through COPFS, but by the petitioner himself in a civil action in England against NGN for phone hacking. They disclosed repeated calls made to the petitioner's number from a "hub number" through which journalists' calls were routed. The pattern of calls was consistent with a phone hacking practice called "double tapping" which allows a caller to listen to the target's voicemail messages. Mr Dangerfield did not submit that any particular information was obtained from the petitioner's voicemail, but rather asked, "Who knows what information NGN were able to obtain from it?"
- Number 16 included pages from the notebook of Glen Mulcaire, who was found guilty in 2007 of illegally intercepting communications. Information in them had

been redacted by the Metropolitan Police Service. Although the commissioner had also been provided with an unredacted copy, he had adopted the redactions made by the haver. The redacted portions related to details of persons with some connection to the petitioner and details of his mobile phone account number. Mr Bird's evidence would have been undermined by evidence that supported the contention that NGN had engaged in phone hacking.

- A series of emails mentioning a woman called Laura began immediately after the end of the civil trial (388). This was said to be a reference to a Ms Smith who was on the list of crown witnesses but not called in the criminal trial.
- The same series of emails (394) included a reference to "good news about Barbara Scott". This was a reference to a meeting between Ms Scott and other SSP members in which a decision had been taken that she should provide her notes of the meeting of 9 November 2004 to the police. The matter was a sensitive one within the SSP, yet NGN knew about it. The respondents should have appreciated the significance of this reference because of information in material disclosed by the Crown before the criminal trial.

[57] The documents produced at number 17 (410-413) of the schedule ought to have been produced under call 10. They included a staff expense form bearing to be signed by Mr Bird relating to a claim for expenses incurred on 13 October 2006 for having "lunch with two Edinburgh detectives re Sheridan case". The petitioner's case was that he was unfairly targeted and that there was a close and improper relationship between the police and NGN. This was evidence of the editor of the NOTW taking detectives to lunch. Call 5 of the specification would have been "opened up" to cover every contact between the police and NGN that was not properly in the course of the police investigation.

[58] Mr Dangerfield referred more briefly to numbers 18-33 in the schedule of documents by reference to his note of arguments. The respondents ought to have sought to recover the documents now produced. Some were obviously significant, whereas others raised more difficult questions. The respondents never put themselves in a position to address the significance of the documents because they did not recover them. I detail below the matters to which he referred further in oral submission.

[59] In relation to number 19 Mr Dangerfield referred to the following:

- There was correspondence from September and October 2006 between NGN's solicitors and the police seeking to arrange a meeting between Mr Bird and police officers. An email dated 11 October 2006 (454) directed the police to a potential witness connected to the SSP, who ultimately became a Crown witness. Another email (455) dated 17 November 2006 from Mr Bird related his impression that police officers dealing with the matter were enthusiastic about the investigation. An email (456) dated 20 September 2007 appeared to be a complaint by Mr Bird to the Senior Investigating Officer about a request that NGN refrain from precognosing witnesses because of the potential to interfere with the criminal investigation. Mr Dangerfield identified further emails which he said indicated that Mr Bird was trying to conceal information about Ms McGuire's trip to Dubai.
- Mr Dangerfield drew attention also to 19.12 (462). He said it was a handwritten note indicating that Mr Bird's personal assistant had been asked to look out email addresses for contact with the police. He inferred that the note had been made in 2010, possibly with a view to having to respond to call 5 of the specification, a call which was not in the event granted. It showed how easy it would be to make a search of NGN's email records for contact between NGN and the police.

[60] Mr Dangerfield made particular reference to a number of documents in number 22, over and above those already mentioned as relating to references in other documents.

- There was a reference (474) to a statement made by Frances Curran MSP, and included an email from Mr Coulson to Mr Bird reading, "What are chances of someone from party ("her") going into police station today". It "tied in" with the information about Barbara Scott.
- There was an email dated 5 August 2006 (477) from a Conservative MSP, to a recipient whose name had been redacted, including a draft letter to COPFS asking for an investigation into "apparent mass perjury" in the civil trial. This was significant because the respondents seemed to have accepted that the investigation was begun because of a disinterested complaint from the MSP, and a complaint from another individual. The email indicated that the complaint was not made disinterestedly, but in cooperation with NGN.

[61] In relation to numbers 30 and 34, Mr Dangerfield said the following. Mr Bird had sent various documents to the commissioner under cover of a letter dated 9 July 2010 (333). He had made passing reference to a payment to a Mr Massey, who was not a Crown witness. By letter dated 28 August 2017 (580) Mr Dangerfield asked COPFS to disclose items related to Mr Massey. Mr Massey is said to have been the source of a photograph of TC and LC, persons said to have attended Cupid's nightclub, and Crown witnesses. He is said to have supplied the photograph to a senior crime reporter. He is said to have approached TC and LC himself. According to Mr Dangerfield NGN wanted KT and AK to identify TC and LC as having attended Cupid's. Mr Bird had not disclosed the significance of the payment to Mr Massey. Emails dated 31 December 2010 (517-8) referring to "cupids pair" were said to be references to TC and LC. A very heavily redacted email from the editor of the Scottish

Sun, dated 7 January 2011 was said to be a reference to payment to TC and LC. A story featuring them had been published shortly after the petitioner was sentenced.

Submissions for respondents: SOR and SSOR

Statutory background and approach to judicial review of the respondents' decisions

[62] Mr Moynihan referred to sections 194C and 194I of the Criminal Procedure (Scotland) Act 1995, and to certain authorities which he said assisted in considering the proper scope of judicial review of decisions of the respondents. I did not understand Mr Dangerfield to take issue with this part of the submission for the respondents.

[63] The Court allows the respondents a degree of latitude in respect to a request for documents: *SCCRC* v *HM Advocate* 2001 JC 36, at paragraph 21. *Raza* v *SCCRC* 2007 SCCR 403 reinforced the importance of understanding that the task of the respondents was to consider and form a view as to whether there may have been a miscarriage of justice. He drew attention to paragraphs 6-9, of Lord Malcolm's Opinion. Paragraphs 8 and 9 which are in the following terms, are in my view of particular relevance:

> "[8] It is entirely understandable and appropriate that Parliament did not ask the Commission to determine whether there had been a miscarriage of justice, since that would trespass on the exclusive jurisdiction of the court. However, it does not follow that the Commission must confine itself to whether there are arguable grounds for an appeal. Rather Parliament has set up a system for the consideration of a conviction or a sentence by a body of appropriate persons who are independent of Government and outside the court system, who, if asked to do so, must assess whether the conviction and/or sentence should be reviewed by the appeal court. If Parliament had intended the Commission to apply the same test as the sifting judges, it could have said so in clear terms. However, when deciding on the grounds for a referral, Parliament did not repeat the statutory provisions for the grant of leave to appeal, nor did it use language such as 'arguable grounds' or '*prima facie* case'. Rather it has asked the Commission to make a judgment, namely to form a view on whether it considers that a miscarriage of justice may have occurred. This does not imply a legalistic assessment of probable cause or stateable case, but a considered assessment by the Commission of the merits of the matter, and as to whether it is of the view that there is sufficient concern as to the conviction or sentence to justify a

> referral to the High Court. Recognition that there are arguable grounds for leave to appeal is a different thing from belief that a miscarriage of justice may have occurred. Thus a person may identify arguable grounds, but, having considered the matter for himself, also conclude that there has not been a miscarriage of justice; or to use the statutory language, that he does not believe that a miscarriage of justice may have occurred. In any event, cases can and are put before the Commission after refusal of an appeal by the court - not just after refusal of leave to appeal by the sifting judges. Plainly an appeal can be refused by the appeal court notwithstanding the existence of arguable grounds in its favour. It would be a nonsense if the unsuccessful appellant could ask the Commission to refer the case back to the High Court over and over again simply because of the existence of those arguable grounds.
>
> [9] The construction which I prefer is supported by the powers of investigation, including precognition, given to the Commission in the relevant part of the Act. It is difficult to see how or why those powers would be either needed or exercised if the Commission's task was as limited as counsel for the petitioner submitted. The full terms of sections 194B and 194C indicate that the Commission's remit is a discretionary one. This can be contrasted with that given to the sifting judges, who have no discretion to refuse leave to appeal if there are arguable grounds of appeal. I agree with Mr Moynihan's submission that this is inconsistent with the submission that the Commission's task should be equiparated with that of the sifting judges. The Commission is not a direct appeal body against a refusal of leave to appeal. Rather the language and overall structure of the legislation relating to (a) applications for leave to appeal, (b) the finality provisions, and (c) the role of the Commission, point to the Commission as being a long stop body designed to step in and act if and when it is of the view that the circumstances are such that the appeal court should consider or reconsider a conviction or sentence. For these reasons I reject the main submission presented in support of the petition for judicial review. In my opinion the Commission approached its task in the correct manner and on the basis of a proper interpretation of the relevant statutory provisions."

[64] *R (Ward and Howarth)* v *CCRC* [2005] EWHC 1062 (Admin) was a renewed application for permission to apply for judicial review of a decision of the body equivalent to the respondents in England to refer the claimants' convictions to the Court of Appeal. It was illuminating as to the approach the respondents must take in considering an application, and as to the approach the court should take to judicial review of a decision of the respondents. Of particular assistance were passages at paragraphs 22 (quoting Lord Bingham CJ in *R* v *CCRC ex p Pearson* [1999] 3 All ER 498), 24, 25 and 29-31. Paragraphs 24, 25 and 29-31 read:

"[24] Before turning to the grounds advanced on this application it is desirable to review the role of this court in regard to the decisions of the Commission. As Lord Bingham CJ stated in ***Pearson*** the exercise of the power of referral depends upon the judgment of the Commission. It is not for this court to consider substituting its own assessment. In ***Pearson*** Lord Bingham concluded the judgment as follows:

> '64. Had the Commission decided to refer this case to the Court of Appeal, that would (if based upon a proper direction and reasoning) have been a reasonable and lawful decision: The decision not to refer was in our view equally reasonable and lawful. The question lay fairly and squarely within the area of judgment entrusted to the Commission. If this court were to hold that a decision one way or the other was objectively right or objectively wrong, it would be exceeding its function. The Divisional Court will ensure that the Commission acts lawfully. That is its only role. To go further would be to usurp the function which Parliament has, quite deliberately, accorded to the judgment of the Commission. We find no grounds for impugning the Commission's decision and accordingly refuse this application.'

This approach was reinforced by Lord Woolf CJ in *R* v *CCRC ex parte Hunt* [2001] 2 Cr.App. R. 71:

> '65. It seems to me that, particularly on an application to review a decision of the Commission, it is important that this court restricts attempts to raise grounds for challenging the decision of the Commission unless a proper basis is established, justifying the consideration of the allegation by this court. It is to be remembered that the Commission only becomes involved after the exercise by an applicant to the Commission of his rights in the court below and, if he seeks this, on appeal. It is a residual, but a very important jurisdiction which the Commission exercises. It imposes a heavy burden on the Commission. It is a jurisdiction which was previously exercised by the Home Secretary. It is a jurisdiction which requires the Commission carefully to exercise the discretion which it is given by Parliament. In these circumstances it is important that the courts should not in inappropriate cases allow the Commission to be sucked into judicial review proceedings which are bound to distract it from fulfilling its statutory role.'

[25] In short, an application of the kind made by the claimants cannot be used to challenge the correctness or otherwise of the Commission's decision, let alone as a vehicle for a rehearing of the earlier appeal. The court is only concerned whether there are arguable grounds that the Commission's decision was reached unlawfully.

[29] There can be no doubt that the claimants vigorously contend that they are the victims of a gross miscarriage of justice. Indeed, there is scarcely any person or institution that escapes blame from the claimants (and in particular Mr Ward) for the outcome of the trial and the subsequent appeals and investigations. It is contended that the inquiries by the Inland Revenue and the DTI were conducted unfairly and in

> some respects dishonestly, the SFO and the police acted likewise, at the trial the prosecution witnesses committed perjury and the trial judge was incompetent and prejudiced. At the appeal stage, the judges were said to have been ignorant and unfair.
>
> [30] Thereafter the claimants or one of them have protested to the heads of the SFO and the DTI, to the Attorney General, to the Home Secretary and the Prime Minister, to the Lord Chief Justice and the Commissioner of the Metropolitan Police, the Director of Public Prosecutions and various members of parliament. They in turn, it is complained, have all failed to deal with the case either fairly or responsibly.
>
> [31] Of course, such an unhappy and deplorable state of affairs could exist albeit the motive for such widespread want of fairness is obscure. But it emphasises a need for an analysis which reveals specific, targeted and coherent complaints. The history of the present proceedings is long on assertion and short on clarity. It further emphasises the need to focus on the specific role of the Commission, putting to one side the activities of the prosecuting authorities and the reasoning of the Court of Appeal."

[65] The passages at paragraphs 22 and 24-25 supported the propositions (a) that the respondents had, in determining applications, to try to predict the approach of the appeal court; and (b) that the Court should not enter into the merits of the respondents' decision, and substitute its own assessment of them. The jurisdiction is in relation only to the lawfulness of the decision. In paragraph 31 David Steele J had emphasised the need for applications for judicial review to include an analysis which revealed specific, targeted and coherent complaints, and the need to focus on the specific role of the respondents.

[66] *R (Ward)* v *CCRC* [2014] EWHC 3071 was referred to for passages at paragraphs 11 and 12. Paragraph 12, in particular, supported the notion that it was for the respondents, a body with finite resources, to determine the degree of investigation to commit to any particular application, and in what depth any particular investigation must be considered.

[67] Mr Moynihan submitted that the petitioner's approach did not identify specific errors of law on the part of the respondents in reaching a decision on the petitioner's application. Rather, he was presenting the court with material and asking the court to reach

its own conclusion. That was not permissible in proceedings for judicial review. It was notable that some of the material referred to in submissions - in particular that produced as numbers 30 and 34, relating to TC and LC, and the information in number 22 about the information said to have been passed to Euan McColm by a female sender, the daughter of a Crown witness - had simply never been the subject of submission to the respondents. The first the respondents had heard of the supposed significance of these items was in the course of the hearing.

The decision of the Inner House in Sheridan* v *NGN

[68] Mr Moynihan invited me to consider the decision of the Inner House in *Sheridan* v *NGN*. It had to be approached with care, in that the respondents had not taken it into account in their decision making. It was, nevertheless, instructive, and there was nothing in the reasoning of the Inner House that was inconsistent with the respondents' conclusion that they did not believe that there had been a miscarriage of justice in respect of the petitioner's conviction for perjury.

[69] The Inner House took the unusual step of refusing a new trial, despite the petitioner's conviction for perjury. That was because the verdict in the civil trial could be reconciled with that in the criminal trial because of differences between the two. In the first place, Fiona McGuire had not given evidence in the criminal trial, but had done so in the civil trial. The Inner House had observed (paragraphs 70 and 72) that the jury in the civil trial could not have returned the verdict they did if they had accepted Fiona McGuire's evidence. They were entitled to disbelieve her evidence, but believe KT's evidence about her relations with the petitioner, and believe the evidence of the SSP members who attended the meeting on 9 November 2004. They were entitled to believe the petitioner's denials of

conduct involving Fiona McGuire, and to disbelieve his denials regarding the events of 9 November 2004. The jury were entitled to form the view that the publication regarding conduct with Fiona McGuire was untrue and damaged the petitioner's character and standing. The jury should not necessarily have been regarded as awarding the petitioner a badge of total credibility, total reliability or total fidelity: paragraphs 75 and 84.

[70] Mr Moynihan referred to certain parts of the advocate depute's speech in the criminal trial as providing a route to understanding the basis on which the Crown had sought the petitioner's conviction, in the context of some of the contentions advanced by the petitioner in the present proceedings. They also highlighted areas in which the evidence at the criminal trial was different from that at the civil trial.

[71] Fiona McGuire gave evidence at the civil trial. The allegation that she had had a sexual relationship with the petitioner was one of the defamatory allegations at issue in the civil proceedings, but did not feature at all in the criminal case. The approach taken by the Crown to Fiona McGuire was to say that the verdict in the civil trial was irrelevant, and that Fiona McGuire was not a witness in the criminal proceedings: advocate depute's speech (1292-3). The Crown did not contend that the petitioner had perjured himself regarding relations - or the absence of them - with Fiona McGuire.

[72] So far as KT was concerned, the petitioner had identified two emails which indicated that a tentative approach had been made to her. This was not fresh evidence. On the contrary, the question of such a tentative approach had formed part of the evidence in the criminal trial. KT denied that she had been offered or received money. Mr Bird, in his evidence at the criminal trial, gave evidence different from that he had given at the civil trial, and said there had been an approach to her. The advocate depute had referred to that conflict between KT's evidence and Mr Bird's evidence in his address to the jury (1338-1339).

The petitioner had cross-examined Mr Bird closely about the matter, including the difference between his evidence in the civil trial and his evidence in the criminal trial.

[73] After the civil trial, but before the criminal trial, Barbara Scott had passed her manuscript notes of the SSP meeting of 9 November 2004. Those manuscript notes had been central to the Crown case, not so much because of what they related about the meeting itself, but because of marginal notes apparently recording an exchange of comments between herself and Ms Grant, who also attended the meeting.

[74] In relation to the McNeilage tape, it was again relevant to look at the approach taken by the Crown. The defence position was that the tape was concocted and recorded a conversation with someone other than the petitioner. The advocate depute pointed out that it would have been of limited assistance to NGN, in that it contained a denial of sexual relations with Fiona McGuire, which the Crown recognised was a denial consistently maintained at all times by the petitioner. It would therefore be a curious record to have fabricated.

Recovery of material

[75] So far as the law was concerned, Mr Dangerfield had conflated two separate matters. The question as to what material an accused person was entitled to recover by way of commission was separate from the question of assessing the significance of material that ought to have been recovered (or disclosed). The test as to whether material was recoverable by means of commission and diligence from a party other than the Crown was that in *McLeod*. *McInnes* dealt with disclosure, and particularly with the consequences where material was disclosed by the Crown only after trial.

[76] So far as *Bannerman* was concerned, the case was not one about recovery of material, but again, about the potential significance of material discovered after a trial had taken place. What the court had been concerned with was its relevance to the issue in the case. The material was plainly relevant to the issue, although the court could not say what the outcome would have been had it been available at the trial.

[77] Recovery might occur before or during a trial, for the purposes of the trial. It might occur at the stage of an appeal, or there might be recovery of material by the respondents. Mr Dangerfield was correct to say that the extent of the Crown's duty to disclose material was different from the right of the defence to ask the Court to order recovery. The test in *McLeod* for recovery of material by the defence was more exacting than the test applied to the question of whether the Crown required to disclose material. The most instructive authority was *McDonald*. In particular, Mr Moynihan referred to paragraphs 70, 71, 73, 75 and 77. At paragraph 70, Lord Rodger of Earlsferry wrote:

> "Each of the appellants has been granted leave to appeal against his conviction. While the appeal court can allow additional grounds to be lodged, it is axiomatic that it is for an appellant to specify the ground or grounds on which he claims that his conviction should be quashed. The appellants have all done so. But, as I understand the position, their contention, that the Lord Advocate is obliged to reinvestigate the disclosure made in their cases, is not necessarily related to, and is certainly not confined to, the grounds of appeal which they have specified. Rather, they contend that the Lord Advocate must reinvestigate the disclosure and supply them with the results so that they can then see whether any failure to disclose would have made their trials unfair in terms of Art 6(1). In other words, they say that the Lord Advocate must search for the material, not because it may bolster their existing grounds of appeal, but so that they can see whether they can use it to devise some other ground of appeal."

[78] Lord Rodger went on to reject that contention. There was no duty on the Crown to revisit disclosure at large with a view to discovering whether documents not disclosed might inform the drafting of grounds of appeal not yet identified. The position would be different if the Crown became aware of material which should have been disclosed but had

not been: paragraphs 73 and 74. Once material was disclosed, it was for the defence to consider whether it was of assistance: paragraph 75. If a failure to disclose came to light at the appeal stage, it would assist an appellant only if he could deploy the new material in support of an existing ground of appeal or use it as the basis for obtaining leave to lodge a fresh ground of appeal: paragraph 77.

[79] That analysis related to the Crown, but was as apposite to the respondents, where material was recovered in the course of an application to them. It was for the petitioner to articulate his grounds of appeal. The respondents would consider those grounds of appeal, and might or might not decide to seek production of documents. In the present case the respondents had struggled to get the petitioner to articulate his position because of the "rolling nature" of the submissions he presented to them.

[80] What the petitioner ought to have done was assemble the documents available to him before the SSOR was issued. He should have used them to formulate grounds of appeal. If there were further, specific documents which he required having done so, he should have identified them for the respondents. What the petitioner had done, however was to tell the respondents that they required to pursue every single request he had made of COPFS for a document.

[81] The petitioner had not actually identified any documents which he needed but did not have. He had referred to the need to recover the Sheridan costs file - the only item highlighted on the schedule - but Mr Dangerfield had in fact obtained that. The only criticism of the respondents was they might have recovered it earlier. The other item mentioned for recovery had been in relation to the identity of the "tipster". The articles to which the "tip" was said to relate had been published long before the trial, and were

available at the time of the trial. In any event, the combination of the payment to the tipster and the particular article could have been articulated and put specifically to the respondents.

Particular documents

[82] Mr Moynihan went on to make submissions about particular documents referred to in the course of Mr Dangerfield's submissions.

[83] In relation to the pages from Glenn Mulcaire's notebook, he pointed out that call 6 of the specification had been restricted by counsel then instructed in the case. It had originally sought documents showing or tending to show surveillance of any witness connected to the criminal proceedings, but had been restricted to seek documents showing surveillance of the petitioner. That had been a tactical decision by her. There was no suggestion that she had not acted with appropriate professional competence in doing so. It was not open to the petitioner to raise a challenge to his conviction on the basis of what had been a tactical decision properly open to his counsel. Among the documents produced was a note showing an exchange of views between counsel and the solicitor then instructed regarding the matter (698-9). It included the following, in relation to the Mulcaire material:

> "In any event the redactions re others [ie others than the petitioner] I cannot see relevance of - remember we had to restrict the surveillance calls only to [the petitioner] not any crown witnesses. How would hacking of crown witnesses cast doubt upon them?".

[84] The respondents had specifically dealt with the petitioner's contentions about Mr Mulcaire's notebook in the SOR at paragraphs 53-69 of the SOR. The petitioner had not engaged with that part of the SOR or sought to demonstrate why the respondents were not entitled to reach the conclusion that they had on the matter.

[85] As to material relevant to payments to Fiona McGuire and her trip to Dubai, she had not been a witness in the criminal trial. The Crown did not allege that she had told the truth in the civil proceedings. After the SOR, Mr Dangerfield had made representations about material relevant to Fiona McGuire, particularly in a letter dated 26 May 2016 (79-81). The respondents had dealt with those representations in the SSOR at paragraphs 11, 12 and 15. The respondents accepted that the material demonstrated that there had been underhand conduct on the part of NGN, but they did not consider that the additional evidence about Ms McGuire would have been likely to have a material bearing on, or a material part to play in the determination by a reasonable jury properly directed of the critical issue in the trial. The petitioner had made no attempt in the present proceedings to demonstrate that the respondents had not been entitled to reach the conclusion that they did. They had addressed the question in the context of the trial as a whole, including the evidence from those present at the SSP meeting on 9 November 2004.

[86] The chapter of evidence about an approach to KT by NGN had in substance been before the jury. The emails, including the one with handwritten annotations, had not been before the jury. The jury had, however, heard Mr Bird's evidence admit that an approach had been made to KT, and admit that his evidence about that had been different at the civil trial. The conflict between his evidence and that of KT, who said there had been no approach, had been before the jury. It would have been open to the petitioner, at the trial, to seek further commission and diligence in relation to approaches to KT on the strength of Mr Bird's admission, but he had not done so. He had not sought to have KT re-called. Mr Bird had referred in evidence to an approach by Andrea Vance. Ms Vance was a Crown witness and could have been precognosed on the point. It remained the position that there

was no evidence that KT received any money from NGN. The respondents had considered this matter and provided reasons for their decision in paragraph 14 of the SSOR.

[87] There was material which was capable of undermining the credibility of Mr Bird, and demonstrating that NGN were "out to get" the petitioner. Again, the respondents had accepted that, but had reached the conclusion that this was not likely to have had a material bearing on the jury's determination of the central issue as to whether the petitioner had committed perjury: SSOR, paragraph 12.

[88] Mr Moynihan drew attention to a particular aspect of the respondents' consideration of the context of the trial as a whole. There had been evidence before the jury of an entry in the petitioner's 2001 diary, on the page for 3 October, of a word scored out, which a witness gave evidence she thought was "Cupid". Below was a telephone number ending 887(3.5). The phone number for Cupid's nightclub ended 8877. The advocate depute had asked the jury to infer that the use of the figures 3.5 had been intended to disguise the number. In a different part of the same diary the same phone number had appeared, with the address for the nightclub, but associated with the name of an individual. During a meeting with the petitioner the respondents had asked the petitioner about his position in relation to this piece of evidence. He thought he had made the entry and said he thought he had phoned Cupid's once. He could not think why he had written 3.5, other than thinking it was either a 3 or a 5. The matter is recorded in paragraph 43 of the SOR. The respondents had noted the petitioner's position about this evidence in his address to the jury in the criminal trial, which was that the figure 3.5 suggested someone phoning directory inquiries, writing down two possible digits and getting it wrong. The respondents had formed the view that his explanation about the figure 3.5 both to them and in his jury speech had lacked logic, given

that the last digit was 7 and that he successfully called the number at least once, as demonstrated by his itemised phone bill for 23 November 2001.

[89] In relation to Charles McCarthy, the petitioner had submitted that taking the items at pages 265 and 595 together, there was an inference that Mr McCarthy had been paid as the source of the article. He did not say the respondents were irrational in failing to draw that conclusion, but simply said that it would be easy for the respondents to confirm whether or not he Mr McCarthy was the source of the story. In Mr Dangerfield's letter of 26 May 2016 it had not been put forward as an inference to be drawn from the documents just referred to, but as asserted fact. The petitioner had never asked the respondents to look at the two items together. There was in any event no clear inference to be drawn as to the source of the article, given that the letter to which it referred had been distributed to 300 people. In the same list of recipients of payments a number of persons were named, and there was no obvious reason why Mr McCarthy, were he the source of the information, should not also have been named. If the article itself had raised an inference that Mr McCarthy had passed information to the NOTW, he could have been asked about it at a much earlier stage, and it was not fresh evidence.

[90] The information about the daughter of an SSP member as a source of information to NGN, had never been raised with the respondents, and nor had the question that the Conservative MSP might have been cooperating with NGN.

[91] The letters about Mr Massey were not before the respondents at all when they made their decisions. The letter to which Mr Dangerfield had referred (580) was dated August 2017. The petitioner had, in the criminal trial, cross-examined Mr Bird about a suggestion from LC that Mr Massey had represented to her that there was a sum of £20,000 available from NOTW for cooperation. The information appeared to have come from LC's

statement to the police. That gave rise to the inference that the petitioner had, at the time of the trial, at least some information about a relationship between Mr Massey and LC. He had deployed that in cross-examining Mr Bird. It would have been open to him to have sought a commission and diligence for the recovery of documents bearing on the matter at the time. In order to ascertain whether it would be regarded as fresh evidence for the purposes of an appeal, it would be necessary to examine what was known about it at the time of the trial. That question had, however, been elided because of the manner in which the judicial review proceedings had been conducted.

[92] The respondents were a skilled, expert body whose decisions were entitled to a degree of respect. Skilled and experienced practitioners had applied their minds to the question of whether they believed that there might have been a miscarriage of justice in the petitioner's case. The respondents had had the advantage of being able to review the case as a whole. They had reached a conclusion which they were entitled to reach.

Decision: SOR and SSOR

[93] The grounds upon which the respondents may refer a case to the High Court are that they believe that a miscarriage of justice may have occurred; and that it is in the interests of justice that a reference should be made: section 194C of the Criminal Procedure (Scotland) Act 1995. In this case the respondents concluded that they did not believe that a miscarriage of justice may have occurred, and so declined to refer the case to the High Court.

[94] The task of forming a view, or making of a judgment, as to whether a miscarriage of justice may have occurred is one for the respondents: *Raza*, paragraph 8. It has been entrusted to them by Parliament. Consistent with the normal principles of judicial review, therefore, it is not for the court to substitute its own view or judgment. The court's task is to

assess whether the petitioner has been able to establish that the respondents acted unlawfully in reaching their conclusion: see, for example, *Ward and Howarth*. I agree with and adopt the comments of David Steele J at paragraph 31 regarding the need for applications for judicial review to identify specific, targeted and coherent complaints. These must indicate in what respect the decision has been reached in error of law.

[95] I accept that it is primarily for the respondents, as a public body with finite resources, to determine the degree of investigation to commit to a particular application: *Ward*, paragraph 12. Its decision about what to consider, what to investigate, and in what depth to do so will, however, be informed by the terms of the application put before it - by the grounds on which an applicant says an appeal should eventually proceed. I do not accept the construction which Mr Dangerfield sought to put on paragraph 7 of the respondents' terms of service. They give notice that the respondents should not be expected to follow the instructions of an applicant, or do everything that he might wish them to; they will act independently in accordance the views that they form of the case and what is required for its proper conduct. It does not mean that an applicant can present any complaint or complaint about his conviction, however incoherent or inspecific and expect the respondents to determine for themselves both what the grounds of appeal should be and to carry out wide ranging investigations of their own volition. The passage does, however, indicate that the course taken by the respondents will be one decided upon in the light of the submissions in the application.

[96] The respondents are not restricted by the terms of an application. They may indeed make a reference whether or not an application has been made by or on behalf of a person to whom the reference relates. They are bound to have regard to the terms of any application or representations made to them by or on behalf of the person to whom the reference relates,

to any other representations made to them in relation to it, and any other matters which appear to them to be relevant: section 194D.

[97] It is reasonably clear from the history given in the SOR that the respondents did not find it easy to ascertain in the first instance what the petitioner's grounds of appeal were. The petitioner submitted through his agent a variety of representations after the issue of the SOR, accompanied by documentary material, and by some degree of complaint that the petitioner's agents were having to recover documentary material without the assistance of the respondents.

[98] What the petitioner contends in this case, in relation to the recovery of documents, is that the respondents should have exercised their powers under 194I. That section provides that where the respondents believe that a person or a public body has possession or control of a document or other material which may assist them in the exercise of any of their functions, they may apply to the High Court for an order requiring that person (a) to produce the document or other material to the respondents or to give them access to it; and (b) to allow the respondents to take away the document or other material or to make and take away a copy of it in such form as they think appropriate. Mr Dangerfield's letter of 11 March 2015 contains, as I read the correspondence, the first direct request for assistance with the recovery of documents. It is simply a request that the respondents obtain from the Crown all of the documents he had been seeking from the Crown.

[99] As I have noted above, in oral submission Mr Dangerfield characterised his correspondence with the respondents in this way: "Please obtain this vast swathe [of material] that we know is there, which you require to do in order to ascertain what ought to have been disclosed." There was, he said, no onus on the petitioner to make such a request

to the respondents; the respondents should have sought the documents - *en masse* - without prompting or advice from him, although he had in fact made a request.

[100] The oral submission quoted above encapsulates what Mr Dangerfield wished the respondents to do. He also made submissions that the respondents should have applied the test in *McLeod* in determining what should have been recovered, and sought to marry particular chapters of material to particular calls in the specification of documents (whether granted or not). His submission was, however, really that the respondents should have, whether at his prompting or on their own initiative, simply sought everything that he was asking the Crown to disclose. His submission came to be simply that everything should have been obtained, with a view to ascertaining from it what items should have been produced at an earlier stage. The consequence of his analysis was that the respondents should have, without addressing any particular legal test as to whether a particular item on the schedule provided to them ought to have been made available (whether by way of recovery or by way of disclosure) sought everything that he himself had been seeking from the Crown.

[101] No basis has been identified in the submissions made to me for saying that the respondents erred in law in failing to comply with Mr Dangerfield's request. It is an entirely unfocused request that does not marry any particular chapter of the material sought to any particular proposed ground of appeal. What Mr Dangerfield submitted was that the respondents ought to have facilitated what amounts to precisely the sort of exercise discussed, and rejected, by Lord Rodger in *McDonald* in the passages referred to above. To review material at large with a view to discovering whether there might be material that ought to be disclosed, is not an exercise that the Crown requires to embark on after conviction. I can see no basis for saying that the respondents required to exercise their

statutory powers to request significant volumes of material with a view to discovering what, if any of it, ought to have been produced earlier.

[102] Further, Mr Dangerfield's submissions, insofar as he sought to make them by reference to documents sought in the commission and diligence process before the trial, left to one side the circumstance that, for example, counsel had made a decision to restrict call 6, in the context of the pages of Glenn Mulcaire's notebook. He made submissions which were in my view speculative as to what a commissioner might or might not have redacted had that commissioner been presented with unredacted information relevant to Fiona McGuire. He invited speculation as to what calls might have been granted if further information had become available.

[103] In the course of submissions for the petitioner there was very little said as to what documents, if any, the respondents were being asked to try to recover, and had not tried to recover. The respondents were criticised specifically for having failed to obtain the "Sheridan costs file", but in fact that was a document that had come into the hands of the petitioner, and on the significance of which Mr Dangerfield had made submissions. There remained a running complaint about failure to obtain Mr McColm's telephone records. I make two observations about that. The extent of his telephone bill was apparent from material sent to the commissioner before the trial. That material did not include the email making reference to "several calls every day to a number of individuals", but I fail to see what that reference adds. I do not see any substantial basis in that expression, or in the information that Mr McColm was on certain occasions the recipient of information about the affairs of the SSP, for the inference that Mr Dangerfield seeks to draw, namely that the calls must have been to members of the SSP who gave evidence against the petitioner.

[104] The question as to whether particular powers of recovery ought to have been exercised seems to me to be beside the point. Even if, contrary to the view I have expressed, the respondents ought to have assisted with the recovery of material, and unlawfully failed to do so, the petitioner has now obtained the material. It does not seem to me to assist him in impugning the decisions of the respondent to argue that the material should have been obtained earlier. It is for him to use the material that he has recovered in formulating grounds of appeal or in supporting his existing grounds of appeal in a focused manner. I accept as correct the analysis proposed by the respondents in reliance on the reasoning in *McDonald*. An appeal is not a general inquiry into the background of the case or prosecution, but a statutory process to examine particular grounds of appeal that have been formulated and placed before the court: *McDonald*, Lord Rodger at paragraphs 70 and 71. Once documents have been recovered, it is for the defence to decide what they make of those documents, and to formulate grounds of appeal: *McDonald* paragraphs 73-77. I see no reason why the analysis in *McDonald* relative to appeals does not also apply where an application is made to the respondents. If, having received the documents, and formulated his grounds of appeal, there was material which remained outstanding to support those grounds of appeal, at that stage the petitioner could have made a focused request for assistance.

[105] I turn to the contention that the respondents erred in their treatment of the material presented to them. In relation to the submission that the material, or at least some of it, is capable of supporting the notion that NGN engaged in unlawful and/or unethical practices, and potentially also of supporting the petitioner's contention that they were "out to get" him, I note first, that the respondents did not really dispute that. The Inner House, when

presented with material to similar effect in *Sheridan* v *NGN,* in which the petitioner was the pursuer, recorded the following expression of view about it from paragraphs 94, 95 and 98:

> "94 It is difficult to see what answer there might be to some of the allegations made. We were directed to what appeared to be records of emails showing deliberate steps taken by the defenders to ensure that Fiona McGuire would not be available if the pursuer's motion to recall her had been successful. There is material apparently tending to show that she was provided with a trip to Dubai at the relevant time for that express purpose. The pursuer also contrasted two sets of documents apparently printed from [NGN's] records and appearing to show that in the document produced in response to an order of the court in the criminal trial, the defenders had falsified the record by excluding an entry which would have confirmed that they had indeed paid for such a trip. Other material was relied on as apparently showing a pattern of phone hacking, which was said to have allowed [NGN] to identify and trace people with whom the pursuer had private contact, with a view to compelling them to give evidence against him. We found the pursuer's analysis sufficient to demonstrate a prima facie case for [NGN] to answer, and it was far from clear what answer, if any, there could be.
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> 95. Had we been in a position to treat the pursuer's allegations as established fact, we consider that the picture thus painted would have been indicative not only of wilful contempt on [NGN's] part in relation to a specific order of the court in the criminal process, but also of such a disregard for proper journalistic conduct and for certain requirements of the criminal law that we would have had to give serious thought to the question whether [NGN] should be allowed to proceed further.
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> 98. We have commented above on the pursuer's allegations as to the illegality and impropriety of [NGN's] conduct. We can reach no concluded view on such matters. A proof or a criminal trial would be necessary to enable facts to be explored and submissions made. We accept that the documents lodged by the pursuer in his appendix raise serious questions about the conduct of senior members of staff of [NGN]."

[106] I am in a similar position, in that the material presented to me supports allegations of unlawful and reprehensible conduct on the part of NGN. Considering the decision of the Inner House more generally, the verdict in the civil jury trial, which that decision left intact, is not inconsistent with a conclusion that there was no miscarriage of justice in the criminal trial. I accept as correct the analysis offered by Mr Moynihan and recorded above. There were significant differences between the evidence and issues in the civil trial and the criminal trial. Perhaps the most notable of these was the allegation, live in the civil trial, but

not in the criminal trial, regarding sexual relations between the petitioner and Fiona McGuire.

[107] As I have already observed, the petitioner's submissions did not engage with the decisions of the respondents or the reasoning provided in the SOR and the SSOR. It appeared that the petitioner was placing material before the court and asking the court to reach a conclusion different from that reached by the respondents. That is not a legitimate exercise. The question for me is whether the respondents were entitled to conclude that they did not believe that there might have been a miscarriage of justice.

[108] The consistent theme of the petitioner's submission was that, had the material now available been available to a jury, it could not but have bolstered his defence and weakened the Crown case. It could not have done other than had a material effect on the deliberations of the jury. His contention at trial was that he had been the victim of a conspiracy at the hands of NGN, and that a miscarriage of justice had resulted from his inability to place before the jury all the material now available that supported that contention. The respondents have maintained throughout that there was a body of evidence against the petitioner from witnesses about whom there was no evidence as to involvement in any conspiracy. Mr Dangerfield sought to demonstrate that there was in the material now available information indicating that those witnesses were "tainted".

[109] So far as the material relevant to Fiona McGuire, including her removal by NGN to Dubai during the civil trial, is concerned this is a matter which the respondents considered in the SSOR, quoted above. They considered it at paragraphs 11 and 12. Those passages were not even referred to in the petitioner's submissions. There was no suggestion that the respondents erred in law in applying the test that they did, namely whether the material was likely to have had a material bearing on, or a material part to play, in the determination

of a reasonable jury, properly directed, of a critical issue at trial, namely whether the petitioner committed perjury in certain specified respects. There was no suggestion that they were not entitled to look at the question in the context of the trial as a whole. Rather, Mr Dangerfield offered here, as throughout this part of his submissions, what was really an intuitive judgment that more evidence about wrongdoing on the part of NGN could not but have had a bearing on the jury's consideration of that central question.

[110] The information that the McNeilage tape had been bought for £200,000 was the subject of evidence at the trial, and while Mr Dangerfield submitted that it should have been recovered in the commission and diligence process, he did not seek to demonstrate that it was new evidence.

[111] The material said to support an inference about a payment to Mr McCarthy is in my view irrelevant, for the reasons proposed by the respondents. First, the matter was never placed before the respondents on the basis that an inference was being drawn from two items in the material. I do not consider that the respondents should have been expected, on the basis of the correspondence from the petitioner's agents, to work out for themselves that such an inference was being proposed. I do not consider that the material supports the inference sought to be drawn.

[112] I have already expressed my view about the material regarding Mr McColm's phone bill, said to provide a basis for saying that SSP witnesses were collaborating with NGN.

[113] The information about KT is not new. The points made by the respondents about this are well-founded. Mr Bird gave evidence in the criminal trial that an approach had been made to her. That conflicted both with her evidence at the criminal trial, and his own evidence in the civil trial. There was no fresh application for commission and diligence at that stage, and nor was there any effort to recall KT. Steps could have been taken to

precognose Andrea Vance, said to be the source of the approach. The respondents dealt with this chapter of the petitioner's representations in the SSOR, and again, there has been no submission focused on demonstrating error of law on their part to the material available to them.

[114] So far as Mr Baldassara is concerned, the respondents dealt with the contention that he had conspired against the petitioner in paragraph 99 of the SOR, and the submissions for the petitioner did not directly challenge the lawfulness of that conclusion, and provided no focused basis on which it could be said to be wrong in law.

[115] The material relevant to phone hacking, and in particular the material in Mr Mulcaire's notebook, was the subject of detailed consideration in the SOR, at paragraphs 53-69. It considered first, the point that no challenge was made to redaction before the trial, at a time when the appellant was legally represented. Even if that did not preclude a late challenge, the decision to redact was of a discretionary nature, and could only be challenged on the basis that no reasonable commissioner could have decided to redact it. The respondents took the view that that could not be demonstrated. Nonetheless, they considered the question whether, if the exclusion of the redacted information were wrongful, there had been a miscarriage of justice as a result. They noted what was the content of the redacted portions. They took into account the query raised by the petitioner's own counsel as to how the circumstance that witnesses might have been hacked would cast doubt on their credibility. The respondents were prepared to accept that information about phone hacking tended to undermine Mr Bird's credibility, and support the proposition that NGN were "out to get" the petitioner. Having regard to the other evidence in the case, and in particular the evidence from witnesses not connected with NGN, the respondents formed the view that there was no real possibility that the verdict of the jury would have been

different had the unredacted passages been available. Again, the petitioner did not refer to this passage of reasoning or seek to demonstrate why it, or any particular part of it, was wrong in law. I see no basis for concluding that the respondents were not entitled to form the judgment that they did on this matter.

[116] So far as the information about LC, TC and Mr Massey is concerned, it postdates the decisions complained of, and is irrelevant.

[117] I do not consider that the respondents can be faulted in any way for having failed to appreciate, unguided, the identity of the person said to be the daughter of an SSP member (the sender of an email to Mr McColm, referred to in paragraph 52, above) and any potential significance of that. I do not consider that the respondents can reasonably be expected to have identified the point raised in submission about Mr Monteith in the absence of representations specifically directing them to the material. I do not accept that they required to trawl through every piece of documentary material produced by the petitioner in a search for something that might be of significance.

[118] As to the remainder of the documents referred to by Mr Dangerfield, he made no particular submission as to how they should have informed the respondents' conclusion. Rather, as I understood it, he said the respondents should have recovered the material, and also that it, in general terms, tended to lend weight to the notion that there was a conspiracy against the petitioner, led by NGN. I was not directed to any material which demonstrated that the respondents were not entitled to form the view that the jury in the criminal trial had heard evidence from witnesses in respect of whom there was no evidence of participation in a conspiracy. The information that Mr Dangerfield sought to deploy with a view to demonstrating participation on the part of SSP members in a conspiracy appeared to invite speculation rather than legitimate inference.

[119] It is plain from the submissions made in the course of these proceedings that the petitioner disagrees with the respondents' conclusions. The petitioner has not, however, demonstrated that those conclusions were ones which the respondents were not entitled to come to, and for that reason, his challenge to the decisions expressed in the SOR and SSOR fail.

Respondents' decision of 1 June 2017

[120] Among the matters dealt with in the SOR and SSOR were allegations against Mrs Sheridan's senior counsel. In both the SOR and SSOR the respondents dealt with them on the basis that they were unsubstantiated. On 28 April 2017 Mr Dangerfield wrote to the respondents enclosing an opinion prepared by senior counsel regarding the material said to be relevant to these allegations. The opinion challenged the proposition that the respondents could properly say, in the light of the information presented, that the allegations remained unsubstantiated.

[121] On 1 June 2017 the respondents made a further decision and gave reasons for their stated belief that the information did not justify the conclusion that there had been a miscarriage of justice. The information was information said to suggest that there had been information leaked to NOTW by at least one of Mrs Sheridan's legal advisers, before the conclusion of the trial.

[122] This decision superseded the earlier decisions in relation to this particular part of the petitioner's application.

Petitioner's submissions

[123] The petitioner's contention in these proceedings was, initially, that the respondents were not entitled to make a further decision about the matter as they had done by their letter of 1 June 2017. That was not his position at the hearing. The argument was, rather, that the respondents made a decision that they were not entitled to make, on the basis of the information available to them.

[124] In the course of his submissions, Mr Dangerfield drew my attention to the following documents.

(a) A staff expenses claim form (540) which contains an entry dated 26 May 2010: "Dinner with Paul McBride QC – Tommy Sheridan inquiries". It bears to relate to expenses incurred by a James Mulholland, reporter, and is signed "J Mulholland", and dated 1 June 2010.

(b) An email dated 3 September 2010 (541-2) from Mr Bird to Mr McColm, which contains the following passage:

> "The gossip, even from Gail Sheridan's legal team, is that Sheridan will be found guilty as the evidence against him is overwhelming. Crown have apparently given him two chances to cop a plea so far and let Gail off. But Sheridan has refused."

(c) An email dated 5 October 2010 (543-4) from James Mulholland to Mr Bird and others which includes the following: "Sheridan stuff. I'm meeting McBride this afternoon for a coffee. We're going to be ultra discreet."

(d) An email dated 24 December 2010 (547) on which the name of the sender had been redacted, to James Mulholland, forwarding a document part of which appeared at 547 to 560. That document appears to be a summary of the Crown

case against Mrs Sheridan, prepared by the junior solicitor advocate for Mrs Sheridan.

(e) Two newspaper stories appeared, on 26 December and 2 January 2011 (pages 689-695), in which passages from the pages just referred to appeared. There appeared to be some misunderstanding on the part of some of those at NOTW, in that the document was referred to in an email of 28 December 2010 (565-6) as a "60 page Crown document leaked to us by [name redacted]". It is also referred to as a "dossier compiled by Crown Office lawyers" in one of the newspaper stories just referred to, when it was in fact a defence summary of the Crown case.

[125] Mr Dangerfield went on to submit that there had been a breach of confidentiality on the defence side, and the only individual named in the available papers as the source of that breach was senior counsel. He said that it would be easy for the respondent to establish who was the source of the breach, by getting the unredacted documents. He said that what had been presented "passed the McLeod test by a wide margin" because it was relevant to grounds of appeal based on fresh evidence, indicating an abuse of process. Mr Dangerfield had not found any authority directly in point as to whether conduct of the sort alleged here by a legal adviser of a co-accused would give rise to a miscarriage of justice. He did refer to the circumstances in which the prosecution of Tulisa Contostavlos was brought to an end in 2014 by a decision of an English court because of the conduct of a Crown witness (an undercover reporter who worked for the Sun newspaper) which suggested that that witness had manipulated the evidence of another witness relied on by the Crown. He did not refer me to any published decision on the matter, although passages from the trial judge's oral decision bear to be reproduced in some of Mr Dangerfield's correspondence with the

respondents. Insofar as I understand the circumstances of that case from press reports at the time they are not directly analogous.

Respondents' submission

[126] Classically, an abuse of process was something involving the Crown or other state authorities. Examples included situations such as entrapment: see for example, the discussions in *Jones* v *HM Advocate* 2010 JC 255; *Mack* v *The Queen* [1988] 2 RCS 903. *R* v *Momodou and another* [2005] 1 WLR 3442 was an example of a case where the irregular conduct of a party other than the Crown in relation to the trial proceedings had been relied on by the appellant in seeking to appeal against conviction. The trial had concerned violent disorder in an immigration detention centre which was run mostly by the staff of Group 4, a company. Group 4 was initially suspected of corporate manslaughter, and also commenced civil proceedings against the Bedfordshire Police authority and was therefore directly involved both as a potential defendant in criminal proceedings, and a claimant in civil proceedings. It was contended that the provision by Group 4 of various forms of group therapy provided to witnesses, and of witness training, had contaminated their evidence so that the jury could not properly assess the evidence. The appeal did not succeed, given the way in which matters were dealt with at trial by counsel and by the judge in his directions to the jury.

[127] The reference to *Momodou* was for the proposition that the activities of third parties might constitute an abuse of process making a fair trial impossible, requiring the trial process to be brought to an end: paragraph 54. *Stuurman* v *HM Advocate* 1980 JC 111 was another example of a case in which the conduct relied on in support of a plea of oppression

was conduct by a third party, namely the publication of particular news reports in respect of which those responsible had admitted contempt.

[128] *Shetland Sea Farms* v *Assuranceforenigen Skuld* 2004 SLT 30 was a civil case in which the court recognised that it had an inherent jurisdiction to dismiss a claim where the party pursuing it had been guilty of an abuse of process. Lord Gill, at paragraphs 143-145, both defined abuse of process, and gave several examples of ways in which a litigant might abuse the process of the court:

> "[143] This court has an inherent power to dismiss a claim where the party pursuing it has been guilty of an abuse of process. In doing so it protects the integrity of its procedures by preventing one party from putting the other at an unfair disadvantage and compromising the just and proper conduct of the proceedings (cf Jacob, 'The Inherent Jurisdiction of the Court' in The Reform of Civil Procedural Law , pp 221ff). But this is a drastic power. The court should exercise the power sparingly, because it may involve the denial of a well-founded claim (cf J A Jolowicz, 'Abuse of the Process of the Court: Handle With Care' (1990) 43 CLP 77). In considering whether to exercise the power the court must keep in mind the general right of every litigant to pursue his case to judgment, however unpromising his case may seem to the court.
>
> [144] There are many diverse ways in which a litigant can abuse the process of the court; for example, by pursuing a claim or presenting a defence in bad faith and with no genuine belief in its merits (eg *Lonrho Plc* v *Al-Fayed* (No 2) [1992] 1 WLR 1); or by fraudulent means (*Levison* v *Jewish Chronicle Ltd*, supra; *Arrow Nominees* v *Blackledge*, supra); or for an improper ulterior motive, such as that of publicly denouncing the other party (*Lonrho Plc* v *Al-Fayed* (No 2), supra, Millett J at p 7G-H). *Hunter* v *Chief Constable of West Midlands* ([1982] AC 529) supports the existence of the court's inherent power in such cases, but the facts of that case are so far removed from those in the present case that I need not consider it further.
>
> [145] To found a claim on a false narrative of fact supported by fabricated documents is clearly an abuse of process."

[129] It was clear that conduct on the part of a third party could give rise to an abuse of process, or oppression. The question was, however, whether the respondents had been entitled to decline to refer the matter to the High Court. The petitioner had not identified any proper basis on which the conduct alleged could be said to have given rise to an abuse

of process or oppression, or to have caused there to be a miscarriage of justice in respect of the jury's verdict that the petitioner was guilty of perjury. There was no indication that the petitioner had been put to an unfair disadvantage, or that anything had occurred to compromise the just and proper conduct of the proceedings. The most egregious part of the alleged conduct, namely passing the report to NOTW, took place after the trial, and could not have impacted on the decision of the jury.

Decision

[130] The respondent summarised the reasons for its decision in the following way:

> "In summary, the Board noted that the opinion did not narrate any new evidence – ie evidence that the Commission did not have in its possession when it reviewed [the petitioner's] case - and it remains of the view that the evidence does not support the allegations that Mr McBride was working for NGN and the Crown, and/or that he disclosed confidential details of Mrs Sheridan's defence, and that of Mr Sheridan, to NOTW; nor does it support the other allegations.
>
> In any event, the Board again considered how any of the foregoing matters could be said to have materially weakened the case presented against [the petitioner] or have assisted his defence. At no time during the review of [the petitioner's] case, despite being asked to do so, have you been able to specify how any of the foregoing matters could have done so, and the Board noted that the opinion [of counsel] does not address this matter either."

[131] I accept that in the absence of any explanation for the possession of the defence summary of evidence by NGN, and on the basis of the content of the internal NGN emails, an inference that falls to be drawn is that someone in Mrs Sheridan's legal team passed the information to them. The respondents accepted in the course of submissions that the defence summary of the Crown evidence must have come from one of Mrs Sheridan's legal advisers. The material produced is capable of supporting that proposition. For the avoidance of doubt I do not regard it as supporting allegations that Mrs Sheridan's counsel "worked for" NGN or for the Crown.

[132] Mr McBride died in 2012. He is not in a position to answer the allegations made in these proceedings. None of Mrs Sheridan's legal advisers is a party to these proceedings. I am not making any factual finding that any particular individual passed the defence summary to NGN, that any particular communications took place, nor that any meeting or meetings actually took place, far less what may have happened at any such meeting or meetings. These contentions have not been the subject of proof before me.

[133] What I require to consider is whether the respondents acted lawfully in responding as they did to the information that the petitioner gave them. The respondents were provided with information which is on its face capable of supporting the contentions (a) that one of Mrs Sheridan's advisers had passed a confidential defence document to NOTW, (b) that someone involved in Mrs Sheridan's defence had disclosed that he or she thought the evidence against the petitioner was strong, and that the petitioner had been offered and declined opportunities to plead guilty on the basis that Mrs Sheridan's not guilty plea would be accepted; and (c) that Mr McBride had dinner with James Mulholland, a reporter, with another meeting, over coffee, at least arranged by Mr Mulholland.

[134] The respondents required to consider whether they believed, on the basis of that information, that there might have been a miscarriage of justice. Any decided cases in which a court had found there to have been a miscarriage of justice in analogous circumstances would be relevant to their decision, and to the lawfulness of their decision. Neither party directed me to any authority directly in point. I have no difficulty in accepting that the conduct of a party other than the Crown might found a plea of oppression, or amount to an abuse of process in the sense described in *Shetland Sea Farms*, namely a situation where the conduct puts a party to the proceedings at an unfair disadvantage, and compromises the just and proper conduct of the proceedings.

[135] I was not invited to consider whether oppression, rather than abuse of process, would be the proper *nomen juris* where conduct such as that alleged in this case was said to bar criminal proceedings. In the absence of submission on the point, I incline to the view that, in the context of criminal proceedings, the appropriate plea might be one of oppression, given the flexible and adaptable character of that plea: see, for example, the discussion in *Jones* at paragraphs 30-37, in the context of entrapment. My decision in this case, however, does not turn on a distinction between abuse of process and oppression or a view as to the appropriate plea in criminal proceedings.

[136] In principle, I accept that failures by professional advisers to respect their professional obligations regarding confidentiality could in some circumstances compromise the just and proper conduct of proceedings (*Shetland Sea Farms*) or be such as to render the prosecution of an accused person an abuse of state power and an affront to justice (*Jones*, paragraph 30). The obligation is a very important one. It is necessary to support the fundamental right of access to a court and to a fair trial. A client must be able to speak privately and freely to her lawyer, and trust that her confidentiality will be maintained. This is, for example, reflected in Principle (b) of the CCBE Charter of Core Principles of the European Legal Profession:

> "It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others - the most intimate personal details or the most valuable commercial secrets - and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there can be no trust. The Charter stresses the dual nature of this principle - observing confidentiality is not only the lawyer's duty - it is a fundamental human right of the client."

[137] Confidentiality serves the administration of justice as well as the interests of the individual client, as Article 2.3 of the CCBE Code of Conduct recognises:

> "2.3.1. It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others, and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer.
>
> The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State."

[138] I have, however, been unable to identify a basis on which it can be said that the respondents erred in law in declining to refer the petitioner's case to the High Court. The petitioner was unable to say why, if the allegations directed against the legal advisers were true, they could be said to have barred criminal proceedings or otherwise caused there to be a miscarriage of justice as regards his conviction for perjury. Mr Dangerfield submitted that an unredacted copy of the material would disclose who had passed the defence summary of Crown evidence to NOTW. The identity of the party responsible, however, is beside the point in the present context. What is important is the effect, if any, of a breach of Mrs Sheridan's confidentiality in the criminal proceedings against the petitioner. I agree with the proposition that the most egregious conduct alleged - that of passing the defence summary to NOTW - appears to have taken place after the end of the trial.

[139] Assuming that each of the allegations (a) to (c) set out in paragraph 133 was proved to be true, I have been unable to identify any basis on which the petitioner has been prejudiced or his conviction rendered unsafe. No basis was identified by Mr Dangerfield in the course of submissions on which it could be said that the petitioner was put at an unfair disadvantage in the criminal proceedings by the conduct alleged; or that the fair and just conduct of those proceedings was compromised by it. The challenge to the decision of 1 June 2017 therefore fails.

Disposal

[140] I therefore sustain the pleas in law for the respondents, repel the pleas in law for the petitioner, and dismiss the petition.

Use of names in this opinion

[141] Counsel for the respondents asked me generally to anonymise references to individuals named in the submissions, including the late Mr McBride. Mr Dangerfield said that no anonymisation was required, in relation to any individual mentioned.

[142] I was alive to the issue particularly because I observed that some individuals, particularly KT and AK, had been referred to only by their initials in the Opinion of the Inner House in *Sheridan* v *NGN* and similarly by Lord Turnbull in his Opinion regarding expenses and interest: *Sheridan* v *NGN* [2018] CSOH 20. These are individuals who gave evidence that they had engaged in sexual activity with the petitioner. Redaction of name is a derogation from the fundamental principle of open justice. As Lord Reed observed, giving the opinion of the court, in *A* v *Secretary of State for the Home Department* 2014 SC (UKSC) 151:

> "[23] It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy. As Toulson LJ explained in *R (Guardian News and Media Ltd)* v *City of Westminster Magistrates' Court* (para 1), society depends on the courts to act as guardians of the rule of law. *Sed quis custodiet ipsos custodes*? Who is to guard the guardians? In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny.
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> [24] The significance of the principle of open justice is illustrated by the fact that it was one of the matters covered by the constitutional legislation enacted following the accession of William and Mary. The Court of Session Act 1693 (c 42), which remains in force, provides:
>
> > 'That in all time coming, all bills, reports, debates, probations and others relating to processes shall be considered, reasoned, advised and voted by the Lords of Session with open doors, where parties, procurators and all others

> are hereby allowed to be present, as they used to be formerly in time of debates, but with this restriction, that in some special cases the said Lords shall be allowed to cause remove all persons, except the parties and their procurators.'
>
> The corresponding Act 'Anent Advising Criminal Processes with Open Doors', passed on the same date, made similar provision for the High Court of Justiciary. As Lord Shaw of Dunfermline commented in *Scott* v *Scott* (p 475), the two Acts formed part of the Revolution Settlement, and bore testimony to a determination to secure civil liberties against judges as well as against the Crown.
>
> [25] The principle that courts should sit in public has important implications for the publishing of reports of court proceedings. In *Sloan* v *B* (p 442) Lord President Hope, delivering the opinion of the court, explained that it is by an application of the same principle that it has long been recognised that proceedings in open court may be reported in the press and by other methods of broadcasting in the media. 'The principle on which this rule is founded seems to be that, as courts of justice are open to the public, anything that takes place before a judge or judges is thereby necessarily and legitimately made public, and, being once made legitimately public property, may be republished' (*Richardson* v *Wilson*, per Lord President Inglis, p 241)."

[143] Lord Reed, at paragraph 41, specifically mentioned an example given by the Lord President of a female pursuer where the decision turns on intimate medical evidence, as being capable of raising issues which could warrant a qualification of the principle of open justice. Lord Reed accepted that it would be in the interests of justice to protect a party to proceedings from the painful and humiliating disclosure of personal information about that party where there was no public interest in its being publicised. The gender of a party is perhaps not obviously significant to their susceptibility to humiliation or pain regarding the publication of intimate medical information, but what is clear from the example is that there can be circumstances other than those identified by Lord Neuberger in *Bank Mellat* v *Her Majesty's Treasury* [2014] AC 700 (litigation involving children, cases where threats of privacy breaches are alleged, and cases where commercially valuable secret information is in issue) where derogation from the principle of open justice may be justified.

[144] The Lord President's guide to the Data Protection Act 1998 enjoins judges in preparing opinions to have regard to the principles of the Data Protection Act 1998. In particular, they should ask themselves whether the inclusion of personal information (such as addresses, bank accounts and telephone numbers etc) is relevant to the decision or necessary for the purposes of pronouncing judgment. The processing of data is now the subject of provision in the General Data Protection Regulation (Regulation (EU) 2016/679) ("GDPR") and the Data Protection Act 2018, but the underlying question as to whether publication of particular information is necessary remains the same. Personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation are recognised as falling into a special category, and is prohibited by Article 9 GDPR, except where a particular condition or conditions specified in that article are met. One of those conditions is that processing is necessary when courts are acting in their judicial capacity.

[145] KT and AK both gave evidence in earlier proceedings and were named in the press at the time. Other witnesses who had attended Cupid's and were referred to in the reasoning of the respondents also gave evidence in earlier proceedings and were named in the press at the time. To that extent, it may be that relatively little is achieved, by way of preservation of their privacy, by using their initials, rather than their names, in an Opinion. It does not, however, seem to me that publishing their full names, again, is necessary for the production of this Opinion. The context is a context which involves their sexual lives. Parts of their sexual lives which they, or at least most of them, might reasonably have expected to remain private, have over the years been the subject of publication, repeated with each fresh

chapter of the legal proceedings. Those proceedings all emanate from a decision of the petitioner to sue for defamation, in the course of which he told lies, and falsely accused others of lying. As Lord Turnbull's Opinion makes clear, KT is an individual who at the time of the civil trial was being asked to testify about sexual conduct involving her which had taken place some years before, and the publication of her identity at that time caused her distress and embarrassment: *Sheridan* v *NGN* [2018] CSOH 20, paragraphs 42-46. Against that background, and bearing in mind the category identified by the Lord President and by Lord Reed in *A*, of information which, if published, would cause pain and humiliation, it seems to me appropriate that the court should not be responsible for the further publication of the names of these individuals.

[146] It is a feature of the particular proceedings before me that the petitioner makes allegations about a variety of persons who are not parties to the proceedings, and who have not given evidence in the proceedings. The extent to which it may or may not be appropriate to publish the identities of persons who are made the subject of allegations in such a context will require consideration on a case by case basis, and always bearing in mind both the fundamental principle of open justice and the Article 8, data protection, and other rights of the persons involved. I see no basis for, or point in, redacting the name of Mrs Sheridan's senior counsel.