FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 57
CA86/19 and CA72/20

Lord President
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motions

in the causes of

DAVID GRIER

Pursuer and Reclaimer

against

THE LORD ADVOCATE

and

THE CHIEF CONSTABLE OF POLICE SCOTLAND

Defenders and Respondents

Pursuer and Reclaimer (v Lord Advocate): Dean of Faculty (Dunlop KC), Markie; Kennedys Scotland (for Fleming & Reid, Glasgow)
Pursuer and Reclaimer (v Chief Constable): Smith KC, Black; Kennedys Scotland (for Fleming & Reid, Glasgow)
Lord Advocate: Moynihan KC, Davie KC; Scottish Government Legal Directorate
Chief Constable: Duncan KC, Arnott; Ledingham Chalmers LLP

20 December 2022

Introduction

[1] Between 2014 and 2015, several persons were investigated and prosecuted in connection with an alleged fraudulent scheme in 2011 to acquire Rangers Football Club from Murray International Holdings. These persons included Craig Whyte, whose company, Wavetower Ltd, were to be the buyers.

[2] In November 2014, Mr Whyte was placed on a petition, containing *inter alia* a charge of fraud, along with Gary Withey, David Whitehouse, Paul Clark and the pursuer. A second petition, dated September 2015, specified further charges against the same accused, apart from the pursuer, and included Charles Green. An indictment, libelling charges against all six accused, and adding Imran Ahmad, was served in September 2015 with a second, substitute indictment following in the December. None of the accused was ever convicted of any offence.

[3] At preliminary hearings at the High Court of Justiciary in February 2016, either the Crown withdrew the libels or the judge dismissed the charges against Mr Whitehouse, Mr Clark and the pursuer; the decision in respect of the pursuer being upheld on appeal in May 2016 (*HM Advocate* v *Withey* 2017 JC 249). A plea in bar of trial by Mr Withey was sustained. Mr Whyte was found not guilty by a jury in June 2017, following a seven week trial.

[4] Mr Withey died in 2019. Mr Whitehouse and Mr Clark raised actions against both defenders for malicious prosecution (*Whitehouse* v *Lord Advocate* 2020 SC 133). In February 2021 the then Lord Advocate settled their claims at a reported £10.5m each. In a subsequent

statement to the Scottish Parliament, he accepted that Mr Whitehouse and Mr Clark had been maliciously prosecuted. Actions by some of the other former accused may be pending.

[5] This reclaiming motion (appeal) arises from the first instance decision ([2022] CSOH 2; see also 2021 SLT 371 and 833) in separate actions by the pursuer against the defenders. The Lord Ordinary held that, in contrast to Messrs Whitehouse and Clark, the pursuer had not been maliciously prosecuted. The Lord Ordinary found that those police officers and members of the Crown Office and Procurator Fiscal Service, who were dealing respectively with the investigation and the prosecution, honestly believed that there had been reasonable and probable cause to charge and indict the pursuer, as did the designated Crown counsel who marked the case for prosecution. Malice had not been proved. In any event, the Lord Ordinary found that the police had not been acting as a prosecutor.

[6] The law on malicious prosecution was recently analysed by a Full Bench in *Whitehouse* v *Lord Advocate*. This case is mainly about the application of the test for malicious prosecution to the primary facts found by the Lord Ordinary and the inferences which he drew from those facts. In addition, on the fourth, and last, day of the hearing, the pursuer lodged a minute seeking to introduce *res noviter* (new material) which, it was said, could have had a material bearing on the Lord Ordinary's assessment of the credibility of Crown counsel.

The allegedly fraudulent scheme

[7] The pursuer, who was then employed by MCR Business Consulting, London, met Mr Whyte in 2010. MCR were acquired by the international firm, Duff & Phelps, in late 2011. Duff & Phelps were specialists in corporate finance, including insolvency. Upon

MCR's acquisition, Mr Whitehouse and Mr Clark became partners in the firm and the pursuer became a senior employee.

[8] The pursuer was engaged by Mr Whyte in connection with his purchase of Rangers Football Club. The Club, which was owned by Sir David Murray through Murray International Holdings, was heavily in debt to Lloyds Bank (formerly the Bank of Scotland). The pursuer was instructed to prepare a scheme for the reduction of the debt. Mr Whyte was receiving advice from Mr Withey, a partner in a London firm of solicitors, namely Collyer Bristow, and from Philip Betts, an asset finance broker. The pursuer's main remit was to "negotiate" the debt. Emails were exchanged between Messrs Withey, Betts and Whyte. In one of these, dated 8 April 2011, and copied to Mr Betts, Mr Whyte told Mr Withey not to disclose anything to the pursuer other than that which was required for him to deal with Lloyds. In the proceedings before the Lord Ordinary, this became known as the "Don't tell David" email. In an earlier email of 6 April, Mr Withey had described a funding arrangement with an American corporation, namely Ticketus, to Messrs Clark, Whyte and Betts. Ticketus were controlled by Ross Bryan through their parent company, Octopus Investments.

[9] Mr Whyte's plan, at least according to the defenders, was to acquire the Club by, in effect, using the money which the Club would thus in due course generate through sales of its own season tickets. The Club would buy itself for Mr Whyte through a company, Wavetower Ltd, being a subsidiary of Liberty Capital Ltd, which he owned. Ticketus would supply Wavetower with funds, which would be repaid from the season ticket sales over three years.

[10] MIH had been told that the acquisition was to be funded by Mr Whyte. The Club's directors thought that Wavetower were to absorb the £20M Lloyds debt and that Mr Whyte

would inject about £5m of his own funds into the Club. With its normal income, including that from future season tickets, the Club would be set on an even keel with no debt and substantial capital for development (ie new players). Assurances were given by Mr Whyte on how he intended to manage two significant tax claims, which were being pursued by HM Revenue and Customs against the Club.

[11] No money was ever provided by Mr Whyte, or by Wavetower, other than the funds supplied by Ticketus. Initially, the police reported that Sir David had told the police that, had he known of the Ticketus arrangement, he would not have agreed to the sale. It would simply have left the Club in the same parlous financial state. All that would have occurred was a change of owner. Insolvency was likely to follow, and it soon did. At a later stage, Sir David was recorded as expressing a different view. It would later be contended by the police and the Crown that insolvency is what Mr Whyte and his advisors had planned all along. In due course, the administrators sold the Club to Sevco Scotland Ltd, a company owned by Charles Green. This sale was also alleged to have been part of a fraudulent scheme, but the pursuer was not said to have been involved in that.

Police investigation

[12] Alastair Johnston was the chair of an "Independent Committee" of the Club's directors, which had been created to provide its views on the acquisition to MIH. He made a complaint about Mr Whyte on 17 January 2012. The investigation began on that date. On 14 February, the Club went into administration with Mr Whitehouse and Mr Clark as joint administrators. They began their own investigations into the acquisition. They spoke to the police about their suspicions. They raised civil proceedings against Collyer Bristow (ie Mr Withey) in London. On 23 May, the BBC broadcast a programme called: "*The Men who*

sold the Jerseys". This claimed that Mr Whitehouse and Mr Clark had a conflict of interest in becoming administrators. More significantly, for present purposes, it said that the pursuer had been aware of the Ticketus arrangement prior to the acquisition.

[13] On 22 June 2012, the Crown Office instructed Strathclyde Police to investigate the acquisition and its aftermath. The investigation was delegated to two relatively low-ranking officers, namely DS James Robertson and DC Jacqueline O'Neill. They were members of Strathclyde Police's Economic Crime Unit within its Specialist Crime Division. These two officers conducted a detailed investigation. In due course, they were to bear the brunt of the criticism by the various accused in the civil actions, including the one raised by the pursuer against the Chief Constable.

[14] Initially, the suspects had been restricted to Messrs Whyte, Betts and Withey. On 24 October 2012, the BBC broadcast a conversation between Mr Whyte and the pursuer in which the pursuer appeared to acknowledge that he had known about the Ticketus arrangement. The pursuer gave statements to the police as a witness on 23 and 24 October and 7 November 2012. He denied involvement in any fraud. He said that he had been unaware of "Ross" (Mr Bryan of Ticketus), or the identity of the funders, (Ticketus), until after the sale of the Club had been completed.

[15] By the summer of 2013, the police had begun to suspect the pursuer, Mr Whitehouse and Mr Clark. This was after meetings with Mr Betts during March and April 2013. The first of these took place at Stansted Airport. Mr Betts said that he had told the pursuer about the Ticketus arrangement on 25 January 2011, when the two men had gone to a pub after a meeting in London. The police's manuscript notes of that meeting included the words "Told DG [the pursuer] funded against tickets wouldnt have been full breakdown as I dont think I knew myself" (*sic*). In a statement, Mr Betts explained what had occurred in more detail.

He reiterated that he had told the pursuer that the funds were being raised against the future sale of season tickets.

[16] The police obtained a warrant to search Duff & Phelps' offices in London and Manchester. The searches were executed on 28 August 2013. A senior manager at Duff & Phelps claimed legal privilege over a number of the documents which were to be seized. Among the items removed was a black folder which contained a cash flow forecast. This had an entry referring to the "Ticketus Advance". This was referred to as Schedule 9.

[17] Suspicion fell on the pursuer because of two matters. The first was his participation in a presentation to the Independent Committee on 24 April 2011. In December 2010, a firm of chartered accountants, namely Saffrey Champness, had prepared financial projections based upon assumptions which had been provided by Mr Whyte and Mr Betts. These had included a cash flow forecast for the post-sale period 2011 – 2012 entitled Schedule 9. Originally, the entry detailing incoming funds of £20M had been described as "Ticketus Advance". Had it remained in the forecast, this description would have alerted the Committee, and hence MIH, to the true nature of the source of the funds; that is that they were ultimately to be based on future ticket sales. On 17 March 2011, Mr Betts instructed Saffrey Champness to amend this entry to show Mr Whyte's company, "Wavetower" as being the party advancing the funds.

[18] The minutes of the Independent Committee meeting record the pursuer as having stated that he was "very comfortable with the forecasts and the re-worked working capital position". The police believed that the pursuer had presented, on Mr Whyte's behalf, a cash flow forecast to the meeting, which had induced MIH to consent to the sale to Wavetower. It was completed on 6 May 2011, in the absence of any knowledge of the Ticketus arrangement. The police thought that this had been the Schedule 9 forecast which they had

later found in the black folder recovered from Duff & Phelps' offices. This was incorrect. The Schedule 9 forecast was not available at the meeting.

[19] The second matter was the pursuer's preparation of "the letter of comfort". This was provided to Ticketus, ostensibly in order to persuade them to release the funds to Mr Whyte's solicitors, Collyer Bristow (ie Mr Withey). In April 2011, MIH had requested evidence that the necessary funds to meet the Lloyd's debt were in Collyer Bristow's client account. Meantime, Ticketus were concerned about the risk of non-repayment of their funds as a result of the Club's tax liabilities. On 5 April 2011, Ross Bryan of Ticketus emailed Messrs Whyte, Withey and Betts seeking comfort in relation to the likely outcome of what became known as the "big tax case" (see *Advocate General* v *Murray Group Holdings* 2016 SC 201; 2018 SC (UKSC) 15), and its implications for Ticketus as a creditor, if the Club were to lose the case and go into insolvency, as in due course they did.

[20] Mr Betts forwarded this email to the pursuer. On 7 April 2011, the pursuer became involved in the preparation of the letter of comfort, which was forwarded in his name, as a partner in MCR, to Ticketus. It said that, if the Club were to go into administration, the administrators would be bound to honour the Club's contract with Ticketus. The police believed that the letter of comfort was intended to induce Ticketus to release the funds. It transpired, however, that Ticketus had transferred the funds to Collyer Bristow before they received the letter, albeit that they were to be held as undelivered pending completion of the sale.

The police report to the Crown Office

[21] DS Robertson submitted numerous "subject sheets" and interim reports to the Area Procurator Fiscal, Glasgow, and to Sally Clark, the Senior Procurator Fiscal Depute in the

Economic Crime Unit of the Crown Office's Serious and Organised Crime Division. An interim report of 23 November 2013 recorded that the police had carried out a full assessment of a "chronological bundle" compiled by Duff & Phelps' English solicitors, namely Holman Fenwick Willan. Together with interviews of Duff & Phelps' personnel and other material, the police gave an update of the pursuer's (and Messrs Whitehouse and Clark's) knowledge of the Ticketus arrangement. They referred to Mr Betts: (a) having told the pursuer of the arrangement in London in January 2011; (b) forwarding the email from Mr Bryan to the pursuer in April 2011; and (c) sending the pursuer an email later that day regarding the provision of the letter of comfort to Ticketus. On the following day, there was a series of emails about the Ticketus arrangement. This included a query asking the pursuer if he had been aware of the manner in which Mr Whyte was funding the deal; the pursuer replying "Still on it but getting closer".

[22] On 8 August 2014, DS Robertson submitted a Standard Prosecution Report to the Crown Office. This was the culmination of the police investigation which had, as already noted, been carried out at the specific request of the Crown Office. It incorporated much of what had been reported before. The substantive part of the SPR extended to some 94 pages. It was addressed to Ms Clark. It named Messrs Whyte, Withey, Whitehouse, Clark and the pursuer as potential accused. It contained draft charges against all five accused, including the fraudulent gaining of control of the Club by concealing the Ticketus arrangement from the Independent Committee. There was a specific charge against the pursuer of attempting to pervert the course of justice by providing statements in which he falsely denied prior knowledge of that arrangement. The police operation (entitled Iona) had involved interviewing over 180 witnesses and seizing 1,200 productions as a result of the execution of 18 search warrants.

[23] The SPR set out the police's understanding of the events surrounding the acquisition of the Club in considerable detail. In particular, it described the Ticketus arrangement and the evidence which indicated to the police that the pursuer had been aware of it before the presentation to the Independent Committee. It highlighted the purpose of the "criminality undertaken" by the five accused, notably the securing of a debt-free Club. In describing what the police thought had occurred, the SPR contained extensive extracts from many emails to and from the proposed five accused and the content of witness statements, from which knowledge of certain matters, according to the police, might be inferred. It set out in chronological order an almost daily diary of the events leading up to the acquisition of the Club. Information covering the investigation followed, again with extracts from witness statements. Prominent in the report was a transcript of the conversation, which had been broadcast by the BBC, between the pursuer and Mr Whyte in which he was said to have admitted prior knowledge of the Ticketus arrangement.

[24] The SPR's "[s]ummary of misrepresentation and criminality" stated that, from the evidence available in the statements and documents, Mr Betts had explained the Ticketus arrangement to the pursuer. The pursuer had sent the letter of comfort to release the Ticketus funds. He had presented a version of the cash flow forecast with, as he knew, "Ticketus" substituted by "Wavetower". He had supplied false information about the source of funding to the Independent Committee. A week later, the pursuer had emailed an attachment, which had been sent to Michael Bills (who worked for the pursuer), with a cash flow forecast from Ticketus, to Lloyds. An email from Mr Bills dated 1 June 2011 outlined what Mr Whyte had done and implicated all three Duff & Phelps individuals, including the pursuer, in the "end game"; being that the Club would go "bust". A large number of selected extracts from "significant witness statements" were appended to the SPR, along

with summaries of the others. These ran to many pages. Copies of the statements of Messrs Whitehouse and Clark and the pursuer were attached. Further enquiries were suggested. Some 395 productions were numbered and described. There was no mention of the "Don't tell David" email nor was there reference to the meeting at Stansted Airport.

[25] The Crown Office, notably Ms Clark, decided to detain the five (Messrs Whyte, Withey, Whitehouse and Clark and the pursuer) and to charge them in terms of the SPR drafts. Ms Clark took the view that there was a *prima facie* case against the pursuer; that being the formal requirement before placing someone on petition. She reached this view on the basis of the SPR, the earlier police subject sheets and Mr Bett's statements. She framed a petition which was derived from the SPR's draft charges. In an email dated 13 November 2014 to Helen Nisbet, the Deputy Head of the Serious and Organised Crime Division at the Crown Office, Ms Clark attached the draft petition and commented that "we've struggled with" the involvement of Messrs Whitehouse and Clark, as it was difficult to establish that they had associated themselves with "the common criminal purpose".

[26] On 14 November, the charges were revised by Ms Clark and re-sent to Ms Nisbet and Caroline MacLeod, a Solemn Legal Manager, with a comment that all three of the Duff & Phelps group had "input into" the letter of comfort which formed part of the "pretence to induce [Ticketus] to transfer the funds". The pursuer was arrested and appeared on petition along with Messrs Whitehouse, Clark and Withey on 17 November 2014. Mr Whyte appeared a few weeks later.

Further searches

[27] Meantime, the police had continued to investigate. The Lord Ordinary considered that DS Robertson's treatment of some witnesses, notably professional persons, was

intimidatory and threatening (Opinion para [83]). DS Robertson obtained a warrant to search Duff & Phelps' Manchester premises for electronic material relating to the Club's administration. This was executed on 8 July 2015 with Ms Clark in attendance. In order to deal with the large amount of material, a process was put in place whereby Duff & Phelps' Scottish solicitors, namely DWF, would review the material for legal privilege and separate it onto different discs. The privileged discs were put in marked, sealed envelopes. These discs were delivered to the police between October and December 2015. On 6 October 2017, the discs were returned to Duff & Phelps. Some of the envelopes had been opened. The Lord Ordinary rejected DS Robertson's explanation of how this had come about (para [82]).

[28] On 5 December 2015, the police obtained and executed a search warrant, without prior warning, at HFW's premises in London. The search commenced while a business entertainment event was taking place. Legal privilege was claimed. HFW obtained an injunction that evening from the High Court of Justice in London prohibiting the police from examining the contents of some 47 boxes of documents which had been seized. The High Court (Queen's Bench Division) described the execution of the warrant as an abuse of state power (order of 9 September 2016). A bill for the suspension of this warrant was presented to the High Court of Justiciary on 18 December 2015. The High Court held that, because the sheriff had not been told that the documents sought were subject to an ongoing dispute in relation to legal privilege, or that High Court proceedings had been initiated, the warrant was oppressive. The warrant was suspended (*Holman Fenwick Willan* v *Orr* 2017 JC 239).

Crown Office decisions

[29] In October 2014, shortly before the appearances on petition, James Keegan QC (sol adv) became the designated Crown counsel (Advocate depute) who would require to decide

who, if anyone, was to be prosecuted, with what crime, and in what forum. Ms MacLeod was appointed as the Solemn Legal Manager responsible for the practical management of the case. Ms Clark was to prepare the Precognition. Although the name remains the same, the Precognition is far removed from its original form of a collection of precognitions compiled by the sheriff, and later the procurator fiscal, for transmission to Crown counsel (Alison: *Practice* 148). It is now generally a file of statements taken by the police, albeit still destined to, and intended for the benefit of, the Crown counsel who will ultimately "mark" the case for prosecution. It ought to contain draft charges and lists of witnesses and productions to assist in the framing of any indictment. An analysis, signed by a procurator fiscal, of whether the evidence is sufficient to support criminal charges, usually forms a preface. It is followed by a recommendation. In the modern era, the Precognition is in electronic form, although in 2014 the final version would more likely have been in hard copy. Ms Clark did not ever complete or formally submit a Precognition.

[30] Rather, by early August 2015, there were concerns about the fast looming time bars. A case must be indicted to a Preliminary Hearing within eleven months of an accused's first appearance on petition (Criminal Procedure (Scotland) Act 1995, s 65). The last date on which an indictment could be served so as to comply with the eleven month time bar was 17 September 2015 (10 months to allow for timeous service of the indictment). If missed, it would quite simply prevent any prosecution on indictment. The five accused who had appeared on the original petition, or at least all but Mr Whyte, would have tholed their assize (be held to have gone through the trial process).

[31] The plan became one to report the case "electronically" by 10 August. The day before, Ms Clark produced a draft report in which she recommended that the pursuer, along with the four original co-accused on the first petition, be indicted. On the same day,

Ms MacLeod countersigned the report and referred to the need to serve a first indictment on 10 September 2015 in case an application for an extension of time was not granted. An application for an extension of time had been made to the sheriff on 3 September. It was anticipated that this first indictment would be superseded by a more comprehensive one, but presumably only if an extension were granted.

[32] Ms MacLeod's recommendation to Crown counsel was that "there is a clear sufficiency of evidence" against Messrs Whyte and Withey and the pursuer. There was also evidence of the involvement of Messrs Whitehouse and Clark, notably their being kept appraised of progress and providing guidance to the pursuer, who was described as "the junior partner". Ms MacLeod noted that counsel and the Lord Advocate had been "kept abreast of developments".

[33] Two further procurators fiscal depute at the Crown Office became involved in the drafting of the indictment, namely Alistair Logan and Alan MacDonald. In an email to Crown counsel dated 4 September, Mr Logan advised that he did not consider that Messrs Whitehouse and Clark could properly be indicted. There was an absence of evidence of their awareness of any false representation or knowledge of the Ticketus arrangement, albeit that they had had some input into the letter of comfort. The pursuer, however, was, according to Mr Logan, "a different kettle of fish and it [was] clear that he was aware from January 2011 of the nature of the Ticketus deal" and thus that Mr Whyte was not using his own money. He was complicit in the letter of comfort and in the false representation of Mr Whyte's financial position to the Independent Committee. Counsel noted this update.

[34] The extension of time was granted by the sheriff on 7 September 2015. On 10 September, Ms Nisbet emailed other members of Crown Office reporting upon a meeting

with the Lord Advocate and stating that "Plan A" had been to indict all five accused. She advised that:

> "We are comfortable with the indictment against 3 (Whyte, Withey and [the pursuer]) of the 5 but Whitehouse and Clark have been causing us concern (although we are confident that a sufficiency will be established in the fullness of time)".

Although the extension had been granted, if that were successfully appealed to the High Court, the last date for service would revert to 17 September (only 7 days hence). Any subsequent indictment would be rendered void and the right to indict would be entirely lost.

[35] Messrs Logan and MacDonald had been tasked with identifying "some kind of sufficiency" against Messrs Whitehouse and Clark (Plan B). Both plans were discarded in favour of the "completely unimagined and unimaginable Plan C to indict all seven" (ie including Messrs Green and Ahmed). Ms Nisbet noted that "We are to libel as many charges as we can". A meeting with an accountant and Crown counsel was to take place on the next day "which may be the quickest way of confirming we have a sufficiency for further charges". The final draft indictment was to be put before the Lord Advocate. A manuscript note, which was taken at the meeting with the accountant, read "nail the three Duff & Phelps people". In his testimony, counsel denied that this was an instruction from him. It was a phrase which he would not have used, but it might mean that the accountants were to produce a report that incriminated the three. Counsel testified that he had not intended to "nail" anybody.

[36] Messrs Whitehouse and Clark appealed against the extension. Concerned about the possibility that the appeal would be allowed, and on the instructions of the Lord Advocate, Crown counsel took what he described as a "tactical" decision to instruct service of a first

indictment within the original, un-extended timescale. This was with a view to issuing a second, fuller and more considered, substitute indictment subsequently.

[37] Crown counsel's instruction, in so far as relevant to the pursuer, commenced as follows:

> "15 SEPTEMBER 2015
>
> I have considered the charges on the indictment … and the evidence that has been presented to me either in document form or reported to me in evidence summaries.
>
> I am satisfied that there is a substantial body of evidence that supports the allegations of conspiracy/fraud on the part of Craig Whyte and Gary Withey as narrated in the indictment.
>
> I have considered the preliminary observations that have been made in a quotation document by the Forensic Accountants … I have noted in particular, the criticisms that they make of the actions of the Joint Administrators, the accused Paul Clark and David Whitehouse. I note that those criticisms are connected to the conduct of [the pursuer] and Paul Clark before the acquisition of Rangers Football Club plc [RFC] by Craig Whyte and during the management of that club.
>
> I note that there is a substantial body of evidence that points to knowledge on the part of [the pursuer] and Mr Clark that money obtained from Ticketus ('secured against' an assignation agreement that related to the upfront sale of season tickets at a discount over three football seasons.) was utilised by Mr Whyte with the connivance of Mr Withey to acquire RFC."

[38] Counsel went on to consider the evidence against Messrs Whitehouse, Green and Ahmed before concluding that the indictment should proceed against all seven. When later asked at the proof about his decision, counsel said that the case "wasn't ready". What he meant by that was not explored in any detail.

[39] The first of the two indictments was served on 15 September 2015. The principal charge libelled against the pursuer and the four original accused was a conspiracy to acquire the Club by fraud, in furtherance of which a misrepresentation had been made at the Independent Committee meeting and the letter of comfort had been prepared (charge 1). An additional charge of this being in furtherance of serious organised crime was added

(charge 4). There was no charge of attempting to pervert the course of justice (cf the original police charges). The complexity of the alleged fraudulent actings of the accused is simply illustrated by the libel being broken down into some 55 sub-paragraphs. Charges (2) and (3) were against Messrs Whyte and Withey only. The remaining charges did not concern the pursuer. Crown counsel, Mr Logan and Mr MacDonald all testified that they had been of the view that there was a sufficiency of evidence to justify an indictment libelling these charges.

The Extension of Time

[40] The reasons supplied to the sheriff by Crown counsel in support of the application for an extension of time were inaccurate. The precise source of the confusion may remain uncertain, but was explored by the High Court in the criminal appeal (*Whitehouse* v *HM Advocate* [2017] HCJAC 46). The position is as follows. When the application came before the sheriff on Thursday, 3 September 2015, counsel told him that some 29 boxes of previously withheld material had recently (July 2015) been recovered from Duff & Phelps in a belated response to the search warrant of August 2013. At a continued hearing before the same sheriff on Monday, 7 September, Crown counsel accepted that this had not been correct. Rather, 39 boxes had been received from the solicitors (Clyde & Co) acting for Collyer Bristow.

[41] The sheriff applied the first leg of the two stage test in *HM Advocate* v *Swift* 1984 JC 83 and decided that this explanation, coupled with the fact that the original petition had been presented prematurely because Mr Whyte constituted a flight risk, amounted to a reason why an extension might be granted. This was also a reason why, when taken with the complexity of the case, an extension of three months ought to be given, applying stage

two of the test, to allow for a "fully considered indictment". But for the alleged late arrival of the material, the sheriff reported to the High Court that his decision might have been different (see *Whitehouse* v *HM Advocate*, LJC (Carloway), delivering the Opinion of the Court, at paras [5] and [6]).

[42] At the hearing on the appeal, it was conceded by the Crown that the revised version of events concerning the 39 boxes had also been incorrect (*Whitehouse* v *HM Advocate* at para [8]). There had been some additional material from Duff & Phelps pursuant to the warrant of July 2015. Thereafter, only a small quantity of material had come from Collyer Bristow's solicitors, and it had already been assessed in 2013. The Crown apologised for the "human error". The High Court reconsidered the application and held that an extension ought to be granted, given the volume of material, the complexities of the case and, ultimately, the public interest in allowing the prosecution to proceed (at paras [18] and [19]).

[43] At proof, Crown counsel testified that, prior to the second hearing before the sheriff, he had not been told by the procurator fiscal (Ms MacLeod) that the information about the 39 boxes had been incorrect. As will be seen in relation to the plea of *res noviter*, Ms MacLeod had been aware, prior to the continued hearing, that the position in relation to these boxes was disputed and uncertain. The Lord Ordinary accepted counsel's testimony and described Ms MacLeod's failure to inform counsel of the uncertainty as "reprehensible" (Opinion para [139]). On the basis of the evidence currently available, this criticism is unjustified.

[44] The tangled web thus weaved unravelled at the commencement of the hearing on the reclaiming motion. A hitherto regrettably undisclosed email from Ms MacLeod to Crown counsel dated Friday, 4 September 2015, and timed at 7.48pm, was produced. This indicates that she had forwarded to counsel an email dated 4 September from Duff & Phelps'

solicitors (DWF) explaining that counsel may have confused the Duff & Phelps boxes recovered in 2013 and the HFW boxes in 2015. The 2013 warrant in respect of their clients had been fully complied with long before 2015. The Lord Ordinary's criticism of Ms MacLeod, a senior prosecutor fiscal depute, was, to say the least, unfortunate. At the risk of unnecessary repetition, it is almost certainly unjustified.

[45] The Crown served the second indictment on the day before the appeal on the extension of time was due to be heard (2 December 2015). Charges (1) and (4) against the pursuer remained, as did many of the charges against the other accused. There were additional charges brought against the pursuer. These were charges (7) to (9), which libelled that the pursuer and Mr Whyte had created invoices for services rendered by the pursuer to the Club instead of Mr Whyte's company, namely Liberty Capital. Charge (1) was a breach of section 993 of the Companies Act 2006, whereby the original five accused were parties to a failure by the Club to pay taxes with a view to causing it to go into administration.

Withdrawal and dismissal of charges

[46] The preliminary hearings were due to take place on 3 and 4 February 2016. The first indictment was not called, and thus fell. Various challenges to the competency and relevancy of, and the specification within, the second indictment were made by the accused. Crown counsel withdrew a number of charges, including what had been charge (4) on the original indictment against the pursuer (serious organised crime). Charge (1) remained, but the allegation regarding the letter of comfort was deleted, leaving only his participation in the Independent Committee meeting.

[47] A further preliminary hearing was held on 26 February 2016, at which the judge heard evidence about the role of the Independent Committee. He concluded that the

pursuer's participation at the Committee's meeting could not have brought about a practical result. Sir David Murray gave evidence, in contrast to what the police had noted him as saying in the early stages of the investigation, that he would have proceeded with the sale irrespective of its views. That being so, the judge held that the indictment did not relevantly aver fraud because no practical result could have followed. In light of that, on 15 April 2016, he dismissed charge (1) as irrelevant.

[48] The Crown appeal was refused (*HM Advocate* v *Withey*). The High Court reasoned (LJG (Carloway), delivering the opinion of the court, at para [29]) that what was being libelled against the pursuer was a conspiracy to acquire the Club by fraud; the pursuer's involvement being his concealing of the Ticketus arrangement from the Committee, thus resulting in MIH selling the Club to Wavetower. There was no link between the concealment and the sale; there being no representations by the pursuer to MIH. The evidence was that the sale would have proceeded in any event (para [32]). Although it may have been possible to allow the prosecution to continue on the basis purely of an incomplete conspiracy or an attempted fraud, the Crown declined this option and proceeded on the basis that what had to be proved was a completed act of fraud (para [33]). On that basis the charge was irrelevant. The statutory charge failed because of an absence of an averment of trading whilst insolvent (para [36]). The remaining charges against the pursuer were also dismissed as irrelevant. That brought the proceedings against the pursuer to an end.

The Lord Ordinary

The law

[49] The Lord Ordinary had regard to the law on malicious prosecution as set out in *Whitehouse* v *Lord Advocate.* Canadian and Australian cases demonstrated, in large part, how

matters should be analysed in modern society. In terms of *Nelles* v *Ontario* [1989] 2 SCR 170, there were four elements which had to be proved: (a) the defender had started the criminal proceedings; (b) the proceedings had been concluded in favour of the pursuer; (c) there had been no reasonable and probable cause; and (d) there had been malice, or a primary purpose other than that of carrying the law into effect. The Lord Advocate accepted elements (a) and (b). The Chief Constable accepted that (b) was satisfied, but not (a). Elements (c) and (d) were separate from one another. Both had to be established (Opinion para [61]) in respect of each defender).

[50] Responsibility for the prosecution of crime rested upon the Crown and not on the police. There was English authority that the police could be held to be the prosecutor where either the Crown were deprived of their ability to exercise independent judgement, because of false information from the police (*Rees* v *Commissioner of the Police of the Metropolis* [2018] EWCA Civ 1587), or the evidence submitted was so tainted by criminality or other impropriety as to be worthless. In order to establish a lack of reasonable and probable cause, there was no need to prove that the prosecutor had no subjective belief in the cause. Malice had a broader meaning than personal spite. It was not to be inferred from an absence of reasonable cause. It was not necessarily to be inferred from an absence of subjective belief (para [72]). Liability would not be imposed where a prosecutor proceeded, in the absence of reasonable and probable grounds, because of incompetence, inexperience, poor judgement, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence (*Whitehouse* v *Lord Advocate*), although malice could be inferred from recklessness in some cases (*Robertson* v *Keith* 1936 SC 29; *Willers* v *Joyce* [2018] AC 779) (para [55]). Malice involved acting with a motive other than a desire to bring a criminal to justice (*Glinski* v *McIver* [1962] AC 726).

The case against the Lord Advocate

[51] The pursuer did not contend that the case against the Crown had been made out when he appeared on petition. His position was that, at that stage, the Crown had been misled by the police. The only issue was whether the case was proved at the indictment stage and thereafter. The Lord Ordinary had previously held (2021 SLT 371) that the Lord Advocate had pled no relevant defence to the pursuer's averments of a lack of objective reasonable and probable cause when the indictment was served. The sole question was therefore whether malice had been made out.

[52] The pursuer placed the greatest weight on two factors. First, the absence of a proper analysis of the evidence, notably the lack of a Precognition as required by the Crown Office Book of Regulations (para [119]). Secondly, the misleading of the sheriff in the application for an extension of time (para [120]). Other matters included the failure to disclose the "Don't tell David" email in the SPR, the application for the warrant to search HFW's premises, and the "tactical" service of the first indictment (para [121]).

[53] The Lord Ordinary noted the difficulty of demonstrating an improper motive in the bureaucratic setting of a public prosecutor's office (para [128]). The absence of a completed Precognition was a serious breach of standard procedure, but he doubted whether this had any relevance to malice (para [129]). The draft Precognition had repeated similar evidential flaws as were in the SPR; for example it assumed that Mr Bett's statements were true. Ms MacLeod's recommendation was brief and not reasoned (para [131]). The Lord Advocate had reached no view on sufficiency; having delegated that to Crown counsel.

[54] All of the individuals concerned in the prosecution had been subjectively of the view that there was reasonable and probable cause to indict the pursuer (para [138]). The

knowledge and understanding of Crown counsel was of particular importance (para [134]). His primary sources were the SPR and the summaries of evidence in the draft Precognition, plus further "haphazard" material (para [134]). He had been able to form the view that there was sufficient evidence of the pursuer's involvement in a conspiracy to commit fraud (para [136]). He considered that the presentation to the Independent Committee meeting, though not decisive in itself, formed part of the conspiracy to acquire the Club by fraud. The letter of comfort had been sent after Ticketus had transferred the funds, but counsel did not regard that as important because the funds were to be held as undelivered. Mr Logan and Mr MacDonald had formed the same view on sufficiency in relation to both indictments. Their evidence had not been challenged (para [137]).

[55] The actions of the Crown in respect of both indictments were not motivated by anything other than the pursuit of the interests of justice (para [138]). There was no evidence that the Crown knew of the material which had been subject to legal privilege. When seeking a warrant to search the offices of Duff & Phelps' solicitors, and in applying to the High Court for an extension of time in which to serve the second indictment, there had been failures to tell the court of relevant matters, but those failures did not point to malice.

[56] In relation to the admissions of malicious prosecution made in the cases raised by Messrs Whitehouse and Clark, the Lord Ordinary determined that his decision should not be "influenced by the extra-judicial outcome of those other cases or by anything said by the Lord Advocate by way of explanation for that outcome" (para [143]).

The case against the Chief Constable

[57] The police did not have objective reasonable and probable cause to charge the pursuer (para [94]). The pursuer's knowledge of the Ticketus deal, even if it could be

established on the basis of "*ex post facto*" statements did not cause anything to occur (para [96]). The pursuer's involvement amounted to his participation at the meeting of the Independent Committee and the drafting of the letter of comfort. The Schedule 9 cash flow forecast had not been presented at the meeting. The letter of comfort did not induce Ticketus to transfer funds, as it was sent after the transfer. As the High Court had held, neither of these actions had led to a practical result and neither could objectively constitute fraud. The charge of perverting the course of justice was based on the pursuer's denial of knowledge of the Ticketus arrangement. As that did not amount to the commission of an offence, there could be no objective reasonable and probable cause for that charge (para [97]).

[58] The police did have subjective reasonable and probable cause to charge the pursuer. DS Robertson had acted reprehensibly in a number of ways, but there was no doubt that, at the time of the SPR, he, and his colleague, were genuinely of the view that there was evidence that the pursuer had participated in a fraudulent scheme (para [102]). DS Robertson's actings, notably in relation to privilege and his interviewing techniques, had been driven by his "groundless suspicion" that Duff & Phelps and their lawyers were obstructing the investigation (para [102]). The errors, which infected his analysis, of the pursuer's participation at the Independent Committee meeting and the drafting of the letter of comfort, had been honest.

[59] It had not been put to the police that they had deliberately misrepresented the position to the Crown. The police had honestly believed that there was a proper case to lay before the court (*Willers* v *Joyce;* para [102]). The failure to mention the "Don't Tell David" email in the SPR, the meeting at Stansted Airport and the examination of material over which privilege had been claimed, did not amount to a misrepresentation to the Crown. The

email had not been obviously exculpatory (para [103]). The pursuer had been aware of it by 16 June 2015 when it was proffered as a reason to terminate the prosecution. The Stansted meeting had been a preliminary discussion. There was no material difference between what was said at that meeting and the later witness statements.

[60] The search at Duff & Phelps' offices was undertaken to see if they had a copy of the original cash flow forecast. A copy was found in the black folder, to which privilege might have attached. There was no evidence that it had been used in the case presented to the Crown. DS Robertson had opened the sealed envelopes, but no misrepresentation of the case to the Crown had followed (para [108]). The discovery of the discs post-dated the first indictment. The primary responsibility for not telling the sheriff of the High Court indictment lay with the Crown.

[61] The police were not the prosecuting authority. The Crown were not deprived of their ability to exercise independent judgement. Important elements of the case were factually incorrect, but not to the extent required to hold the police to be a prosecutor. The police did not think that the information in the SPR was either false or tainted (para [111]). The decision to charge the pursuer was made by the Crown, who had been entitled to rely on the SPR. Its errors had not been discoverable at that time.

[62] The police had not acted with malice (para [112]). They had had no motive other than to bring the pursuer, whom they believed to have committed criminal offences, to justice. The police investigation may have suffered from incompetence, poor judgement, lack of professionalism or recklessness, but that was not enough for malice. There was no illegitimate motive or a deliberate misuse of the court process. Insofar as the decision to recommend charging the pursuer may have been reckless, it amounted to over-zealousness, not indifference. The treatment of Mr Betts, as a witness instead of a suspect, stemmed from

DS Robertson's assessment that Mr Betts had been truthful about the alteration to the cash flow forecast. DS Robertson considered that the pursuer had been untruthful when he denied awareness of the alteration at the time of the Independent Committee meeting.

Causation

[63] The Lord Ordinary rejected the contention that the *de minimis* test, which was adopted in industrial disease cases (*Simmons* v *British Steel* 2004 SC (HL) 94), applied. The pursuer's losses were not indivisible. At least some damage to his reputation and earning potential had been caused by the BBC. The pursuer had raised an action of defamation against the BBC. It was currently sisted. No evidence had been led to enable the court to assess which losses were caused respectively by the Chief Constable or the Lord Advocate. There was evidence that the pursuer's professional ranking had begun to decline prior to his arrest and charge. Even if the court had been in the pursuer's favour on the merits, it could not have pronounced decree for a sum in damages in respect of each defender.

Quantum

[64] It was common ground that three elements required to be assessed: loss of earnings, *solatium*; and the expenses of defending the criminal proceedings. Loss of earnings would have been assessed at £998,000 (including future losses of £120,000); £30,000 was appropriate for *solatium*, and there was £935,859 in expenses.

Submissions in the Reclaiming Motion

The pursuer's case against the Lord Advocate

[65] The circumstances in which an appellate court could interfere with first instance

findings of fact were well known. Interference with inferences drawn from the primary facts was more readily justifiable than interference with primary facts which were based upon the credibility and reliability of witnesses (*AW* v *Greater Glasgow Health Board* [2017] CSIH 58 at para [49]). The Lord Ordinary had drawn the wrong inferences from the primary facts. In addition, the court could interfere in a range of circumstances in which the court at first instance had erred in law or failed to consider relevant evidence (para [50]). There had been four instances of such errors or failures.

[66] First, the Lord Ordinary had ignored the Lord Advocate's admission of maliciously prosecuting Messrs Whitehouse and Clark. This was an extra-judicial admission against interest (Walker & Walker: *Evidence* (5th ed) at para 9.2). It was not collateral. There were sufficient averments to cover it and evidence had been led about it without objection (*McGlone* v *British Railways Board* 1966 SC (HL) 1). Since the conspiracy was said to be between the pursuer, Mr Whitehouse and Mr Clark, how could it be malicious in respect of Messrs Whitehouse and Clark and not the pursuer?

[67] Secondly, at the meeting with the forensic accountant, which was shortly before the first indictment, there was a note to "nail the three Duff & Phelps people". This was not mentioned in the Lord Ordinary's Opinion. Thirdly, he had failed to take into account the import of the illegal warrant to search the offices of HFW, which the High Court had described as oppressive and the courts in England as an abuse of state power.

[68] Fourthly, the Lord Ordinary had erred in stating that malice was not to be inferred from an absence of probable cause (*Glinski* v *McIver* at 743; *Whitehouse* v *Chief Constable* at para [89]). He had not taken into account the lack of probable cause. His citation of *Robertson* v *Keith* did not demonstrate otherwise. Malice can be inferred from recklessness, including wilful blindness, such as when a case was indicted when it was not ready.

[69] Malice required proof of an improper purpose; that the prosecutor deliberately perverted or abused the process of criminal justice (*Whitehouse* v *Lord Advocate* at para [107] citing *Miazga* v *Kvello Estate* [2009] 3 RCS 339 at para [80] and *Henry* v *British Colombia (AG)* [2015] SCC 24 at para [46]). It was accepted by all parties that subjective belief was relevant only to malice and not to whether there was reasonable and probable cause. There had to be some improper purpose or motive (*Henry* v *British Colombia (AG)* at para [51]). The legal definition was broader than spite or ill will. An obvious insufficiency of evidence could support an inference of malice (*A* v *New South Wales* (2007) 233 ALR 584 at para [90]; *Willers* v *Joyce* at para 55).

[70] An inference of malice ought to have been drawn from the primary facts. The sheriff had been misled by the Crown in the application for the extension of time. The Crown had a duty of candour. Had the correct information been provided to the sheriff, he may have reached a different view (see *Zurich Insurance Co* v *Hayward* [2017] AC 142 at para 35). Then there was the instruction to the forensic accountant, and the accompanying meeting note to "nail the three Duff & Phelps people". That had not been disclosed to the judge who had ordered recovery of the instruction. His order had not been obtempered. There was no innocent explanation for this.

[71] Malice on the part of Crown counsel was present from the time of his instruction to indict until dismissal of the charges some nine months later. Crown counsel had admitted that, at the time of his instructions to indict, the case "wasn't ready". The case should not have been indicted without a proper analysis. Crown counsel had not seen a Precognition. It was accepted that the Lord Ordinary's finding that Crown counsel had not acted maliciously "significantly weakened" this submission. The Lord Ordinary had narrated the

circumstances of the HFW search. This was relevant to the issue of malice. The Lord Ordinary had not made anything of it.

[72] Malice could be inferred from a want of probable cause. There was no probable cause because the pursuer's actings had no practical effect which would have been necessary for a charge of fraud to have been made out. The improper motive was to achieve a conviction at all costs. A "tactical" decision to indict had been taken despite the absence of a Precognition. It was accepted that the Lord Ordinary had found that Crown counsel had nevertheless been able to form a view there was a sufficiency of evidence, but he had said that the case "wasn't ready". Indicting in these circumstances did not amount to a proper invocation of the criminal law. Counsel had not looked at the second indictment.

[73] On causation, the Lord Ordinary erred in holding that the pursuer's failure to establish the requisite apportionment of blame between the defenders rendered the court unable to make any award in his favour. Where joint wrongdoers contributed to a single outcome, each was responsible for the entire loss whether the other causes were "innocent or guilty" (McGregor, *Damages*, 21st edition, para 10-20 *et seq*). To require a pursuer to lead evidence, to establish which defender had occasioned which specific loss, would involve an impossible standard. The question was whether the defenders' actions had made a material contribution to the whole loss (*Williams* v *Bermuda Hospital Board* [2016] AC 888; *Simmons* v *British Steel*). The defenders were jointly and severally liable. It was for the particular defender to show that the losses would have been incurred in any event.

[74] On quantum, the pursuer accepted the Lord Ordinary's figures for *solatium* and loss of earnings. The claim for legal defence costs was a subrogated claim made by the pursuer on behalf of Duff & Phelps' insurers.

The pursuer's case against the Chief Constable

[75] The complete absence of evidence against the pursuer, and the abuse of state power in executing a warrant to search HFW's offices, were indicative of malice. The Lord Ordinary had said that he would not accept DS Robertson's testimony in the absence of support for it. In finding that DS Robertson believed that there was sufficient evidence, the Lord Ordinary had not followed his own formula. There was no support for that belief. DS Robertson had reported that a version of the cash flow forecast had been presented at the Independent Committee meeting and that the pursuer had prepared the letter of comfort in advance of the transfer of funds from Ticketus. Neither was true. DS Robertson had attempted to explain that, when he had said that the pursuer had presented a version of the forecast "on or around" 24 April, he was not saying that this version had been handed over at the meeting itself, hence the absence of a minute to that effect. His position had been bizarre and malice could be inferred. It had not been specifically put to DS Robertson that he had deliberately misled the Crown because it had been agreed by counsel that it was not necessary, in the context of a virtual WebEx proof, to put every point to every witness.

[76] There were five indicators of malice: first, the erroneous references in the SPR to the Independent Committee and the letter of comfort; secondly, the failure of the SPR to mention the Stansted Airport meeting; thirdly, the sinister failure to disclose the notes of that meeting; fourthly, the use of the cash flow forecast, prior to it being released from the plea of privilege; and fifthly, the failure to mention the "Don't tell David" email. The Lord Ordinary should have looked at the evidence in the round. This gave a clear indication of the attitude of DS Robertson as an individual who was not trying to bring a person to justice. It was not possible to look into DS Robertson's mind to ascertain what his motive had been. Ultimately, the decision was one which no reasonable judge could have made. Had the

Crown been made aware of these matters, they would have declined to prosecute. Disclosure of them would have resulted in a successful application to terminate the proceedings on grounds of oppression. The Lord Ordinary ought to have found that these events were all indicative of an improper motive, and a desire to bring the pursuer not to justice, but to injustice.

[77] It had not been suggested at the proof that the pursuer had done anything wrong. The court required to be careful when looking at individual emails and parts of statements. Much more evidence was put before the Lord Ordinary. The court should not rely on his opinion. The pursuer had previously told the police about the potential irregularities of funding once he had become aware of the Ticketus arrangement. DS Robertson had reported in October 2012 that the pursuer had been aware of the arrangement, but not its details. The Ticketus arrangement was, of itself, not toxic. What changed the police's view of the pursuer was the recovery of the Schedule 9 cash flow forecast in the file discovered in August 2013. This suggested to the police that Duff & Phelps had prior knowledge of the arrangement.

[78] DS Robertson's motive could be inferred from his behaviour. He was reported to have stood up during an interview of a witness at Charing Cross police station and "chanted" a "Rangers' song". He had also threatened Duff & Phelps' solicitor.

[79] The Lord Ordinary erred in holding that the Chief Constable was not a prosecutor. Where the sole source of information deprived the prosecutor of the ability to make an independent judgement, that source itself became the prosecutor (*Martin* v *Watson* [1996] AC 74). The test required a nuanced, contextual and realistic approach in its application to the Scottish system. The Crown were entitled to rely upon the representations made by the police and to assume that they had correctly, fairly and accurately recorded the results of

their investigation. Had the police reported the position correctly, the Crown would not have prosecuted. The assessment of the sufficiency of the evidence, which led to service of the petition, had been carried out by Ms Clark. It was based on the SPR and the subject sheets. The cause of the prosecution was the SPR. Ms Clark had accepted it as accurate. She could not say whether she would have put the pursuer on petition, had she been aware of the errors in relation to the Independent Committee meeting and the letter of comfort.

The Lord Advocate

[80] The Lord Advocate summarised the issues in six parts. (1) Had the Lord Ordinary set out the law correctly? Subject to point 4, he had done so; (2) Had the Lord Ordinary erred in making his primary findings in fact? None was challenged; (3) Had the Lord Ordinary correctly applied the law to the facts? This was the *de quo*; (4) There was a presumption that a public office holder was doing no more than his duty, honestly and in good faith (*Beaton* v *Ivory* (1887) 14R 1057 at 1061); (5) The only issue concerned the decision to indict. Any breach of privilege was irrelevant as was undisclosed material such as the Stansted Airport meeting and any invasion of the sealed CDs; and (6) At first instance there had been twelve days of testimony and thousands of pages of productions, including witness statements. The appeal court was being asked to reconsider the case through a narrow focus using a telescopic view. All that the pursuer was complaining about was that the Lord Ordinary reached the wrong conclusion.

[81] The Lord Ordinary had correctly distilled the meaning of malice from *Whitehouse* v *Lord Advocate*, as involving an "improper or malicious motive". There were anecdotal examples such as trumped up charges (*Willers* v *Joyce* at para 36) or obviously insufficient evidence (*A* v *New South Wales* at para 90). An action for malicious prosecution must fail if

the court concludes that the prosecutor initiated or continued the prosecution on the basis of an honest, albeit mistaken, belief that reasonable and probable cause existed. That was because he or she would have been acting for the proper purpose of carrying the law into effect. It was a singular feature of this case that the pursuer did not challenge in cross-examination the honesty or subjective belief of any of the key individuals involved at the indictment stage; whether Crown counsel, Mr Logan, or Mr MacDonald.

[82] On the pursuer's four alleged errors, first, the Lord Advocate's admissions in the cases of Messrs Whitehouse and Clark had been deleted from the pursuer's pleading after the debate in February 2021 (2021 SLT 371). There was therefore no record on which to base any submission about them. The settlement had been raised in closing submissions at the proof, but it was a collateral matter. The Lord Ordinary had not accepted that Crown counsel had acted from an improper motive. The perception of the prosecution had been one of an overarching fraud with Mr Whyte pretending to buy the Club with his own money; Sir David Murray having said to the police that he would not have sold the Club had he been aware of the reality. As the Lord Ordinary had found, the conspiracy was initially between the pursuer, Mr Whyte and Mr Withey. The pursuer had, according to counsel, been willing to mislead the Independent Committee, knowing that it could influence Sir David. This was a step in a series of events; the dupe not being the Committee but Sir David. The emails indicated that the pursuer had been aware of who Ross Bryan was; despite his denials. The Crown had relied not only on what Mr Betts had said, but also on the letter of comfort, its reference to the season tickets and the change of "Ticketus" to "Wavetower".

[83] At the start of the proof, counsel for the Lord Advocate had said that it was agreed that:

> "we will not follow the normal rule that all principal points have to be put in cross-examination to witnesses. Cross-examination will be illustrative only and no adverse comment will be made about a particular point not having been put in cross-examination".

This did not sanction a failure to put any allegation at all to the protagonists that they did not have an honest belief in sufficiency. Critical points had to be put to the witnesses in the usual way.

[84] Secondly, the "nail" note had not been founded upon in the closing submissions at proof. Crown counsel had denied that he had given this instruction. That was not challenged. If it was not an instruction, it was not relevant. Thirdly, the Lord Ordinary had taken into account the HFW search. Finally, he had correctly summarised and applied the law. The four gateways to a review of the facts by an appellate court were closed.

[85] An inference of malice depended on an analysis of the evidence as a whole. *Rees* v *Commissioner of Police of the Metropolis* turned on highly unusual facts and did not support a general proposition about the effect of misconduct. The Lord Ordinary was entitled to hold that it was not comparable.

[86] In relation to the available material, first, there was the significant finding in fact that the prosecutors had an honest belief that there was sufficient evidence. That was the beginning and the end of the case, unless there was reason to undermine it. Secondly, the Lord Advocate was not criticised for instructing that a single indictment be served before the expiry of the time bar, subject to there being a sufficiency. Thirdly, the High Court had upheld the sheriff's decision to extend the time bar. Refusal of an extension would not have affected the validity of the first indictment. The extension was not a precondition of a prosecution.

[87] A problem had arisen in relation to what had been exchanged between Ms MacLeod and Crown counsel at the time of the extension hearings. After the Lord Ordinary's Opinion, Ms MacLeod had produced a detailed timeline. She referred to material which had not, in terms of an earlier undertaking by the Crown, been disclosed. The behaviour of neither Ms MacLeod nor Crown counsel had been reprehensible. The references to 39 or 29 boxes had both been wrong. It was nevertheless not self-evident that Crown counsel's testimony that Ms MacLeod had not provided him with the correct information, was untrue.

[88] Fourthly, no error had been made in relation to there being evidence of a conspiracy between the pursuer, Mr Whyte and Mr Withey. Fifthly, the second indictment did contain additional charges against the pursuer; the main one being fraudulent trading and the others concerning false invoices. Mr Logan and Mr MacDonald had given detailed explanations for this.

[89] The reclaimer mischaracterised the issue of causation. It was not one of apportionment between wrongdoers, but the extent of the liability where several persons sequentially caused harm to a pursuer. Several factors may have had an adverse effect on the pursuer's reputation and earning potential. Apart from the criminal proceedings, they included his association with Mr Whyte and the BBC programmes. If the Lord Advocate was only liable from the indictment stage, the pursuer could not recover any earnings or legal expenses which had been lost before that date. The Lord Ordinary had been unable to attribute particular losses to the BBC or between the defenders. He correctly assessed solatium at £30,000 on the basis of *Thompson* v *Commissioner of Police of the Metropolis* [1998] QB 498. On 20 July 2021, the pursuer had said that he would produce further evidence of the legal defence costs, otherwise that head of claim would be withdrawn. There the matter rested.

The Chief Constable

[90] The pursuer's case was essentially about police reporting. The pursuer had identified no error in law in the Lord Ordinary's analysis. Rather the grounds of appeal challenged the assessment of the facts; fundamentally, whether the police had deliberately misreported the evidence. The pursuer had not engaged with the test for review; ie that the Lord Ordinary's decision was affected by an obvious and important error, or could not reasonably be explained.

[91] The reclaiming motion was principally concerned with three questions about the state of mind of the reporting officers. Did the evidence demonstrate that they: (1) did not believe that they had a proper case to put before the Crown and the court; (2) were deliberately and predominantly motivated by a purpose that was inconsistent with their proper function; and (3) presented information which they knew to be false, tainted with impropriety or evidentially worthless? The Lord Ordinary had answered all of these questions in the Chief Constable's favour.

[92] It was agreed that it was sufficient for proof of the absence of reasonable and probable cause that there was no objective cause. Any subjective element was relevant only to malice. As the defenders were not insisting in their cross appeals, the issue of what happened if there was probable cause but also malice, should that be demonstrated, did not arise. The delict was an intentional one. The question was not about legal relevancy but whether the police considered that they had a proper case to present. Malice could, but need not, be inferred from a lack of reasonable and probable cause, but that was for the Lord Ordinary to determine.

[93] Malice was a slippery concept, in the sense that it was resistant to gloss (*sic*). The behaviour had to be deliberate. The bar was a high one. Recklessness would not suffice, but it was not present in any event. The case had been advanced on the footing that the Chief Constable had been the prosecutor. Prosecution was the responsibility of the Crown and not the police (*Smith* v *HM Advocate* 1952 JC 66 at 71; Renton and Brown: *Criminal Procedure* (6th/loose-leaf ed) para 4.01). Authorship of a prosecution could not be deduced simply from malice in the supplying of evidence. Initiation would be established if the police had procured or instigated the prosecution (*B* v *A* 1993 SC 232 at 238; *Martin* v *Watson* at 83). A person can be held liable for wrongfully procuring a prosecution where the information given is false (Norrie: *Injuries to Particular Interests* in Stair Memorial Encyclopaedia vol 15, para 452 citing *Lightbody* v *Gordon* (1882) 9R 934 at 940). The Lord Ordinary's distillation of English cases and their application to the Scottish context may not be correct.

[94] The pursuer had to demonstrate an obvious error on the part of the Lord Ordinary; that he had reached a decision which could not be explained. The Lord Ordinary had seen the whole film and not just a series of stills. He had made careful findings in fact, including that DS Robertson's actings did not affect his conclusion that he had a proper case to lay before the court. There was a body of evidence in relation to the suspicions falling on the pursuer which were contained in the police reporting from November 2013 to August 2014. These concerned his awareness of the Ticketus funding, his involvement in covering up the funding arrangements and his lying to the police at interview. Whether an error had been made in relation to whether a document had been handed over at the meeting, it was not disputed that the pursuer had been party to the presentation of false information. There may have been an error on the date of the Ticketus payment, but the money was not

released until after the letter of comfort. The pursuer had denied knowing of the Ticketus arrangement and who "Ross" or Ticketus were.

[95] The police had made the detailed interim report in November 2013 and presented the SPR in August 2014. The Lord Ordinary had been entitled to find that any errors had been honest ones because: (1) the evidence was capable of supporting the pursuer being party to the presentation of false information to the Independent Committee; (2) it was not suggested to DS Robertson that his error, in reporting that the cash flow forecast had been handed out at the meeting, had been deliberate; and (3) DS Robertson's explanation of the error was supported by other evidence, notably the email traffic which suggested that the Committee had had access to a cash flow forecast.

[96] The error in relation to the letter of comfort was said to be the report that it had been sent before the funds had been transferred into the escrow account. As DS Robertson had said, at the time of the transfer, Ticketus still controlled the funds. The letter was to be used to allow the deal to complete. It was not put to DS Robertson that this error had been deliberate. His explanation was not challenged. Any error was relatively insignificant in the context of the whole evidence. The Lord Ordinary made no finding that it was the SPR which had led to the pursuer being put on petition. Irrespective of what was known about these matters now, Ms Clark would still have put the pursuer on petition.

[97] The decision to treat Mr Betts as a witness had been made in good faith. The Lord Ordinary had accepted that the Stansted meeting had been a preliminary one; designed to find out what Mr Betts might say. There was no material difference between the notes of that meeting and the subsequent statement.

[98] On causation and quantum, the submissions of the Lord Advocate were adopted *mutatis mutandis*.

Res Noviter

[99] On the fourth, and last, day of the hearing on the reclaiming motion, the pursuer lodged a lengthy Minute which advanced a plea of *res noviter veniens ad notitiam* (newly discovered information). This averred that, in the application for an extension of time, the Crown had founded on the late receipt of 39 boxes. At the hearing on 3 September 2015, the number of boxes had been reduced to 29 and these were said to have come from Duff & Phelps pursuant to the 2013 warrant. This number reverted to 39 at the continued hearing on 7 September, but this time the boxes were said to have come from Clyde & Co (acting for HFW). The Minute averred that there was "no responsible basis" for this representation. Crown counsel's suggestion that a "minor and thus insignificant error" had been made was untrue. At the hearing on the criminal appeal, counsel had accepted that inaccurate information had been provided at both hearings because of "human error". This too was wrong. The High Court had been misled.

[100] During the cross-examination of Crown counsel, the pursuer's counsel had told him that he was "not suggesting that [he] personally misled the court, but … the court had been … misled". He said that the information had been provided by Ms MacLeod. He did not recall finding out about the error until after the extension decision. In her testimony, Ms MacLeod had not been sure of whether she had expressed doubts to counsel about what the sheriff had been told.

[101] The application states:

> "From information only just received by the Pursuer … Ms MacLeod was apparently being truthful and [Crown counsel] was being dishonest".

This blunt accusation stems from the late disclosure by the Crown of the email exchange between Ms MacLeod and counsel. This included an email from Ms MacLeod to counsel dated Friday, 4 September and timed at about 7pm. This in turn attached the email from DWF (Duff & Phelps' Scottish solicitors) which said that what had been said to the sheriff about 39 boxes had been inaccurate and that Duff & Phelps had fully and timeously complied with the 2013 search warrant. Ms MacLeod had told counsel that she would make further enquiries. These enquiries did not bear fruit in relation to the correct number and source of any boxes. Ms MacLeod now said, in a statement produced to the court on the final day of the reclaiming motion, that, prior to the second hearing before the sheriff, this information had been passed to counsel.

[102] It was said that the pursuer had been deprived of the opportunity to examine Crown counsel on the accuracy of what he told the sheriff and the High Court. The pursuer now wished to recall counsel and Ms MacLeod. If counsel were held to have been dishonest, this would demonstrate that he had been malicious and had used the court for an improper purpose.

[103] The pursuer submitted that the question was whether it was in the interests of justice that this be explored further, against a background of the importance of finality (*Rankin* v *Jack* 2010 SC 642 at 657). Ms MacLeod had been excoriated unfairly. Any finding that a witness had knowingly deponed falsely would remove any former favourable impression (*Yuill* v *Yuill* [1945] P 15 at 20).

[104] The Lord Advocate responded that the cogency of any new evidence had to be considered in the context in the grounds of appeal. The evidence had to be "calculated to affect the judgment in the case" (*Rankin* v *Jack* at para [40]) and "at least *prima facie* likely to have that effect". The Lord Ordinary had accepted that Crown counsel's references to 29

and 39 boxes had been in error. Ms MacLeod had testified that she had sent an email to the police on 6 September 2015 asking them to check an entry regarding the Duff & Phelps chronology. This read "28/29 July 2015: Crown bring up 15 of the additional 29 boxes … released from D & P under LPP [legal professional privilege] only delivered to Police July 15". She was asking about 29 Duff & Phelps boxes, not 39 Clyde & Co boxes. A copy of that email, which had not been a production, had been sent to the pursuer's solicitors on the date of Ms MacLeod's testimony. She said that she had discussed this with counsel. The pursuer had done nothing about the email. Counsel had only been asked about the 39 boxes; ie the second error. The email had been available at the time of the cross-examination of counsel. He could have been asked about how he had come to make two mistakes, but he was not. The Lord Advocate had submitted at the proof that there was no "specification" of the proposition that Ms MacLeod had misled counsel. The pursuer had overlooked what was said in the email and an inaccurate summary of what Ms MacLeod had said was put to counsel. It was not *res noviter*. This was an attempt to open a side window when the front and back doors were locked.

Decision

Preface

[105] The detection and prosecution of crime is often far from a simple task. Allegations of fraud, especially in the corporate and commercial sector, can be difficult to investigate. If fraud exists, the perpetrators may have been adept at covering their tracks. Both at the investigation stage, and when Crown counsel elect to prosecute, it is important that those involved, especially those taking the critical prosecutorial decisions, are both experienced and skilled in financial matters and commercial ethics and practices.

[106] Mistakes can still be made. Cases may be reported by the police to the Crown Office which Crown counsel reject as inadequate evidentially, or because of the manner in which the investigation has been conducted. Carefully drafted indictments may be dismissed by the court because of some undetected flaw, or as a result of a misunderstanding of the law. In due course, an accused may be acquitted because the testimony at trial did not reach the threshold which had previously been thought, on Precognition, to exist.

[107] If, in every case, the Precognition were to contain entirely full and accurate statements from the witnesses and a flawless and meticulous evidential analysis preceding its recommendation to Crown counsel, the prospect of a defective prosecution would be much reduced. However, especially in the pressured context of the Scottish system, which has relatively strict, statutory time limits on the period available for serving an indictment on a person who has already appeared on petition, mistakes can be made. Not everything may have been included in a statement. Not every document may have appeared relevant at the time of reporting. Very often, especially in the digital age, important further enquires will be merited even at the stage of the indictment, hence the provision enabling lists of witnesses and productions to be lodged late under section 67 of the Criminal Procedure (Scotland) Act 1995. As with many forms of litigation, where a time limit is involved, a strong degree of pragmatism may be required in order to ensure that the wider interests of justice are considered and not subordinated to the requirements of internal procedures.

[108] It is not to be readily assumed that a failure by the police to report a particular piece of information, or to produce a specific document, to the Crown stems from malice. On the contrary, there is a presumption that a public office holder is doing no more than his duty, and doing it honestly and *bona fide* (*Beaton* v *Ivory* (1887) 14R 1057, LP (Inglis) at 1061). A police report, by its very nature, is bound to be a summary in order to make it reasonably

digestible to the prosecuting authority. It cannot, and should not, cover all the minutiae of months of investigation. It must, to a degree, be selective, even though the law of disclosure must ultimately be complied with. Even then, what is readily seen in hindsight to have been of relevance may not have assumed such a significance at an earlier stage. This is the real world in which prosecutions are commenced. In short, the occurrence of mistakes does not normally constitute a conspiracy or give rise to an inference of malice.

The keys to an Appellate Review

[109] In *Woodhouse* v *Lochs and Glens (Transport)* 2020 SLT 1203, the court repeated the need for an appellate court to exercise appropriate caution when reviewing findings of primary fact, especially when the decision at first instance has been based upon determinations of credibility or reliability (LP (Carloway), delivering the opinion of the court, at para [31]). The court has to be satisfied that the findings were "plainly wrong". That means that the Lord Ordinary has to be shown to have reached a decision which cannot reasonably be explained or justified (*Henderson* v *Foxworth Investments* 2014 SC (UKSC) 203, Lord Reed at 219). Alternatively, it may be demonstrated that the court at first instance has made some other identifiable error, including "a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence" (*ibid* at 220).

[110] An appellate court must be careful because of the limitations of the appeal process, with its narrow focus on particular issues rather than having, as the Lord Ordinary did, a panoramic vista of the evidence as a whole. As counsel for the Chief Constable put it, the appellate court is looking at a selected series of stills, rather than the complete film. Counsel for the pursuer, in directing his case against the Lord Advocate, sought to unlock the door to

an appellate review of the essential finding of a lack of malice by using four potential keys. None of these fits the lock.

[111] First, the Lord Ordinary did not ignore the Lord Advocate's admission that the prosecutions of Messrs Whitehouse and Clark had been malicious. He specifically took cognisance of this, but considered that he should not be influenced by such an extra-judicial outcome. The court agrees. The precise reasons for settling the Whitehouse and Clark cases, as disclosed in the statement to Parliament, may not be entirely clear but they were no doubt based, in part, on a consideration of the evidence available against those individuals.

[112] From the terms of Crown counsel's instruction itself, and the earlier recommendations from the procurators fiscal to him, it can readily be seen that the case against the pursuer was viewed in a different evidential light from that against Messrs Whitehouse and Clark. The distinction becomes clearer when the terms of Mr Logan's email to counsel of 4 September 2015 are considered. This stated that neither Messrs Whitehouse or Clark ought to be indicted. Matters are further illuminated when Ms Nisbet's email of 10 September 2015, to similar effect, is taken into account. The evidence against the pursuer was seen as far stronger than that against Messrs Whitehouse and Clark. Different considerations would arise when the Lord Ordinary was assessing the honest belief of Crown counsel in the sufficiency of evidence against the pursuer and those which must have influenced the Lord Advocate in determining to settle the cases against Messrs Whitehouse and Clark.

[113] The court considers that the Lord Ordinary did not err in law in treating the admissions in the settled cases as having no material bearing on the case against the pursuer. A reading of the views of Ms Nisbet and Mr Logan amply explains why, even if Messrs Whitehouse and Clark were to drop out of the equation, a conspiracy case could

remain evidentially sound against the pursuer, Mr Whyte and Mr Withey. This is what the Lord Ordinary found. Exactly what Crown counsel meant when he said that the case "wasn't ready" is unclear. Many cases are not ready when they are indicted to a Preliminary Hearing, if by that is meant ready for trial. That may be unfortunate, but it is a fact of life. The test, when assessing malice, is not whether a case is "ready", but whether there is a sufficiency of evidence to merit the libelling of the charges against the accused.

[114] Secondly, it is not surprising that the Lord Ordinary did not mention the manuscript note to "nail the three Duff & Phelps people" in the minutes of the meeting with the accountant on 11 September 2015. What this meant, or who, if anybody, said it, or to whom, was never established. All that the evidence amounted to, if accepted, was that Crown counsel had not said it or meant it. This piece of evidence went nowhere.

[115] Thirdly, the Lord Ordinary did take account of the search of HFW's offices in December 2015. He devoted a section of his Opinion (paras [53]-[55]) to what had occurred. He repeated that the High Court had held this activity to be oppressive. He referred to this again when summarising the pursuer's case against the police (para [58]), with which the Crown were said to be complicit (para [59]). He held that the primary responsibility for obtaining the warrant had been that of the Crown (para [109]). He noted later that serious mistakes had been made in relation to the warrant (para [141]). Nevertheless, he held that there was no improper motive on Crown counsel's part. He was entitled to reach that conclusion having heard counsel's explanation.

[116] Fourthly, the Lord Ordinary was correct to say that malice is not to be inferred from an absence of probable cause, in the sense that they are not synonymous. There are cases in which, looked at objectively, there is an absence of probable cause at the stage of indictment, but that does not mean that the prosecution is thereby malicious. The indicter may have

erred in his understanding of the law, or in his interpretation of the evidence on paper and what inferences might be drawn from it.

[117] There are many other possible reasons for the indictment of a case without probable cause. These include, as it has been put, "incompetence, inexperience, poor judgement, lack of professionalism, laziness, recklessness, honest mistake, negligence or even gross negligence" (*Whitehouse* v *Lord Advocate* 2020 SC 133 (LP (Carloway) at para [107]), quoting from *Miazga* v *Kvello Estate* [2009] 3 RCS 339, Charron J, delivering the judgment of the Canadian Supreme Court, at para [81]). Although he does not say so expressly, the Lord Ordinary's quotation of this passage must be taken to mean that he is following that *dictum*, although he goes on to qualify this by referring, albeit without comment, to *Robertson* v *Keith* 1936 SC 29 (LJC (Aitchison) at 47) to the effect that malice may be inferred from recklessness. That is not inconsistent with either *Whitehouse* or *Miazga*. Depending on the circumstances, malice may be inferred from recklessness, or from an absence of evidence (probable cause) (*A* v *New South Wales* (2007) 233 ALR 584, Gleeson CJ, delivering the judgment of the majority of the High Court of Australia, at para [90]), but it need not be. Each case will turn on its own particular facts.

The Meaning of Malice

[118] There is no indication in the Lord Ordinary's Opinion that he erred in his understanding of the test for malice. That test requires that a prosecutor initiate or continue a case not with a *bona fide* purpose of bringing a criminal to justice but for some other, and thus necessarily improper, motive. The analysis in *Glinski* v *McIver* [1962] AC 726 (Lord Devlin at 766) accurately reflects how malice ought to be seen in Scots law. It covers not only spite and ill will but also any motive other than a desire to bring a criminal to justice

and circumstances in which the prosecutor is attempting to obtain some extraneous benefit. In relation to the latter, *Willers* v *Joyce* [2018] AC 779 (Lord Toulson at para 55) offers a useful critique. The Lord Ordinary synthesised the foreign and domestic jurisprudence and arrived at a correct view of what is required. That is encapsulated succinctly in four words: improper purpose or motive. The court adopts, in that regard, the *dictum* in *Henry* v *British Columbia (AG)* 2015 SCC 24 (Moldaver J, delivering the opinion of the majority of the Supreme Court of Canada, at para 51).

The evidential analysis

The case against the Lord Advocate

[119] In the case against the Lord Advocate, it had already been decided that, at the stage of indicting, there was no objective reasonable and probable cause (*Grier* v *Lord Advocate* 2021 SLT 371, Lord Tyre at paras [42]-[45]). This court was not asked to review that decision. It proceeds on the basis that objective cause was absent. The only issue which remained was that of malice.

[120] The court is unable to fault the Lord Ordinary in the inferences which he drew from the primary facts found. At the heart of the case was the mind-set of Crown counsel when he made the decision to instruct service of the first indictment against the pursuer. It is on that decision that the Lord Ordinary had to, and did, focus. That decision is what initiated the prosecution (including that proceeding on the second indictment); not any earlier or subsequent views on the evidence which may have been reached by the police or the several procurators fiscal. For these views to have been relevant, they would have to have been communicated to Crown counsel with the deliberate intent to mislead him into a prosecution which had no reasonable or probable cause and to have achieved that end.

Although he may have sought, and even accepted, the views of others, his decision is not a collective one. It is that of Crown counsel alone. In taking his decision he was exercising the independent authority delegated to him by the Lord Advocate.

[121] The Lord Ordinary started by referring to what he described as the "bureaucratic setting" of the office of public prosecutor. He correctly pointed out that it is less likely that malice will arise in that context than if there were a private police prosecution. If anything, the Lord Ordinary underestimated the importance of the setting. Cases are reported by the procurators fiscal to Crown counsel, almost always in the form of a Precognition. That file or dossier ought to contain the statements and productions, followed by an analysis of the evidence. The nature and extent of that analysis, and the ultimate recommendation of whether and where to prosecute, will depend on the facts and circumstances.

[122] On completion of the Precognition, and sometimes earlier, the case leaves the hands of the permanent prosecutorial staff and is put into those of Crown counsel, the Advocate depute who will mark the case. Crown counsel are independent legal professionals, advocates or solicitor advocates, who are engaged on a commission directly from the Lord Advocate to conduct cases on her behalf. Although there are exceptions, they are generally expected to remain in office for a limited period in order to preserve the perception that they act independently of the permanent cohort and take decisions which might be seen by some to be tainted by prosecutorial zeal or other perceived absences of neutrality. The independence of the Advocate depute (just like that of the Lord Advocate) is a constitutional safeguard of the greatest importance in the system of criminal justice. It will, or ought to be, very difficult to impute an improper purpose or motive to such an individual in the absence of clear evidence to the contrary. The rhetorical question is bound to be: what possible

motive would Crown counsel have for launching a prosecution in which he or she thought the evidence to be insufficient or tainted?

[123] The pursuer points to a number of factors from which, he says, malice ought to have been inferred. In order to succeed he would have to go much further and to maintain, as he did, that malice was bound to be inferred from the proved circumstances. In doing so, he pointed to errors in the progress of the prosecution, including the absence of a completed Precognition. As the Lord Ordinary found, the Precognition was not completed and, to that extent, the case was not ready. Crown counsel knew that. He was also aware that, two days after he took his decision to indict, a time bar could have resulted in any prosecution at solemn level being impossible. Whether or not the case was ready, Crown counsel had to decide in respect of each of the accused, if there was a sufficiency of evidence on the principal charge of conspiracy to commit fraud. He could not avoid taking a decision just because a formal Precognition had not been completed and presented to him. Such an approach would elevate form over substance.

[124] The absence of a formal Precognition may perhaps have been, as the Lord Ordinary put it, "a serious breach of standard procedure", but it cannot be said to have given rise to a requirement incumbent on Crown counsel that he should insist on having a completed Precognition before instructing an indictment. On the contrary, it would be his duty, with a time bar looming, to make a decision on the material available. In taking that decision, he was bound to form his own view. There was no paucity of information. Crown counsel had plenty of material, including the detailed SPR, from which to work. He had been working as the "embedded counsel" for a lengthy period. What counsel described as a tactical decision was in reality one which had to be made in the prevailing state of preparation, whether the case was ready or not. If the case were not indicted, there was a prospect that the

opportunity to prosecute would be lost forever and the broader interests of justice would be defeated. The circumstances demanded a pragmatic approach.

[125] The Lord Ordinary reached a clear conclusion that all of the individuals concerned in the prosecution were of the view that there was reasonable and probable cause to indict the pursuer on the charges which he ultimately faced and that their actings were not motivated by any purpose other than the pursuit of the interests of justice. In particular, he found in fact that, notwithstanding the absence of a completed Precognition, Crown counsel was able to, and did, form a view that there was a sufficiency of evidence against the pursuer of a conspiracy to commit fraud.

[126] The Lord Ordinary's findings in relation to the motives of all those in the prosecution team are amply justified on the evidence. Notwithstanding the High Court's decision, which was restricted to the relevancy of the indictment and proceeded upon a concession relative to fraud as a completed crime, those in the Crown Office, including Crown counsel, shared the view of the police, as set out in the SPR, that the pursuer had been engaged in a scheme to acquire the Club by fraud; that is, as they saw it, buying the Club with its own money. There were two compelling evidential reasons for this. First, the presentation of the cash flow forecast to the Independent Committee with "Wavetower" substituted for "Ticketus". Whether the description of what occurred at the meeting with the Committee was entirely accurate does not detract from that which had been presented to the Crown Office. One thing that is not in doubt is that, whatever his state of knowledge, the pursuer did not mention Ticketus at the meeting. Secondly, there was the pursuer's involvement in the letter of comfort which, as reported to the Crown Office, had been instrumental in Ticketus releasing the funds from the escrow account.

[127] There was evidence from Mr Betts that the pursuer was aware of the Ticketus arrangement long before the meeting. The fact of the "Don't tell David" email was irrelevant, because the Crown were not then aware of it. The same applies to the manuscript note of the Stansted meeting. The Lord Ordinary is critical of Ms MacLeod's recommendation as being "brief" and unreasoned, but she was only the counter-signatory to the Precognition, not its primary author. Whether these criticisms have any merit or not, the pivotal decision rested with counsel. He considered that there was a sufficiency. The Lord Ordinary believed him. There is no material upon which the Lord Ordinary's decision on that key point can be successfully undermined.

[128] The pursuer founded heavily on the errors made by Crown counsel during the application to extend the time limit and when instructing the search warrant of HFW's offices. The section 65 application will be revisited under the *res noviter* heading. Suffice it to say, as has been seen, during the proof Ms MacLeod supplied the pursuer's agents with DWF's email to her concerning the 29 boxes. Notwithstanding the content of this, the pursuer elected to cross-examine counsel on the basis that it was not being suggested that counsel had "personally misled the court". That being so, the Lord Ordinary could hardly have concluded (as is now suggested) that he did. Whether or not counsel had misled the court, the extension would have been granted, at least on appeal. The complexities of the case alone justified the allowance of further time (*Whitehouse* v *HM Advocate* [2017] HCJAC 46, LJC (Carloway) delivering the opinion of the court, at paras [18] and [19]). With hindsight, it is unfortunate that the Crown perhaps lacked faith in the courts reaching such a view. On the search, the Lord Ordinary recorded that counsel had admitted to errors in connection with the HFW warrant. He determined, as he was entitled to do, that instructing a search was not indicative of improper motive, and hence malice.

[129] The critical steps in the prosecution were putting the pursuer on petition and then indicting him. The Crown are not criticised in relation to the former. For the reasons already explored, the pursuer's theory of underlying malice, that of securing a conviction at all costs, has no rational basis or evidential support. In light of the decision that the first indictment was not malicious, similar considerations apply to the second. The principal charge remained. Nothing material turns on the fact that there were additional, mostly statutory, charges added. Whether Crown counsel had specifically sanctioned these, the indictment must have been framed in the context of the previous discussions with him about a second dittay. The latter must have been signed by a Crown counsel; that is to say duly authorised.

[130] None of those involved in indicting the pursuer was challenged on the critical matter of honesty of belief in the course of the proof. Whilst not necessarily destructive of the pursuer's case, it made it very difficult for either the Lord Ordinary or a Division of the court to reach a different view. The court has struggled to understand what the parties meant by agreeing not to follow the "normal rule that all principal points" had to be put in cross-examination, cross was to be "illustrative only" and no adverse comment would be made on something not having been put. The reason for this accommodation was said to be that the proof was being conducted virtually by WebEx, rather than in person. Why that ought to have made a difference was not explained nor was the reason why it was thought competent for parties to purport to alter the normal rules on the assessment of evidence by the court. The pursuer accepted in his submissions to the Lord Ordinary that, if it were not suggested to a witness that he or she was being untruthful about a matter of significance, it would be unfair to find that the witness had been lying. This indicates that the fundamentals of the normal rules were not being departed from.

[131] The principles relative to a failure to cross-examine are straightforward. They are set out in *McKenzie* v *McKenzie* 1943 SC 108 (LJC (Cooper) at 109) as follows:

> "[T]he most obvious principles of fairplay dictate that, if it is intended later to contradict a witness upon a specific and important issue to which that witness has deponed, or to prove some critical fact to which that witness ought to have a chance of tendering an explanation or denial, the point ought normally to be put to the witness in cross-examination."

The question of fairness thus arises primarily in the context of a witness giving evidence when it is the intention of the cross-examining party to lead contradictory testimony at a later stage. Its general nature ought to be put to the witness as a matter of fairness so that he or she might tender any available explanation. The rule is not an absolute one and, in modern practice, a failure to put something is often regarded as a matter merely for comment (see *Dawson* v *Dawson* 1956 SLT (notes) 58). In certain situations it will, as a matter of fair play, be desirable to put a contrary version of events to a witness, if the cross-examiner intends to submit later that that version is the true one (see Macphail: *Evidence in Stair Memorial Encyclopaedia* vol 15 para 555). It will all depend upon the circumstances, notably whether the opposing party, or even the witness, is prejudiced in the final outcome.

[132] In this case, the pursuer was not intending to lead contradictory evidence after Crown counsel, and the procurators fiscal, had given evidence. He was intending to be, and was, critical of their combined actings in submissions at the conclusion of the proof. The question is whether he was either precluded from doing so or whether the failure to cross-examine ought to have been taken into account by the Lord Ordinary in his determination on credibility. In the normal case, where this criticism is mounted against a pursuer, it may be sufficient for a defender to draw attention to the averments on record to demonstrate that the pursuer was well aware of the defender's position. Had the pursuer wished to

contradict that position, it was for him to do so. A defender is not required to give his opponent's witnesses an opportunity to expand upon their evidence in chief.

[133] In *Whitehouse* v *Lord Advocate* 2020 SC 133 (LP (Carloway) at para [52]), the court was critical of the length and detail of the averments on record as serving to obscure the legal bases upon which Messrs Whitehouse and Clark were seeking damages. Although the pursuer's case against the Lord Advocate does not suffer from the extreme problems which existed in *Whitehouse*, in terms of length, it is still not easy to work out from the pleadings exactly what the nature of the malice on the part of Crown counsel or the procurators fiscal is said to be. It is averred (Cond 3.8) that the Lord Advocate's conduct was such that no reasonable prosecutor would have adopted ("followed") it and was "for that reason" malicious. Many criticisms are levelled about the procedure adopted by those in the Crown Office including, although this seems to be later contradicted, the absence of any instruction to indict from an Advocate depute. There is much focus on the Book of Regulations. The fundamental, but erroneous, contention throughout the pleadings seems to be that failures within the Crown Office in relation to a sufficiency of evidence can, of themselves, inevitably led to an inference of malice.

[134] For the reasons already explored, the pursuer had to establish an improper motive or purpose on the part of the prosecutor. In this case, that attribution had to be to the person who instructed the indictment; that is Crown counsel. Since that was the necessary element of proof, but not one which is easily extracted from the averments, fairness dictated that whatever malicious motive or purpose was being attributed to him, it ought to have been put to him in cross. If, as was submitted at the hearing of the reclaiming motion, the motive was to achieve a conviction at all costs, that ought to have been put fairly and squarely to Crown counsel. A failure to do so may not have been fatal but it was certainly a matter for

adverse comment and a factor to which the Lord Ordinary ought to have had regard. It is not clear that he did so other than in relation to Messrs Logan and MacDonald. That approach favoured the pursuer.

The case against the Chief Constable

[135] The duty of the police is to report the results of their investigations to the Crown; usually to the local procurator fiscal or, in this case, to the Crown Office. That duty must be carried out in good faith. There is no duty on the police at that stage in connection with the ultimate presentation of the case to a court, by which stage responsibility has passed to the prosecution service. The report may, and often will, contain the view of the police on whether there is evidence of a crime having been committed and who the perpetrators might be. It is not, however, the function of the police to determine whether there is a sufficiency of evidence and, if so, against whom. That is the exclusive province of the Crown (see *Smith* v *HM Advocate* 1952 JC 66, LJC (Thomson), reading the opinion of the court, at 71). The decision to place a person on petition is that of the relevant procurator fiscal and his deputes. The determination to prosecute on indictment is solely that of independent Crown counsel, who will normally have received the Precognition, together with a recommendation from the procurator fiscal. The police have very limited input into these decisions. They are not and cannot be prosecutors. In any event, the court agrees with the Lord Ordinary that they were not prosecutors on the facts of this case. They cannot therefore be sued for malicious prosecution. In so far as the pursuer's case is directed against the police upon that basis, and the pursuer's relative plea-in-law, perhaps advisedly, does not say that it is, it is misconceived.

[136] If the police provide the procurator fiscal with information or evidence which is either false or tainted, that in itself may be actionable. The wrong is not characterised as malicious prosecution, since it occurs in advance of any prosecution, but the information may cause that prosecution and hence result in loss. It will be actionable if what the police put in those reports is done maliciously. If that malicious reporting directly causes the Crown to prosecute a person, the police will be liable in damages. Proof of causation will remain difficult, given the role of the procurators fiscal and/or Crown counsel in reaching an independent decision on sufficiency and, in the event of a sufficiency, on whether a prosecution is in the public interest. Here, the procurators fiscal and Crown counsel carried out their own analysis of the material presented to them, albeit principally in the form of the SPR and appended materials. The case against the police must fail on this basis.

[137] Cases from other jurisdictions, which are based upon a deprivation of the Crown's ability to exercise an independent judgement because of false or tainted information (eg *Rees* v *Commissioner of Police for the Metropolis* [2018] EWCA Civ 1587), may be interesting. They may have an indirect, but analogous, bearing on the issue of causation (that is whether a malicious police report resulted in a prosecution), but they do not, and should not, play a direct role by introducing the novel concept of malicious police prosecution in Scotland where the decision to prosecute is taken by the public prosecutor. That is the position in virtually all cases. As was recently repeated (*Glasgow City Council* v *VFS Financial* 2022 SC 133, LP (Carloway), delivering the opinion of the court, at para [51] and citing *McE* v *de La Salle Brothers* 2007 SC 556, Lord Osborne at para [161]) it is "most unwise and likely to lead to substantial confusion" if rules which have been devised in another jurisdiction, which have a different basis and historical origin, are grafted onto the existing general principles of Scots law. In the field currently under comparative analysis, there is ample Scottish

jurisprudence, some dating back to the 16th century (see eg Reid: *Delict* at para 17.52; see also Walker: *Delict* (2nd ed) at 870 *et seq*).

[138] As with the case against the Lord Advocate, the fundamental defect in the case against the Chief Constable is that it approaches malice as if it were, at least in some cases, an inevitable inference from objective fact. It will be in rare cases that an inference will be irresistible. The central contention, that there was no support for DS Robertson's view on sufficiency (even if that were to be material), is erroneous. His view was supported by the testimony of others, notably DC O'Neill, the procurators fiscal and Crown counsel, which was to the same effect. It was also incorrect to say that DS Robertson's report, on the pursuer's presentation to the Independent Committee and his preparation of the letter of comfort, was untrue. It may have been erroneous in some respects, but the pursuer had been at the Committee meeting, when some form of cash flow forecast was discussed. The letter of comfort ran in the pursuer's name.

[139] As already observed, a police report to the Crown is inevitably a summary which will contain primarily what the police regard as important, even if, in an ideal world, that ought to include any material factors in favour of the suspect's innocence. It is not intended to be a comprehensive account of everything that the police did, or of what everyone said, and when, during the investigation. Like the Lord Ordinary, the court is unable to detect anything sinister in the fact that certain matters did not find their way into the SPR, such as references to the meeting at Stansted, the notes of that meeting and the "Don't tell David" email. Although these, and other matters, have assumed a degree of importance in the reclaiming motion, they are of lesser, if any, significance when the totality of the evidence is considered. They are little more than factors which indicate some questionable aspects to the police investigation.

[140] The court does not accept that, had the Crown been aware of these matters, they would have declined to prosecute or that their disclosure would have resulted in a successful plea of oppression. The court, to a degree, accepts the pursuer's contention that it should be careful when looking at individual emails and parts of statements, as distinct from examining the facts found by the Lord Ordinary. But the pursuer specifically asked the court to look at individual productions and transcriptions of parts of the testimony.

[141] It was not suggested to the police that, in sending the SPR to the Crown Office, they were deliberately trying to mislead the Crown into mounting a prosecution of the pursuer. As with the case directed against Crown counsel, if the pursuer were suggesting that DS Robertson had been intending to dupe the Crown Office into mounting a prosecution on the basis of inaccurate or tainted evidence, fairness dictated that this ought to have been raised with him in cross-examination.

[142] In the absence of such a challenge, it is not surprising that the Lord Ordinary was not prepared to accept that DS Robertson's actions, whether his interviewing techniques, the opening of sealed envelopes, the use of the cash flow forecast and the obtaining and executing of the warrants, far less his alleged singing of a Rangers' song, justified a finding of malice. The court can find no sound reason to interfere with his conclusion. The evidence supported the view that the police's honest belief was that the pursuer had been party to the presentation of false information to the Independent Committee. Some form of cash flow forecast had been made available to the Committee and that was supported by the relative emails around that time. At the time of the letter of comfort, Ticketus controlled the release of the funds. The Lord Ordinary's conclusion on lack of malice is not susceptible to substantial criticism.

Causation

[143] The pursuer raised separate actions against the defenders. He was correct so to do. That is because any liability of the defenders would be several and not joint. The alleged wrongs were separate. They did not contribute to the same damage (*Turnbull* v *Frame* 1966 SLT 24, Lord Fraser at 24 following *Hook* v *McCallum* (1905) 7 F 528, LJC (Macdonald) at 532 following *Barr* v *Neilsons* (1868) 6 M 651, LP (Inglis) at 654). The Lord Ordinary's view on the divisibility of the losses is correct, as is his attribution of some of the losses to the allegedly defamatory material which was broadcast by the BBC.

[144] However, where a pursuer has established that he has suffered cumulative damage to his reputation, lost earnings and incurred legal expenses unconnected to the litigation itself, it is not open to the court to decline to award any damages on the basis that there has been no specific evidence on what wrong caused what damage. That would introduce an unnecessarily high hurdle to what is essentially a jury question for the application of the conventional broad axe with a blunt blade. Had the Lord Ordinary found that the pursuer's losses had been caused by one or both defenders and/or by a third party, he ought to have applied that axe by assessing the impact of the broadcast, deducting that from the total of what are now largely agreed amounts and, excluding any pre-indictment loss of earning or legal costs from any damages due by the Lord Advocate. He would divide the balance in such proportions as he considered reasonable.

[145] Quantum is not an issue for this court. Before leaving that subject, however, it is worth remarking that any court engaged in an assessment of legal expenses as damages would be bound to look askance at a figure of almost £1m which is said to be reasonable in order to defend a prosecution which did not even get close to reaching a trial. In a case

involving what seems to be an extravagant sum, the court should consider a remit to the Auditor of Court for an agent and client taxation.

Res Noviter

[146] This court can allow additional proof on the grounds of *res noviter veniens ad notitiam*; that is to say, new facts coming to the knowledge of a party. It will exercise that power where the interests of justice require that course of action in the circumstances of the particular case; bearing in mind that finality and certainty are important aspects in the justice equation, as is the need to ensure that every party has had a fair opportunity to investigate and prepare their cases (*Rankin* v *Jack* 2010 SC 642, Lord Reed, delivering the opinion of the court, at para [37]). The court would not normally allow proof of material which could, if the case had been properly prepared, have been made available at the proof. Even if the material could not have been made available, the court may still not admit the material because of the importance of finality in litigation. The court's assessment is "essentially an intuitive judgment".

[147] The court is not satisfied that it is in the interests of justice to admit the new evidence. First, it does not assist directly in the proof of any material fact. Secondly, the fact that erroneous information had been given by Crown counsel to the sheriff was well-known before the proof. It had been explored in the criminal appeal (*Whitehouse* v *HM Advocate*). The pursuer elected not to use counsel's erroneous submissions to the sheriff in his attempt to prove malice. He expressly disavowed the possibility of counsel deliberately misleading the sheriff. The court does not criticise that, as a tactical decision. It was nevertheless made at a time when the pursuer's agents had been sent the email of 6 September 2015 from Ms MacLeod to the police, asking them to check on the note of "29 boxes … released from

D&P under LPP only delivered to Police July 15". Ms MacLeod had testified that she had discussed the matter with counsel. In short, whatever new email may now have been unearthed, and whether it should have been disclosed to the pursuer, the issue of culpability in the sheriff court could have been explored at the time. Standing the pursuer's tactic, which again the court does not criticise, of not confronting counsel with the direct accusation, which is now made, of seeking a conviction at all costs, the lack of pursuit of this line is not surprising.

[148] Thirdly, the court does not accept that either the conduct of Crown counsel or Ms MacLeod was reprehensible. However unfortunate it may be, it is not unusual for misunderstandings in advance of submissions to be made on a procedural matter. The court is not persuaded that the newly produced emails or the new material from Ms MacLeod demonstrates a *prima facie* case of dishonesty on the part of Crown counsel. Given especially the apology which was tendered to the High Court, it seems far more likely that an unfortunate mistake was made. Even if that were not so, and a greater level of culpability was apparent, that is a far cry from demonstrating that counsel's decision to indict the pursuer was malicious. Seen in the context of the whole evidence, this passage of sheriff court procedure is of relatively peripheral significance. It is not likely to have affected the Lord Ordinary's assessment of Crown counsel's credibility and hence the outcome of the cases.

[149] The court will refuse the minute to hear additional proof. It will refuse the reclaiming motions and adhere to the Lord Ordinary's interlocutors of 11 January 2022.