SHERIFF APPEAL COURT

[2021] SAC (Civ) 15
CAM-A23-18

Sheriff Principal M M Stephen QC
Sheriff Principal C D Turnbull
Appeal Sheriff F Tait

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL MHAIRI M STEPHEN QC

in the appeal by

THE ADVOCATE GENERAL FOR SCOTLAND

in the cause

GALBRAITH TRAWLERS LIMITED

Pursuer and Respondent

against

THE ADVOCATE GENERAL FOR SCOTLAND

Defender and Appellant

Pursuer and Appellant: Lindsay QC; Anderson Strathern LLP
Defender and Respondent: Howie QC, Irvine, G M McGill & Co Ltd

15 April 2021

[1] This action by Galbraith Trawlers Limited relates to the detention (or purported detention) by a public official in the service of a department of Her Majesty's Government, the Home Office, of vessels owned by the company. They are (1) the fishing vessel "Amy Harris IV" ("the Amy Harris"); (2) the fishing vessel "Fear Not II" ("the Fear Not"); and (3) the fishing vessel "Sapphire IV" ("the Sapphire"). The Amy Harris was skippered

by Mr James Rennie who, on 25 August 2015, was arrested on suspicion of facilitating a breach of immigration law contrary to section 25 of the Immigration Act 1971 ("the 1971 Act"). The vessel was detained on the same date at Campbeltown. The allegations related to the vessel's Filipino crew. The second and third named vessels were detained on 23 December 2015 following the arrest of Mr John Galbraith, the pursuer's controlling shareholder, on 15 December 2015 on suspicion of a similar breach of immigration law again relating to the vessels' Filipino crew.

[2] In December 2015 the pursuer, by summary application made to the sheriff at Campbeltown, sought the release of the Amy Harris in terms of section 25D(3) of the 1971 Act. That application was amended in January 2016 to include the Fear Not and the Sapphire. Following consignation of £30,000 with the sheriff clerk, the Amy Harris and the Fear Not were released on 26 February 2016 with the Sapphire released on 18 August 2016.

[3] An indictment was served on John Galbraith with charges alleging contraventions of section 25 of the 1971 Act. These proceedings were reduced to summary complaint in January 2017. The complaint was deserted at the trial diet on 14 November 2017 bringing to an end the criminal proceedings against Mr Galbraith. No criminal proceedings were raised against Mr Rennie.

Action for damages

[4] This action for damages is directed against the Advocate General for Scotland who is sued pursuant to the Crown Suits (Scotland) Act 1857, as amended, as the appropriate law officer in relation to actions raised against the Crown in Scotland. The pursuer seeks declarator and damages in respect of liabilities of the Crown which arise out of the unlawful action of servants or agents of the Crown (immigration officers in the service of the Home

Office). The action is founded on the detention of the vessels being *ultra vires* and unlawful, based upon the detention (or purported detention) thereof being carried out by Mr Jack Linton, a servant of the Crown employed by the Home Office and holding the rank of "immigration officer". Section 25D(1) of the 1971 Act enacts that a senior officer or constable may detain a relevant ship. Section 25D(8) of the 1971 Act provides that "senior officer" means an immigration officer not below the rank of Chief Immigration Officer. It is averred that Mr Linton did not have the requisite rank of Chief Immigration Officer and that he therefore acted *ultra vires*, the purported detentions being unlawful. The Advocate General admits the detention of the vessels but denies that Mr Linton effected the detentions explaining that Her Majesty's Inspector, Carolyn Lindsay ("HMI Lindsay"), made the decision to detain the vessels which decision was communicated to Mr Rennie and Mr Galbraith, respectively, by letters in the name of Mr Linton. In any event, it is averred in answer that Mr Linton was a "senior officer" for the purpose of section 25D of the 1971 Act and would have had the requisite authority to make a lawful decision to detain the vessel if he had been called upon to make such a decision.

Pleadings

[5] The pursuer has five craves. The first three craves seek a finding and declarator that the fishing vessels' detention between various dates was *ultra vires*, without warrant and unlawful. Crave 4 seeks damages of £375,000 being the gross loss of profit for the period over which the vessels were detained and therefore could not be engaged in fishing. Crave 5 seeks damages of £7,816 a sum which relates to the cost of litigation by way of making summary application to the sheriff at Campbeltown for release of the vessels subject to consignation.

[6] Article 7 of Condescendence makes averments about the purported detentions being *ultra vires*. In terms of section 25D the power to detain is conferred on a constable or senior officer. Mr Linton holds a lower rank. The detentions were therefore void and unlawful.

[7] In his answers to Article 7 the Advocate General states that the decision to detain was made by HMI Lindsay and conveyed by Mr Linton who, in any event, was an Acting Chief Immigration Officer (though not designated as such in the letter of 25 August 2015, which effected (or purported to effect) the detention of the Amy Harris).

[8] Article 8 of Condescendence makes averments in relation to misfeasance in public office based on the deliberate misuse of statutory powers. The defender is vicariously liable (on behalf of the Home Office) for Mr Linton's actions. In the answers it is stated that there was no deliberate or recklessly indifferent misuse of the statutory powers by any public official in detaining the vessel.

[9] Article 9 of Condescendence avers negligent actings by Mr Linton in breach of a duty of care to the pursuer to protect it from economic loss in consequence of his unwarranted and *ultra vires* use of powers under the 1971 Act. Foreseeable loss would flow from the detention of the vessels as clearly they would not be able to leave port and engage in their sole activity which is prawn and langoustine fishing.

[10] Article 10 of Condescendence makes averments that Mr Linton has strict liability to the pursuer in respect of his *ultra vires* actings. Article 11 of Condescendence contains averments of loss - loss of revenue from fishing relating to the three detained vessels and another smaller vessel the Sea Nymph. The vessels landed a catch worth £469,776 in the three months prior to the detention of the Amy Harris (May to August 2015). 28% of that amount represents the gross profit following deduction of operating costs etc. The pursuer all this time had to finance borrowings and other fixed costs for the vessels with no

corresponding income. As a result the pursuer required to sell assets at a disadvantageous price. Fishing licences were sold below their potential value. The licence for the Amy Harris was sold in early 2016 for £58,000 whereas the likely value of the licence in 2017 would have been £200,000. Harbour dues still required to be paid and repairs effected due to the vessels not being at sea regularly.

[11] It is averred in answer 11 that the sum said to constitute the gross profits for the trading period prior to detention included the period when the Filipino crew were working illegally on these vessels in breach of section 24(1) of the 1971 Act. Recovery of damages for loss of profit caused by being prevented from engaging in unlawful trade would be contrary to public policy and is not a relevant head of damages.

[12] Following debate at Campbeltown Sheriff Court, the sheriff, on 10 February 2020, repelled the defender's first preliminary plea directed to the relevancy and specification of the pursuer's pleadings; repelled the defender's plea directed to the merits of the pursuer's pleadings together with the defender's fourth, fifth and sixth pleas in law seeking absolvitor. Furthermore, the sheriff excluded from probation the defender's averments in answers 3, 5, 7, 8, 10 and 11 relating to the involvement of HMI Lindsay; the lawfulness of the decision she made to detain the vessels and the *esto* case to the effect that Mr Linton would have had the requisite authority to detain "if called upon to make such decisions". The sheriff sustained the defender's second plea in law in so far as excluding from probation the pursuer's averments in Article 9 of Condescendence relating to negligence and duty of care. Consequentially, the sheriff sustained the pursuer's first and second pleas in law and granted decree in terms of the pursuer's first, second and third craves. The sheriff allowed a proof before answer restricted to the issues of causation of loss and quantification of damages.

Statutory provisions

[13] **Immigration Act 1971:**

"Section 25D - Detention of ship, aircraft or vehicle

(1) If a person has been arrested for an offence under section 25, 25A or 25B, a senior officer or a constable may detain a relevant ship, aircraft or vehicle –

(a) until a decision is taken as to whether or not to charge the arrested person with that offence; or
(b) if the arrested person has been charged-
(i) until he is acquitted, the charge against him is dismissed or the proceedings are discontinued; or
(ii) if he has been convicted, until the court decides whether or not to order forfeiture of the ship, aircraft or vehicle.

(2) A ship, aircraft or vehicle is a relevant ship, aircraft or vehicle, in relation to an arrested person, if it is one which the officer or constable concerned has reasonable grounds for believing could, on conviction of the arrested person for the offence for which he was arrested, be the subject of an order for forfeiture made under section 25C.

(3) A person (other than the arrested person) may apply to the court for the release of a ship, aircraft or vehicle on the grounds that-

(a) he owns the ship, aircraft or vehicle.
(b) he was, immediately before the detention of the ship, aircraft or vehicle, in possession of it under a hire-purchase agreement, or
(c) he is a charterer of the ship or aircraft.

(4) The court to which an application is made under subsection (3) may, on such security or surety being tendered as it considers satisfactory, release the ship, aircraft or vehicle on condition that it is made available to the court if-

(a) the arrested person is convicted; and
(b) an order for its forfeiture is made under section 25C.

(5) In the application to Scotland of subsection (1), for paragraphs (a) and (b) substitute-

"(a) until a decision is taken as to whether or not to institute criminal proceedings against the arrested person for that offence; or
(b) if criminal proceedings have been instituted against the arrested person-

(i) until he is acquitted or, under section 65 or 147 of the Criminal Procedure (Scotland) Act 1995, discharged or liberated or the trial diet is deserted simpliciter;
(ii) if he has been convicted, until the court decides whether or not to order forfeiture of the ship, aircraft or vehicle,

and for the purposes of this subsection, criminal proceedings are instituted against a person at whichever is the earliest of his first appearance before the sheriff on petition, or the service on him of an indictment or complaint"

(6) 'court' means-
(b) in Scotland, the sheriff;

(8) 'Senior officer' means an immigration officer not below the rank of chief immigration officer."

The appeal

[14] The defender and now appellant appeals the sheriff's interlocutor save in respect of the sheriff excluding the respondent's averments on negligence. The respondent cross-appeals based on the proposition that the sheriff fell into error in observing at paragraph [96] of his note that had the defender averred that Mr Linton did detain the vessels, and that this was lawful as he was an "acting" Chief Immigration Officer at the time and thus had the requisite authority, that evidence would have been required to determine whether he came within the category of "senior officer" to whom Parliament had given power to effect detentions.

Grounds of appeal

(1) The first ground of appeal narrates that the sheriff erred in holding that the maxim *ex turpi causa non oritur actio* offers no bar to the recovery of damages and therefore the sheriff ought not to have repelled the appellant's sixth plea in law.

(2) In the second ground of appeal the appellant submits that the sheriff erred to a material extent in holding that the respondent's averments on misfeasance in public office were sufficiently relevant and specific to go to proof.

(3) The third ground of appeal argues that the sheriff erred in holding that the respondent's averments on strict liability were relevant.

(4) The fourth ground of appeal relates to the appellant's pleadings. The sheriff erred in law to a material extent in holding that the appellant's pleadings do not present a relevant defence to the respondent's averments that the detentions were *ultra vires*, unlawful and unwarranted.

The respondent resists the appeal on all grounds.

Cross appeal

The respondent's cross appeal is set out above. The appellant opposes the cross appeal.

Ex turpi causa non oritur actio

[15] Counsel for the appellant submitted that the common law maxim *ex turpi causa non oritur actio* applies in the circumstances of this case. The appellant has relevantly averred that the present action is founded upon the respondent's unlawful act of using the vessels to fish with Filipino crew who did not have permission to work within British territorial waters. The appellant's detailed averments in answer 11 set out the respondent's scheme for procuring Filipino crew for the vessels and employing them to fish. The crew did not have leave to work within UK territorial waters. When discovered the Filipino crew were

removed. The subsequent detention of the vessels on which they had worked was part of the same operation carried out by the Home Office to prevent such illegal activities.

[16] The maxim *ex turpi causa non oritur actio* derives from the judgment of Lord Mansfield in *Holman* v *Johnson* (1775) 1 Cowper 341 at 343:

> "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted." (applied in *McLaughlin* v *Morrison* 2014 SLT 111 at paragraph [38]).

[17] The appellant's averments on this issue are relevant and taken *pro veritate* the respondent's own averments constitute an admission that it was seeking to profit from its own wrongdoing. The sheriff accordingly erred in holding that in the circumstances of this case the maxim did not apply.

[18] Finally, under reference to *Romantiek BVBA* v *Simms* [2008] EWHC 3099 (QB), even if any persons for whom the appellant is liable acted in bad faith (which is not accepted) the respondent would still be barred from recovering damages from the appellant.

[19] It was submitted on behalf of the respondent that the doctrine of "*ex turpi causa*" was only to be deployed in clear cases of a limited type, namely those involving breaches of the criminal law (*Patel* v *Mirza* [2017] AC 467 – per Lords Sumption and Toulson JSC). The doctrine is based on a legal policy of denying a party compensation for a wrong done to him which he would otherwise be entitled to receive. The Supreme Court in *Patel* took the view that it must be applied cautiously, under reference to the Canadian authority of *Hall* v *Hebert* [1993] 2 SCR 159. The law does not give with the right hand what it has taken away with the left.

[20] Turning to the cause of action and the pleadings it was submitted that there is no inconsistency with the operation and integrity of the court system in this case. There is no

breach of the criminal law. Neither the respondent nor its director had been convicted of any offence. No charges were brought against the respondent company and proceedings against its main director had been deserted. Importantly, the cause of action in the present case derives not from any act of the respondent or its directors or skippers but from the *ultra vires* and delictual actions of an immigration officer employed by the Home Office. It is those actions and the consequences of those actions which form the cause of action here. Section 25D of the 1971 Act has as its sole purpose a method of obtaining security over the vessels in the event an order for their forfeiture is made by the court following conviction on indictment. The circumstances relating to illegal activity in the procurement of Filipino nationals as crew on these vessels do not form the basis of this action but may have a bearing on the quantum of damages. The issue in this case relates to the illegality of the detention of vessels and as such it is not an issue which attracts the application of the *ex turpi causa* doctrine. The sheriff's exclusion of the defence was therefore correct and his interlocutor, in so far as dealing with this defence should not be recalled or varied.

Decision

[21] The maxim *ex turpi causa non oritur actio* describes a policy which if raised in defences the court must consider and, if satisfied that it applies, constitutes a complete defence to an action for damages, thus denying a pursuer satisfaction of his rights against the defender. The dicta in the 18th century case of *Holman* v *Johnson* (*supra*) still holds good and the doctrine applies when a pursuer relies on his criminal act (or that of its author in title) to establish his cause of action. It is for the defender to satisfy the court that an *ex facie* meritorious case should be dismissed on account of illegality.

[22] *Patel* (*supra*) is the most recent authoritative decision on the doctrine. In that case Lord Sumption JSC at page 534 observes at paragraph 233:

> "The starting point is that the courts exist to provide remedies in support of legal rights. It is fundamental that any departure from that concept should have a clear justification grounded in principle, and that it should be no more extensive than is required by that principle. The underlying principle is that for reasons of consistency the court will not give effect, at the suit of a person who committed an illegal act (or someone claiming through him), to a right derived from that act".

In *Patel* the court approved the *dicta* of McLaughlin CJ in *Hall* where the conclusion was reached that only in very limited circumstances would the courts bar recovery in tort on the ground of the plaintiff's immoral or illegal conduct. The doctrine also has as its purpose the duty to preserve the integrity of the legal system by acting consistently (per Lord Hughes JSC in *Hounga* v *Allen* [2014] 1 WLR 2889 at paragraph 55: "the law must act consistently; it cannot give with one hand what it takes away with another, nor condone when facing right what it condemns when facing left"). Is there a concern as to inconsistency in this case?

[23] Before that question can be answered it is of assistance to consider how the doctrine has been classified. Lord Hoffman in *Gray* v *Thames Trains Limited* [2009] 1 AC 1339 described the doctrine in terms of its narrow and wider form. The narrower form is concerned with cases where the pursuer seeks to recover damages for loss directly arising from the sentence or punishment imposed by the criminal courts. Recovery in such cases is precluded based on the principle of consistency as eloquently expressed by Lord Hughes in *Hounga* v *Allen*. The application of the rule in this narrow form is clear and logical. However, we agree with counsel for the respondent that the appellant in this case instead relies on the wider form of the doctrine usually expressed in terms that a person cannot recover loss which is the consequence of his own criminal or illegal act. Whether the

principle applies requires the court to consider the cause of action and whether it relies on the respondent's illegal act or acts.

[24] It is clear from the respondent's averments that the cause of action here lies in the *ultra vires* and unlawful actions of an immigration officer in the employment of the Home Office for whom the appellant is responsible. The action does not depend on the activities of the respondent at all but relates solely to the purported detention of the vessels. In other words the respondent's case is founded not on its own illegal acts but rather on the illegal acts of those for whom the appellant is vicariously liable. The submission advanced on behalf of the respondent as to the purpose of section 25D is one with which we agree. The section is concerned with preserving or detaining a relevant ship or vessel:

> "if it is one which the officer or constable concerned has reasonable grounds for believing could, on conviction of the arrested person for the offence for which he was arrested, be the subject of an order for forfeiture made under section 25C."

The constable or senior officer may only detain a vessel until a decision is taken whether or not to charge an individual with an offence or if charged until acquitted or the charge against him is dismissed or the proceedings are discontinued. In Scotland, criminal proceedings mean solemn proceedings on indictment (section 25C(1) of the 1971 Act). The respondent is Galbraith Trawlers Limited. The company has not been charged with any offence and its principal director having been charged with contraventions of the 1971 Act on indictment, these proceedings had been reduced to summary complaint by January 2017, the effect of that being that the proceedings were no longer relevant and effective to warrant detention or continued detention. In any event, proceedings were ultimately discontinued or deserted against the respondent's director. Any alleged illegal activities on the part of the respondent do not form the cause of action although they may have a bearing on damages for example, in calculating loss of profit where adjustment may be required to assess the cost

of EU Nationals. The detention of the vessels prevented the respondent from fishing lawfully and for profit. In these circumstances, the defence advanced on behalf of the appellant based on the doctrine *ex turpi causa non oritur actio* has no application in the circumstances of this case and is therefore irrelevant. The sheriff was correct to exclude the defence and repel the sixth plea in law for the respondent.

Misfeasance in public office

[25] The respondent's case on misfeasance in public office is set out in Article 8 of Condescendence. In his answers the appellant repeats the averment that Mr Linton made no decisions in terms of section 25D of the 1971 Act, instead such decisions were made by HMI Lindsay. The appellant avers that there has been no misfeasance in public office by Mr Linton or by any other public official for whom the defender is liable; likewise there was no deliberate or recklessly indifferent misuse of any statutory powers by any public official involved in the detention of the vessels. The sheriff analyses the relevancy of the respondent's pleadings at paragraphs [62] – [65] of his judgment. He concludes at paragraph [65] "that the Pursuer's averments on misfeasance in public office are sufficiently relevant and specific to be allowed to go to proof".

[26] The appellant argues in ground of appeal 4 that the sheriff erred in so deciding as the respondent's pleadings taken *pro veritate* do not establish that Mr Linton had no honest belief that his actions were lawful. The cumulative effect of the respondent's averments is equally consistent with the statutory power being exercised negligently by him. It is accepted on behalf of the respondent that negligence does not found a case based on misfeasance but contended that the respondent's averments disclose a relevant case under this delict – often

known as the *Micosta* delict, so named after the case of *Micosta SA* v *Shetland Islands Council* 1986 SLT 193.

[27] Counsel for the appellant contended that the essential elements of the delict of misfeasance or deliberate misuse of statutory powers by a public body involves a high test. Under reference to the *dicta* of Lord Ross in *Micosta* it requires the pursuer to establish that the alleged misuse of statutory power was deliberate and that there is malice or proof that the action had been taken by the defender in the full knowledge that he did not possess the powers which he was purporting to exercise. Mere error of judgement would be insufficient. If there was a genuine or reasonable belief that the actions were *intra vires* there would be no liability (*Ballantyne* v *City of Glasgow District Licensing Board* 1986 SC 266 per Lord Jauncey).

[28] The respondent does not aver malice but that Mr Linton acted in the full knowledge that he did not possess the powers that he purported to exercise. In these circumstances, it is necessary to show that the official acted with reckless indifference to the illegality and its consequences (*Phipps* v *Royal College of Surgeons* [2010] CSOH 58 at paragraph 9). The respondent's pleadings fail to disclose any ulterior motive on the part of Mr Linton such as personal gain. He was solely concerned with the consequences of the illegal activity which had been facilitated by the vessel owners and skippers. The averments in answer make it clear that there was no deliberate or recklessly indifferent misuse of power based on the decision to detain having been made by HMI Lindsay and communicated by Mr Linton on her instructions. The motive for detention was to secure the vessel in case forfeiture was ordered by the court (see *Romantiek supra*). The averments demonstrate good faith on Mr Linton's part and no reckless indifference. The appellant's specific averments in answer are met with "not known and not admitted". The respondent's case amounts to little more

than Mr Linton and his superiors misinterpreting the meaning of "senior officer" and whether that requirement applied to the person making the decision to detain or putting that decision into effect.

[29] The material facts advanced by the appellant in answer are highly relevant to the issue of whether Mr Linton acted with the required degree of reckless indifference. The respondent's case on record fails to meet the requisite test for misfeasance and is therefore irrelevant. The sheriff erred in holding that the pleadings were relevant and ought to have sustained the appellant's first and second pleas in law to the extent of not admitting to probation the respondent's case on misfeasance.

[30] Counsel for the respondent also analysed the test or "ingredients" necessary before misfeasance in public office would be actionable. Decided cases in England (*Three Rivers District Council and Others* v *Governor and Company of the Bank of England* (No 3) [2003] 2 AC 1 and *Romantiek BVBA*) and in Scotland (*Micosta*) require essentially the same elements to be present namely:

(i) the defendant must be a public officer;

(ii) the defendant must have been exercising power as a public officer; and

(iii) the defendant must either have been acting with targeted malice or with knowledge that he had no power to do the act complained of, or with reckless indifference as to his lack of knowledge, and that the act will probably injure the plaintiff.

[31] The respondent's case on misfeasance is pleaded in Article 8 of Condescendence. It meets the essential elements required to establish a case based on *Micosta* delict. There is no dispute that the first and second essential requirements are averred and satisfied. The respondent avers a basis for finding that Mr Linton was at least reckless as to the

probabilities that his actions would lead to loss; and avers a lack of honest belief in Mr Linton's power to act in the detention of the vessels. He knew that he held a lower rank than that of Chief Immigration Officer and yet purported to detain each of the vessels in terms of the specific statutory provisions regulating detention (section 25D of the 1971 Act). In so doing he was either knowingly or recklessly indifferent to the fact that he did not possess the rank and therefore the power to detain the vessels.

[32] The sheriff was entitled to hold that the averments in support of misfeasance or *Micosta* delict were sufficiently relevant. The test set out in *Jamieson* v *Jamieson* 1952 SC (HL) 44 is not met here. In other words if the respondent's averments are proved its case must not necessarily fail.

Decision

[33] Until Lord Ross' opinion in *Micosta* there appears to have been little or no Scottish authority on deliberate abuse of statutory power by a public official. The English courts had for some time recognised the tort of misfeasance in public office. In *Micosta*, the Lord Ordinary considered that deliberate misuse of statutory powers by a public body would be actionable as a delict under the law of Scotland. At page 198 Lord Ross observes:

> "In my opinion, deliberate misuse of statutory powers by a public body would be actionable under the law of Scotland at the instance of a third party who has suffered loss and damage in consequence of the misuse of statutory powers, provided that there was proof of malice or proof that the action had been taken by the public authority in the full knowledge that it did not possess the power which it purported to exercise……"

The principles set out in *Micosta* were repeated in *Ballantyne* (*supra*) and approved in *Philp* v *Highland Council* [2018] CSIH 53 at paragraph [33] and [34]. Both parties in this appeal accept that the principles set out in *Micosta* and *Ballantyne* represent accurate statements of

the law in Scotland. However, the question in this ground of appeal is whether the respondent is bound to fail even if he proves all of his averments on misfeasance (see *Jamieson*).

[34] The respondent's case is not based on malice and the respondent does not seek to prove that Mr Linton acted maliciously, instead, as the sheriff recognised, the respondent's case is based on reckless indifference, there being no need to plead malice. The *de quo* of the respondent's case is that Mr Linton did not have the power to effect the detention due to his rank. He was well aware of his rank, namely, that of an immigration officer or at the highest an Acting Chief Immigration Officer. The respondent's case proceeds on the basis that neither of these ranks or descriptions of his rank vested in Mr Linton the power to effect a detention in terms of section 25D of the 1971 Act. The respondent's case on record is consistent and straightforward. As the sheriff observes at paragraph [64] of his judgment, "The fact that the pursuer does not know or admit that Mr Linton was an 'acting' CIO does not make its pleadings irrelevant or unspecific". We agree with that conclusion. The respondent's argument is that it matters not which of these ranks Mr Linton holds. Neither equates with the rank of "senior officer" and the qualification "acting" chief immigration officer merely serves to emphasise that he does not hold the rank of Chief Immigration Officer. Mr Linton knew that he did not possess the requisite rank to effect a detention in terms of s25D of the 1971 Act. Further, standing the averments that Mr Linton held and would have known himself to have held a rank lower than that of Chief Immigration Officer and yet purported to detain each of the vessels there is a basis for holding that he lacked an honest belief in his power to act and also that he was at least reckless as to the probability that his actions would lead to loss for the respondent. We therefore adhere to the sheriff's interlocutor in respect of this ground of action.

Strict liability

[35] In his third ground of appeal the appellant argues that the sheriff erred in holding that the respondent's averments on strict liability were relevant.

[36] Counsel for the appellant began his submissions by identifying circumstances in which the law recognises the right to claim damages in respect of unlawful administrative action. Lady Hale succinctly described the circumstances in which damages are recoverable for losses caused by unlawful administrative action in *R (on the application of Quark Fishing Limited)* v *Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2006] 1 AC 529 at paragraph 96.

> "The fact that our courts were able to strike down the Secretary of State's instruction as wrong in law is not enough. Our law does not recognise a right to claim damages for losses caused by unlawful administrative action (although compensation may sometimes be available to the victims of maladministration). There has to be a distinct cause of action in tort or under the Human Rights Act 1998."

Accordingly, the respondent does not have a right to claim damages in respect of any loss sustained as a consequence of an alleged unlawful exercise of the powers conferred by section 25D of the 1971. No reliance is placed on the Human Rights Act 1998 in the respondent's pleadings. The respondent has failed to aver relevantly a distinct cause of action in delict and its averments on strict viability are therefore irrelevant.

[37] Counsel for the appellant proceeded to give three examples of why the sheriff had erred in law. Firstly, the sheriff erred in law by accepting the respondent's submission that detention under section 25D may be regarded as directly analogous with arrestment on the dependence (see paragraph [77] of his judgment). No such analogy exists. Detentions effected under the 1971 Act are conceptually distinct from common law arrestments on the dependence. Statutory detention under the 1971 Act forms part of the wider system of

immigration control and these powers are exercised in the public interest. The exercise of statutory powers by a public official is regulated by the delict of misfeasance in public office which strikes a fair balance between the competing public interest and the interests of the individual. Misfeasance in public office is not a delict of strict liability. On the contrary, arrestments on the dependence arise in private law disputes and form a powerful procedural weapon which requires to be strictly controlled by the court. Strict liability is imposed for wrongful diligence in order to safeguard against abuse of process. There is no basis in fact or law for imposing strict liability for a breach of section 25D of the 1971 Act where the interests of the individual are protected by the delict of misfeasance in public office. The imposition of strict liability would destroy the balance which is struck between public and private interests wholly and appropriately regulated by the delict of misfeasance in public office or in Scotland the *Micosta* delict. The imposition of strict liability in these circumstances would have an undesirable, chilling effect on public administration.

[38] Secondly, the sheriff erred in holding that the delict of "trespass" was relevant in the circumstances of this case. There are no averments of trespass. The respondent does not aver that there was any physical interference with the vessels and, indeed, it was accepted that detention did not require any physical contact with the vessel. The action proceeds on the basis of letters delivered by Mr Linton. Letters cannot constitute a trespass. Furthermore, the delivery of letters by an official with an acting rank who is not the person who made the decision to detain does not constitute a delict. The sheriff, in reaching his decision on the relevance of the respondent's averments as to strict liability, took into consideration a case decided in Ireland: *Island Ferries Teoranta* v *Minister of Communications and Others* 2012 IEHC 256, involving the detention of a ferry in circumstances which the Irish Court recognised as the delict of "trespass". The sheriff erred in placing weight on that

authority, there being no case based on trespass in these pleadings. Likewise, a statutory detention cannot be equiperated with arrestment on the dependence. The reference to *Azcarate* v *Iturrizaga* (1938 SC 573) by the sheriff at paragraph [75] of his judgment was therefore misplaced. Here the respondent's case focusses solely on the two letters in the name of Mr Linton. The respondent's pleadings focus on the communication of the decision to detain rather than how the detention was effected which is what the cases considered by the sheriff were concerned with. There are no averments relating to how the detention was effected.

[39] Thirdly, there is no civil liability for a breach of section 25D of the 1971 Act. There is nothing in the statute that would give rise to any right to civil action. A breach of section 25D is not a recognised delict.

[40] It is for these reasons that counsel for the appellant submitted that the respondent's averments relating to strict liability are wholly irrelevant. The sheriff, therefore, erred in law in failing to sustain the appellant's first and second pleas in law to the extent of not admitting the averments in Article 10 of Condescendence to probation.

[41] In his submissions counsel for the respondent addressed the appellant's attack on the case advanced by the respondent on strict liability.

[42] As there is no prior authority on the power to detain under section 25D of the 1971 Act it is necessary to draw an analogy with other delicts. Accordingly, given the similarities between a section 25D detention and the arrestment of a vessel in security for a civil claim (for example, *Azcarate*) the sheriff should be regarded as not falling into error in accepting the analogy and that for the following reasons.

[43] Firstly, the nature of the delicts in terms of the consequences for the ship owner are identical. Both involve a "holding back" from a man that which is his without being

warranted in law (see The "*Mediana*" [1900] AC 113 at page 118 (Earl of Halsbury L.C.)). When a vessel is arrested the warrant to detain the ship (being in the nature of a warrant to arrest on the dependence: *Carlberg* v *Borjesson* (1877) 5 R. 188) is regulated by statute (the Debtors (Scotland) Act 1987) by virtue of a court warrant whereas in the case of detention under section 25D the power derives directly from the statute without the need for a court order. However, it was submitted that these differences are of no materiality.

[44] Secondly, each form of detention is designed to secure property to meet what may later prove to be a legally established demand, an order for forfeiture in one case and a civil debt in the other. Both forms allow for the lifting of the detention or arrestment subject to the lodging of a bond or adequate alternative security fixed by the court. Both forms detain or hold the vessel where located at the point of detention until released by order of the court or until the failure or success of the detaining party which may be by obtaining decree for payment of money or, in the case of the 1971 Act detention, a court order for forfeiture of the vessel following conviction on indictment. The purpose of the holding back, whether arrestment or detention, is in all material respects the same and therefore the analogy between arrestment and detention is one the sheriff was entitled to accept.

[45] It was submitted that the appellant's argument that the two forms could be readily distinguished due to the fact that one is carried out by the state or an agent of the state in the course of a public activity (immigration control) and the other related to private law, was not correct or relevant. The fact that the detention under section 25D of the 1971 Act is a procedure available to public officials in the public interest does not prevent liability arising from unwarranted detention (*Entick* v *Carrington* (1765) 19 St Tr. 1030 and *Smith* v *Ministry of Defence* [2013] UKSC 41) In any event, the detention of a vessel under section 25D does not have as its objective the investigation or combat of immigration offences: in the event that

the alleged offences are prosecuted summarily there can be no resort to section 25D detention as in such a case forfeiture of the vessel is never competent (section 25C (1) of the 1971 Act). The purpose of detention cannot therefore sensibly be described as having the public interest objective of countering crime. Its sole purpose like that of the arrestment on the dependence is to obtain security so as to prevent disappointment in the event of obtaining decree and to obtain satisfaction of that decree in the case of arrestment and to allow a court to make an order for forfeiture.

[46] It was submitted that any contention made by the appellant that liability for detention under section 25D of the 1971 Act raises a matter of public law and can be distinguished from wrongful arrestment is ill-founded. There is no public law element to the present case. It is an action for damages for loss caused by an act of a Home Office official said to be without warrant, *ultra vires* and unlawful causing loss to the pursuer. The present action does not involve administrative or public law craves rather a private law remedy when the Crown commits the delict against a subject, as the pursuer avers, has happened. A dispute between the Crown and an individual is resolved in the sphere of private law (*Davidson* v *Scottish Ministers* 2006 SC (HL) 41 per Lord Rodger of Earlsferry).

[47] The appellant's argument that the alleged misuse of statutory power is exclusively a matter for what may be termed "misfeasance in public office" is misplaced. There is no limit to the delicts which may be committed by officials purportedly acting in furtherance of their duties. The case of *Bell* v *Black & Morrison* (1865) 3 M 1026 is authority for the proposition that it is no answer to a case in delict that the acts or omissions complained of were committed or omitted in the course of state action in the public interest (see also *Entick supra*).

[48] Finally, the criticism advanced by the appellant of the sheriff's reference to "trespass" in paragraph [75] of his judgment is mistaken. In that passage the sheriff is considering a case decided in the Irish Courts (*Island Ferries Teoranta*) which was concerned with similar circumstances in the sense that it involved the *ultra vires* detention of a ferry by a public official. In that jurisdiction "trespass" is used both in relation to the seizure or detention of goods and also in relation to temporary incursion on land. The term "trespass" encompasses seizing and detaining what is not yours. Thus, whatever the terminology, it is analogous to wrongful arrestment and detention as with this case.

Decision

[49] The sheriff considers the respondent's case based on strict liability at paragraph [73] – [77], concluding:

> "[77] I accept the Pursuer's contention that detentions under section 25D of the 1971 Act should be seen as directly analogous with arrestments on the dependence. Both processes perform the same function, namely the securing of an asset pending the outcome of litigation. Both processes feature the mitigatory aspect of release on payment of caution. In both processes it is clear that malice or bad faith will render the process void and give rise to an action in damages. From the authorities cited above it is clear that a private individual who arrests on an invalid warrant would be held liable even though they had acted in good faith. There is no reason why a public body doing likewise should not also be held liable (Entick; Quark Fishing). If detention serves the same purpose as arrestment and can create the same injury as arrestment then - if done wrongfully - that injury should be curable by the same remedy. I therefore conclude that the Pursuer's averments on strict liability are relevant."

[50] The first issue under this ground of appeal is whether the sheriff erred in accepting that the acts with which this case is concerned can be regarded as being of the same nature as arrestment on the dependence, in the sense that their unlawful or *ultra vires* use by a public official would render the body or department responsible for his actings liable in

damages for any loss. As there is no prior authority on the nature or exercise of the power to detain vessels in terms of section 25D of the 1971 Act it is necessary to consider other delicts. The analogy with the arrestment of a vessel in security of a civil claim is an attractive one but is it a correct and justifiable one? There are clear similarities between a section 25D detention and arrestment on the dependence. We were referred to authorities which consider the nature of arrestment which involves a procedure directly akin to detention in the sense that the consequences for the ship owner are the same: the vessel is not able to take to sea, ply its trade and make profit. In this jurisdiction arrestment and the process of arrestment derives from statute (The Debtors (Scotland) Act 1987). In this case the purported detention also derives from statute (The Immigration Act 1971). The difference is that the power to arrest a vessel on the dependence requires intervention by way of warrant granted by the court - although that warrant at the stage when arrestment is sought as a protective measure usually derives from the averments in the initial writ or an *ex parte* statement justifying the measure, but nonetheless a statement that imposes a duty of care on its author. In practice, a warrant to arrest is granted almost as a matter of course at the stage of warrant for citation. There may be no direct judicial act or enquiry. Should diligence or detention be carried out unlawfully in the sense that the warrant turns out to be unjustified or its execution is flawed or imprecise then the arrestor commits a legal wrong. In *Azcarate* the Lord President at page 579 observes:

> "…a creditor arresting without warrant is also liable to an action of damages at the instance of the arrestee, and it is unnecessary to aver malice…If the warrant of arrestment is bad, or if it has been executed in an illegal manner, the issue need only to contain the word 'wrongful'… These passages, in my opinion, support the proposition that, if you execute a diligence which is not warrantable, you have committed a legal wrong. In this case the arrestee is the owner of the ship and he has the right to complain of the wrong."

We were also referred to the unlawful arrestment of the vessel "Edgar Cecil" in *Carlberg* where the term arrestment implies "to fix the vessel" in the place she is found.

[51] Accepting that in the case of an arrestment on the dependence the warrant is granted by the court whereas the detention in this case arises directly from a public official exercising powers in terms of the 1971 Act, we doubt that this alters the nature of detention being a form of diligence. The purpose of the detention is solely to effect security over the vessel in the event the court orders its forfeiture. By arresting on the dependence the pursuer prevents a moveable object being disposed of pending decree. Detention of a vessel prevents it being used or disposed of pending determination of its forfeiture following conviction in solemn criminal proceedings. Both forms permit release on the lodging or tendering of caution or some other surety. The apparent similarities are real. The absence of a requirement to satisfy a court that detention under the 1971 Act is *prima facie* competent does not rob the detention process of the effect and consequences for the vessel owner nor is the purpose of each of these means of securing property any different. No doubt the absence of the requirement for a judicial warrant under the 1971 Act is to enable appropriate and swift action to be taken to prevent a vessel evading detention when allegations of illegality are raised but this merely serves to emphasise that the public official in whom the authority to detain is vested has to be a senior officer or a constable and who requires to exercise their powers under the 1971 Act strictly in accordance with the statutory provisions set out in section 25D, being the only source of the power to detain.

[52] The appellant seeks to distinguish between these protective measures by adverting to the fact that one is a remedy in private law between individuals whereas detention in terms of the 1971 Act is carried out by a public official in the course of an important function, namely, immigration control. In light of *Entick*; *Smith*; and *Robinson* v *Chief*

Constable of West Midlands [2018] AC 736, public bodies are liable in delict just as individuals are. Lord Reed JSC in *Robinson* states:

> "[32] At common law, public authorities are generally subject to the same liabilities in tort as private individuals and bodies: see, for example, *Entick* v *Carrington* (1765) 2 Wils KB 275 and *Mersey Docks and Harbour Board* v *Gibbs* (1866) LR 1 HL 93. Dicey famously stated that "every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen": *The Law of the Constitution*, 3rd ed (1889), p7 181. An important exception at common law was the Crown, but that exception was addressed by the Crown Proceedings Act 1947, section 2.
>
> [33] Accordingly, if conduct would be tortious if committed by a private person or body, it is generally equally tortious if committed by a public authority:…..It follows that public authorities are generally under a duty of care to avoid causing actionable harm in situations where a duty of care would arise under ordinary principles of the law of negligence, unless the law provides otherwise."

[53] These authorities are not incompatible with the decision of the House of Lords in *Quark* (*supra*), a case involving judicial review of an administrative direction in relation to the allocation of fishing licences in the Solomon Islands and South Georgia. That case did not involve an action in tort or delict. It did involve a challenge to the lawfulness of the Secretary of State's instruction regarding the allocation of fishing licences on public law grounds. This case, on the other hand, involves the unlawful use of statutory powers to detain fishing vessels for a specific purpose. Properly understood, the action has no public law element but seeks remedies arising from allegedly unlawful action by a public official which encroached on the respondent's rights to use the vessels for the purpose of fishing for profit. That being so, we do not accept the contention advanced by the appellant that the delict of misfeasance in public office or *Micosta* delict is the only remedy available to an individual who seeks to complain about the lawfulness of the actings of a public official which have caused him loss.

[54] Finally, we have considered the submissions advanced in relation to the sheriff's reference to "trespass" at paragraph [75] of his judgment. Made in the context of considering the Irish Supreme Court decision in *Island Ferries Teoranta* (*supra*) the reference to trespass is a reference to the recognised tort of trespass, meaning trespass to goods in that jurisdiction which encompasses seizing and detaining what is not yours. In that case it was decided that an action of damages would lie against a person making a decision to seize or detain a vessel even if acting *bona fide* but in the knowledge that the decision to do so was in excess of authorised power. The Irish Supreme Court approved the reasoning of Cooke J in the High Court as unimpeachable when he found that the detention of the ferry "*Ceol na Farraige*" by the harbour master was actionable trespass. The case has certain similarities to the present. What may be the tort of trespass in Ireland can be equiperated with wrongful arrestment or wrongful diligence in Scotland. We do not agree that the sheriff's use of the term "trespass" discloses any error on his part. Overall, as the analogy drawn with wrongful arrestment is in our view a powerful one, we have come to the view that the sheriff did not err in upholding the respondent's case based on strict liability.

Ultra vires

[55] This ground of appeal raises the fundamental issue of whether the detention of the vessels was *ultra vires* and challenges the sheriff's decision to find that the answers do not offer a relevant defence to the respondent's case. The sheriff found the pursuer entitled to declarator that the vessels were unlawfully detained. Consideration requires to be given to the pleadings and the correct interpretation of section 25D of the 1971 Act. After debate the sheriff sustained the respondent's first and second pleas in law and granted declarator in terms of craves 1, 2 and 3 of the initial writ.

[56] The sheriff at paragraphs [89] – [106] of his judgment considers the basis of the respondent's case - namely, that Mr Linton detained the vessels and that his detention of the vessels was *ultra vires* and unwarranted due to him not possessing the requisite rank to effect a lawful detention in terms of section 25D of the 1971 Act. Article 3 of condescendence sets out averments of fact relating to the detention on 25 August 2015 of the Amy Harris. Article 5 of Condescendence sets out averments of fact in respect of the detentions of the Fear Not and Sapphire on 23 December 2015. Detention was effected by delivery or service of letters by Mr Linton addressed to Mr Rennie and Mr Galbraith respectively. The issue for the sheriff and in this appeal is whether the appellant pleads a relevant defence to that ground of action. The appellant admits in his defences that the vessels were detained but denies that the detentions were effected by Mr Linton (by virtue of his general denial). The appellant explains that the decision to detain was made by HMI Lindsay, who was a "senior officer", and that decision was conveyed by Mr Linton in the letters. In any event, Mr Linton was an Acting Chief Immigration Officer (though not designed as such in the first letter of the detention). In Answer 7 the appellant avers that,

> "No decisions under section 25D of the 1971 Act were made by Mr Linton in respect of the Vessels. In any event, as Mr Linton was an Acting Chief Immigration Officer at all material times, he would have had the requisite authority to make the decisions to detain the Vessels under section 25D of the 1971 Act, if called upon to make such decisions."

[57] Counsel for the appellant submitted that the sheriff erred in law to a material extent in holding that the appellant's pleadings did not present a relevant defence to the respondent's averments that the detentions were *ultra vires* and unwarranted. The sheriff misunderstood the meaning and effect of section 25D and in any event misapplied it to the facts and circumstances as averred in answer. Section 25D specifies few requirements with regard to the detention. In the present circumstances a “senior officer” may detain a

relevant ship. The "senior officer" requirement only applied to the person making the decision to detain. This interpretation is completely rational as Parliament recognised that detention was a serious step and wished to ensure that an official of sufficient seniority, knowledge and experience would make the decision whether or not to detain the vessel. That is the proper and rational approach. The approach advanced by the respondent before the sheriff misapplied and misinterpreted the statutory provision. The sheriff erred in finding that the "senior officer" requirement applied to all parts of the process namely, the making of the decision; the communication of that decision and the implementation of the decision. These are the three stages of detention however there is nothing in section 25D that requires these three steps to be taken by the same individual. The provision empowers a constable to effect a detention. This is instructive. The constable would not have knowledge of the Immigration Act to begin the process of making a decision on detention himself or herself but would implement, as an officer of law in the locality, a decision of a senior officer in the Home Office Immigration Department. Section 25D specifies no particular procedural requirements. In this case HMI Lindsay made the decision to detain which decision was communicated by Mr Linton. There was no delegation of HMI Lindsay's power to Mr Linton. However, Mr Linton, as the person communicating and implementing HMI Lindsay's decision to detain, delivers that decision by his letter. Section 25D does not require the decision of the senior officer to be communicated by that officer as there are no formal notice or procedural requirements in the statutory provisions. Counsel relied on *Scrymgeour-Wedderburn* v *Procurator Fiscal Kirkcaldy* 2019 SCCR 332. It was contended that that case supports the appellant's decision that no particular notice requirement is necessary and, in any event, any typographical error in the letters written by Mr Linton (such as the omission of the word "Acting") would not invalidate the decision to

detain. (see Lord Justice General at paragraphs [9] and [10]). In any event, the respondent, in effect, agreed to the detention or accepted the detention. No challenge was made to the validity of the detention in the summary application to the sheriff in terms of section 25D(3).

[58] Counsel for the appellant contended that there was nothing in section 25D that required the person implementing the decision to be the same person that made the decision contrary to the respondent's position. It is not unlawful delegation for the senior officer to task a subordinate officer with implementing the detention by taking the necessary action to put into effect the detention of the vessels. There is nothing unlawful as the subordinate officer is not purporting to exercise the statutory powers on their own behalf but are implementing a decision made by a senior officer with the requisite rank and authority to make such a decision. Section 25D does not expressly exclude delegation of both or either the communication or implementation of the decision to the owner or captain.

[59] The effect of the interpretation of section 25D adopted by the sheriff results in an absurdity necessitating the same person to make the decision, communicate the decision and effect the detention. The sheriff's interpretation would lead to more than one decision having to be made as to detention and whether the vessel was "a relevant ship" for the purpose of the statute. To underline the absurdity of the sheriff's decision counsel for the appellant highlighted the consequence as meaning that the senior official in the Home Office would require to travel in person from London to Campbeltown to effect the detention as the senior officer would be prohibited from tasking the local immigration official, or the local constable, from implementing the detention on his or her behalf. This is unworkable and could not be what Parliament intended.

[60] It was further contended that the sheriff erred in holding at paragraph [95] of his judgment that the detentions can only have been effected by the two letters from Mr Linton.

This constitutes a material error in law as a detention cannot be effected by mere communication. The letters merely informed the respondent that the decision to detain the vessel has been made. Rather it is the actions taken in reliance upon these decisions, as communicated in the letters, which effect the detention of the vessels. It is these actions that result in the passing of practical control from the respondent to the appellant and complete the detention. The sheriff appears to have simply accepted the respondent's pleadings on this matter without question. The respondent's averments as to actual detention are extremely brief, wholly irrelevant and lacking any reasonable specification. The respondent's averments are, in effect, silent on the third stage of how detention was actually effected. Although the appellant admits that the vessels were detained he does not admit that they were unlawfully detained. The sheriff erred in failing to recognise that the respondent's averments were irrelevant as regards detention and not capable of supporting a case based on *ultra vires* or unlawful detention. He, therefore, erred in granting declarator. The sheriff also erred in failing to recognise the deficiencies in the respondent's averments and in failing to dismiss the action.

[61] The respondent's position is that section 25D of the 1971 Act is concerned with the act of detention itself not with the decision to detain. It is clear that the rank of the person detaining the vessel is vital to a lawful detention. The recipient of a letter purporting to detain a vessel must know who the detaining officer is. This allows the skipper or vessel owner to know whether the detention is *ex facie* valid. The notice or letters are of utmost importance as the 1971 Act does not confer on the detaining officer the power to board a vessel or disable or dismantle a vessel. It is the respondent's case that the letters in the name of Mr Linton effected the detention there being no other means of doing so. A vessel can only be detained in port. In practical terms, the letters constitute detention with notice also

being given to the harbour master. The focus of section 25D is on the actual "holding back", of the vessel which can be effected only by a senior officer or a constable. The respondent's case on record is straightforward, namely, that Mr Linton detained the vessels (or purported to) by delivering letters in his own name to the skippers. He gives his rank as immigration officer or acting chief immigration officer. If there was a typographical error in his designation in the August letter it is of no moment. The use of "Acting" is not only an admission that Mr Linton did not possess the rank to detain, but serves emphasis that fact. *Scrymgeour-Wedderburn* is not in point.

[62] The conclusion reached by the sheriff is correct and leads to no absurdity or practical difficulty. The sheriff does not say that section 25D of the 1971 Act requires the same official to make the decision to detain and also effect the detention. Instead, the learned sheriff held that it is not the officer who makes the decision to detain to whom the statute directs attention, but the officer who carries out the detention. It is his rank and state of knowledge at the point of detention which are relevant to the determination whether the detention is *intra* or *ultra vires* not those of whatever senior officer elsewhere who makes the decision that the ship is to be detained but does not in fact go to detain the ship himself or herself. At no point did the sheriff hold, as the appellant asserts, that the same senior officer must both take the decision to detain and carry it out. The inclusion of "a constable" as an officer who may detain a vessel is indicative that the statute's focus is the act of detention itself. Clearly, a constable does not take high level strategic decisions as to detention but can put into effect detentions, if satisfied that the vessel is "a relevant ship". The constable is the practical solution if a high ranking official in the Home Office cannot make it to Campbeltown. Whether to exercise the power to detain in terms of section 25D is a matter for the Home Office. If a decision to detain is made it must be carried out strictly in accordance with the

statutory powers enacted otherwise it will be *ultra vires*. Detention of a fishing vessel involves an infraction of the property rights of the owner of the vessel. Wrongful or unlawful detention may sound in damages.

[63] The respondent's position is simple – Mr Linton detained the vessels; he prepared and delivered the letters of detention. His rank is set out in the letters as the recipient needs to know that given the terms of section 25D. There is no particular procedure or form required to effect detention (see *Bristol Airport PLC* v *Powdrill* [1990] Ch. 744*)*. The respondent has given proper notice of the manner in which the purported detentions were achieved. Detention is admitted, however, the appellant, who ought to be aware if anyone else detained the vessels, fails to aver any alternative method or by whom the vessels were actually detained. All the appellant avers is who made the decision to detain, which the sheriff was correct to reject as irrelevant. The sheriff was correct to grant declarator, there being no defence to the respondent's case that the acts of Mr Linton in detaining the vessels were *ultra vires*. The appeal should be refused; the sheriff's interlocutor of 10 February 2020 adhered to and the cause remitted to the sheriff in Campbeltown to proceed as accords.

Decision

[64] In our opinion section 25D of the 1971 Act is concerned with the mechanism of detaining a relevant ship (or indeed aircraft or vehicle) which may be the subject of a forfeiture order by a court where a person arrested for an offence under section 25; 25A or 25B of the 1971 Act is convicted on indictment of any of these offences. Not all ships are relevant ships. In order to determine whether it is "a relevant ship" it is necessary to consider section 25C which is concerned with forfeiture and which contains certain qualifying provisions by reference to the convicted person's relationship to the ship; the

ship's tonnage; the number of illegal entrants carried at the time of the offence and the knowledge of any owner or director as to any intention to use the vessel in the commission of the offence. As discussed earlier, detention is for the sole purpose of securing a ship which could be the subject of an order for forfeiture. A ship may not be detained unless a senior officer or a constable has reasonable grounds for believing that the ship could be the subject of an order for forfeiture under section 25C if the arrested person is convicted of one of the offences mentioned. Forfeiture can only be considered if the person is convicted on indictment.

[65] Accordingly, although detention may only follow if an arrest for an offence under section 25; 25A or 25B is made, detention should not automatically follow. Detention involves a serious incursion into the property rights of the owner or charterer which prevents the ship leaving port for any reason. It prevents the ship being used for its commercial purpose which, in this case, involves fishing. In that context, it is unsurprising that the rank of the officer who detains a ship is important – any immigration officer in the employment of the Home Office is not permitted to detain, only senior officers. A senior officer is an immigration officer not below the rank of chief immigration officer in other words an immigration officer who has attained the rank of chief immigration officer. Clearly, this requirement not only restricts the exercise of the power to detain to certain classes – a senior officer and a constable – but it is a safeguard, as the sheriff observes at paragraph [101], in his judgment.

[66] In that context, it is necessary to look at the pleadings. The respondent's case is relatively simple. Mr Linton detained the vessels in August (the Amy Harris) and then in December (the Fear Not and the Sapphire). He effected the detention by delivering the letters, which are set out in the Appendix to this opinion. The letters run in his name –

Jack Linton, Immigration Officer (August letter) and Jack Linton, Acting Chief Immigration Officer (December letter). For reasons we will come to the difference in designation matters little. He is not of the rank of chief immigration officer or above. If there was any typographical error in his designation in the first letter, again it matters little. We therefore do not find the case of *Scrymgeour-Wedderburn* to be of assistance as there is no particular form or procedure specified by statute in order to effect detention. The letters were addressed to Mr Rennie, who had been the captain or skipper of the Amy Harris; and to Mr Galbraith, who had been the skipper of the other vessels. Both had been arrested on suspicion of facilitating a breach of immigration law contrary to section 25 of the 1971 Act.

[67] Section 25D does not prescribe any particular procedure by which detention is to be effected or achieved. However, the letters are explicit in their terms. The August letter includes the words "the vessel has/will be been detained under Section 25D Immigration Act 1971" and in respect of the Fear Not and the Sapphire "the above named vessels have been detained under Section 25D". There is little room for ambiguity. We have little difficulty in accepting the respondent's proposition that detention can be effected by delivery of letters. The 1971 Act does not provide the immigration officers with the power to board vessels or disable or dismantle vessels for the purpose of detention. Giving notice to the owners or skippers by delivery of letters would be an effective means of detaining providing the letters are by a senior officer or a constable. The case of *Bristol Airport PLC* was concerned with detention under the Civil Aviation Act 1982 section 88(1) due to default in payment of airport charges. In that case the Appeal Court approved the proposition that the act of detention requires some overt act but need not take any particular form. It could be a declaration; a notice or any particular act designed to prevent, in that case, an aircraft being flown including blocking its exit.

[68] The appellant submits that the sheriff erred in his interpretation of section 25D reaching a conclusion which leads to an absurdity. The sheriff at paragraph [102] states:

> "The section read as a whole makes clear that the officer who detains the vessel must possess these reasonable grounds for belief. It is insufficient for the detaining officer to be ignorant of the reasonable grounds and simply acting on the directions of another officer. Parliament has vested discretion in senior officers because they may be trusted to exercise it properly. This would not have been necessary if the detaining officer was simply intended to action the decisions of others."

As counsel for the respondent observes the sheriff does not suggest that the same senior officer makes the decision to detain and then must effect the detention herself. The statute is concerned with the rank of the officer and his state of knowledge at the time of detention. These factors are crucial to the question of whether the detention was lawfully or unlawfully carried out. Any practical difficulties which the appellant contends leads to the absurdity of having HMI Lindsay travel from Whitehall to Campbeltown are readily resolved by the Home Office ensuring that an immigration officer of suitable rank in Scotland is provided with the necessary material to satisfy him or herself as to the reasonable grounds for believing that the vessel is a relevant ship for the purpose of section 25D. Should the "Rest and be Thankful" be closed the detention may be effected by the local officer of law, the constable in Campbeltown, subject to being provided with material confirming that the vessel in question is a relevant ship. The interpretation of section 25D is not aided by the fact that the power to detain is conferred on "a constable". It was advanced on behalf of the appellant that the constable would simply implement the decision of a senior officer in the Home Office, emphasising the role and rank of the decision maker as a senior officer. We do not agree. Instead, the inclusion of "a constable" serves to emphasise that the interpretation advanced by the respondent is to be preferred, namely, that the section is concerned with

the act of detention itself and not the decision to detain. The constable is the practical solution, especially given the nature and remoteness of the Scottish coastline.

[69] The appellant's pleadings require to be examined through the prism of that interpretation of section 25D of the 1971 Act. In his defences the appellant admits that the vessels were detained and avers that HMI Carolyn Lindsay made the decision to detain the vessels. She was the senior officer for the purpose of section 25D and had the authority to make such a decision. The pleadings crucially go on to state that her decision to detain was communicated by letters in the name of Mr Linton. However, it is averred that the letters are not in themselves the decision to detain but merely communicated the decision by HMI Lindsay. The letters do not state that Mr Linton made the decision to detain the vessels. No decisions were made by Mr Linton in respect of the vessels although as Mr Linton was an Acting Chief Immigration Officer, at all material times he would have had the requisite authority to make decisions to detain the vessels if called upon to do so. Therefore, it can readily be seen that the defences focus on the decision to detain and not the detention. Of course, section 25D makes no mention of the decision to detain but is concerned with detention. The averment in answer that Mr Linton's letter merely communicated HMI Lindsay's decision appears to us to be patently irrelevant and also incorrect. There is no mention in Mr Linton's letters of HMI Lindsay, far less her decision. If Mr Linton was a messenger in the sense advanced by the appellant he would be delivering HMI Lindsay's letter and thereby effecting detention in the manner contended for by the appellant. The terms of Mr Linton's letter have been referred to and are set out in the appendix to this opinion. They are clear in their terms. The letters are Mr Linton's own and make no reference to HMI Lindsay or any decision maker but instead make reference to the detention.

[70] Scrutiny of the appellant's pleadings lead to the inescapable conclusion that they lack candour. The appellant admits the detention of the vessels but does not say who detained them, only who made the decision to detain. These are matters of importance and matters which ought to be within the knowledge of public officials in the Home Office who are using or contemplating using powers under the 1971 Act. The court should not have to fit the pieces of the jigsaw together unless this material information cannot or does not fall within the knowledge of the parties. The appellant must know how the detention was effected. The detention procedure was initiated, planned and carried out by the Home Office. It is therefore reasonable to expect the appellant to plead by way of answer to the respondent's averments in Article 2 how the detentions were effected. It follows from what we say that the sheriff, in our opinion, was correct in repelling those parts of the defence relating to HMI Lindsay's decision to detain and its communication. We are satisfied that the respondent pleads a relevant case of unlawful detention or *ultra vires* which, if proved, entitles the respondent to declarator. However, the matter does not end there. Although the sheriff was entitled to exclude from probation the appellant's averments at Answer 3 and repeated in Answers 5, 7, 8, 10 and 11, the remaining averments do not admit sufficiently or with certainty on the issue of declarator. Whereas the detentions are admitted, the matter of who carried out the detentions and how these were effected is met with a general denial. This means that it is necessary to put the respondent to proof on the limited issue of detention. We therefore recall parts (iv) and (v) of the sheriff's interlocutor of 10 February 2020 and modify part (vii), to the effect of allowing a proof before answer (on the pursuer's second, third and fourth pleas in law) on the issues (i) whether detention of the vessels was carried out by Mr Linton and was therefore *ultra vires* and unlawful; (ii) causation of loss; and (iii) quantum of damages.

Cross appeal

[71] The cross appeal raises a narrow but important point. It challenges the sheriff's opinion in his judgment at paragraph [96] where he discusses what is, in effect, a hypothesis – namely that it may have been a relevant defence had the appellant pleaded that Mr Linton had detained the vessels and that the detentions would have been lawful because he was an "acting" chief immigration officer at the time and therefore would have had the requisite authority. The sheriff goes on to observe:

> "Had this defence been pleaded I think evidence would have been required to have been heard on the functions of 'acting' CIOs and how they are appointed, in order to decide whether they came within the category of 'senior officer' to whom Parliament had given power to effect such detentions."

Of course, no such defence has been pleaded. As we have observed the respondent's averments that the vessels were purportedly detained by Mr Linton on behalf of the Home Office are denied albeit the matter of the detentions having been effected is admitted.

[72] The respondent takes issue with the sheriff's opinion. It proceeds on an error of law. Only two classes of person are given the power to detain "a relevant ship" namely a senior officer and a constable. What matters is the status and rank of the person with power to detain at the time of detention. As regards immigration officers that is a person holding a rank no lower than that of chief immigration officer. The description which the detaining official must answer to is that he is "not below" the rank of chief immigration officer. The statutory provision is therefore concerned with persons of the rank of chief immigration officer or higher. On the other hand, an "acting" officer is one who, by definition, does not hold the rank in relation to which the word "acting" is applied. In the circumstances of this case, the 'acting' qualification applies to the lowest rank empowered to effect a detention. This is important and serves to underline that the individual, in this case, Mr Linton, does

not hold the rank necessary to detain a relevant vessel. The term "acting" is of no assistance to the appellant. The sheriff was wrong to read into the statutory definition of a "senior officer" (section 25D(8)) words which are absent from it. Certainty is required when the statute itself is warrant for the officer to detain a vessel. It would be inconsistent with the need for certainty for the statute to permit, *a fortiori* without express reference, the use of an "acting" rank. That would conflict with the clear terms of the statute and the intention of Parliament. Senior counsel for the respondent referred us by comparison to the Police Reform Act 2002 section 29 and the Immigration Act 2016 schedule 6 paragraph 10.

[73] To assert that the detention was carried out by an "acting" chief immigration officer is to concede that it was carried out by an individual who did not possess statutory warrant to effect detention and therefore it is conclusive of *ultra vires* and unlawfulness. The sheriff erred in concluding that proof would be required.

[74] Counsel for the appellant accepted that it was not the appellant's case that Mr Linton detained the vessel. Nevertheless, the sheriff's conclusions relating to the requirement for proof as to the functions of an "acting" chief immigration officer disclose no error of law. The appellant is offering to prove that for all practical purposes an acting chief immigration officer is the same as a Chief Immigration Officer. The appellant has relevant averments in Answers 3, 5 and 7 including the averment "an Acting Chief Immigration Officer has exactly the same duties and powers as a Chief Immigration Officer" and that Mr Linton was a "senior officer" for the purpose of section 25D of the 1971 Act. In face of these averments the sheriff did not err when he held that it would have been necessary to hear evidence as to the functions of an acting chief immigration officer; how they are appointed and what their duties are in order to decide whether they came within the category of "senior officer" to whom Parliament had given power to effect detention. This issue could only be determined

after evidence had been led. There is nothing in the operative section that excludes officers with an "acting" rank. The ranks within the Home Office are non-statutory and simply administrative. There are no common law or statutory rules of interpretation which require the section to be interpreted in a manner which excludes "acting" senior officers. The cross appeal falls to be refused.

Decision

[75] In our opinion the terms of section 25D(8) are clear - "s*enior officer*" means an immigration officer not below the rank of chief immigration officer. The definition of senior officer is concerned with rank. It is not concerned with the day to day duties, conditions, or remuneration of the officer but with the rank they hold. Section 25D makes no provision for the inclusion of an acting chief immigration officer within the definition of "senior officer". Clearly, that is of critical importance when considering the lowest rank on whom the power to detain is conferred. It appears to us that in the absence of provision for an acting chief immigration officer it is then a binary choice either Mr Linton was a chief immigration officer or he was not. His designation as "acting" appears to us to broadcast to the recipient of any letters that he does not hold the rank of chief immigration officer but is "acting up".

[76] We have given careful consideration to what the sheriff may have envisaged by way of proof. At proof the evidence may well have explored matters such as duties, conditions and salary however, we have come to the view that these matters are irrelevant standing the terms of section 25D(8). It was suggested, on behalf of the appellant, that it would be necessary to hear evidence about the functions of acting chief immigration officers and how they are appointed etc. However, we fail to see the relevance of such evidence to the simple question of whether the officer holds a particular rank.

[77] We have been referred to two statutes: the Immigration Act 2016 and the Police Reform Act 2002. Section 29 of the Police Reform Act is the interpretation section relative to Part 2 which deals with complaints. Section 29(1) provides the definition of "the appropriate authority". Specific provision is made for an acting Chief Officer (effectively the acting Chief Constable) to act in connection with the complaint. An officer in an "acting" role is therefore specifically assigned powers in respect of part 2. The Immigration Act 2016: Schedule 6 paragraph 10 gives powers to an immigration officer or a constable to enter premises to do anything necessary to secure the premises against entry (where there has been an illegal working closure notice or an illegal working compliance order made). However, the legislature has been careful to make specific provision so that the power can have practical effect by allowing the immigration officer or constable to be accompanied by another person acting under the immigration officer or constable's supervision to carry out essential maintenance or repairs. These examples serve to indicate that if Parliament had intended that an acting chief immigration officer be empowered to detain then that could have been accommodated and provided for in section 25D(8). Although the Immigration Act 1971 was enacted 50 years ago its provisions and specifically section 25D (and its predecessor section 25A) have been amended at various stages (notably by the Nationality Immigration and Asylum Act 2002) affording opportunities to Parliament to add a provision that an acting senior officer may detain if that was the intention. It follows that the cross appeal should be allowed and if it is proved that the detentions were effected by Mr Linton by delivery of the letters addressed to Mr Rennie and Mr Galbraith then the respondent is entitled to declarator in terms of the first, second and third craves.

[78] We were addressed by parties on expenses at the appeal hearing. Expenses should follow success. The respondent has been successful in resisting the appellant's grounds of

appeal and the respondent's submissions on the cross appeal have also found favour. We will therefore award the expenses of the appeal procedure to the respondent and sanction the employment of senior and junior counsel in this appeal.

Appendix 1

"25th August 2015
Mr James Rennie
[address redacted]

Vessel – Amy Harris IV (CN35)

I write further to your arrest on suspicion of facilitating a breach of the United Kingdom's immigration law at Ardrossan Harbour on 19th August 2015.

Please be advised that the vessel has/will be been detained under Section 25D Immigration Act 1971. You should be aware that a court may order the forfeiture of this vessel if you are convicted on indictment of an offence under Section 25, 25A, or 25B Immigration Act 1971.

Please ensure that any person who may have an interest in the ownership of this vessel is given a copy of this letter.

Yours sincerely,

Jack Linton
Immigration Officer
Email: [email address redacted]

Appendix 2

23th December 2015

Mr John Galbraith
[address redacted]

Vessel – Sapphire IV (CN355), Fear Not II (CN354)

I write to you in furtherance of your arrest on suspicion of facilitating a breach of the United Kingdom's immigration law on Monday 15th December 2015.

Please be advised that the above named vessels have been detained under Section 25D Immigration Act 1971. You should be aware that a court may order the forfeiture of these vessels if you are convicted on indictment of an offence under Section 25 25A or 25B Immigration Act 1971.

Please ensure that any other person(s) who may have an interest in the ownership of theses vessel is given a copy of this letter.

Yours sincerely

J Linton

Jack Linton
Acting Chief Immigration Officer
Email: [email address redacted]