OUTER HOUSE, COURT OF SESSION

[2022] CSOH 2

CA86/19 & CA72/20

OPINION OF LORD TYRE

In the cause

DAVID GRIER

Pursuer

against

CHIEF CONSTABLE, POLICE SCOTLAND

Defender

and in the cause

DAVID GRIER

Pursuer

against

THE LORD ADVOCATE

Defender

Pursuer: Smith QC, MacLeod, Markie, Black; Kennedys Scotland
Defender (Chief Constable): Duncan QC, Watts, Laurie; Ledingham Chalmers LLP
Defender (Lord Advocate): Moynihan QC, Ross QC; Scottish Government Legal Directorate

11 January 2022

Introduction

[1] On Friday 14 November 2014, the pursuer was detained by the police at his home in England. He was taken to Glasgow, where he was arrested and charged, together with three

co-accused, with participation in a fraudulent scheme along with Mr Craig Whyte to acquire a controlling shareholding in The Rangers Football Club plc ("the Club"), and further charged with attempting to pervert the course of justice. He remained in custody over the weekend and appeared on petition, along with the others who had been arrested, at Glasgow Sheriff Court on Monday 17 November 2014, when he was bailed.

[2] On 15 September, 2015, an indictment was served on the pursuer and others. The pursuer was charged with fraud and with involvement in serious crime by participation in a fraudulent conspiracy. A second indictment was served on the pursuer and others on 2 December, 2015. In this indictment the pursuer was charged with seven offences including fraud, money laundering, and carrying on a business with intent to defraud.

[3] At a preliminary hearing before Lord Bannatyne on 5 February 2016, four of the charges against the pursuer were withdrawn by the advocate depute. In two judgments issued in February and April 2016, Lord Bannatyne upheld the pursuer's plea to the relevancy of all of the remaining charges against him. On 13 May 2016, the Appeal Court of the High Court of Justiciary refused the Crown's appeal against Lord Bannatyne's decisions. The criminal proceedings against the pursuer came to an end.

[4] In these two actions the pursuer seeks damages from the Chief Constable and from the Lord Advocate for wrongful, unlawful and malicious prosecution. Although the action against the Lord Advocate was raised some time after the action against the Chief Constable, the cases were latterly managed jointly, and a proof before answer was heard in the two cases together. The proof proceeded against the background of my having held, in the action against the Lord Advocate, that there was no relevant defence pled to the pursuer's case that from the stage of indictment the prosecution continued in the absence of objective reasonable and probable cause (see 2021 SLT 371 and 2021 SLT 833). All other issues in

relation to the existence of subjective and objective reasonable and probable cause and malice remained alive for the proof.

Factual background

Introduction

[5] The fraud that was suspected of having been committed, in relation to Mr Whyte's acquisition (via Liberty Capital Ltd, a company under his control) of a controlling shareholding in the Club, can be summarised as follows: that it was fraudulently represented to the sellers, Murray International Holdings ("MIH"), that the funds which Mr Whyte intended to use to repay the Club's bank debts came from his own resources, when in fact he had no such resources and intended to (and did) obtain most of the necessary funds by selling the Club's future season ticket revenues to an American company called Ticketus, and that the sellers were thereby induced to sell their interest in the Club for £1.

[6] Nobody has been convicted of any offence in relation to Mr Whyte's acquisition of the Club. All of the charges against the pursuer's co-accused, Mr David Whitehouse and Mr Paul Clark, were either withdrawn or dismissed as irrelevant. Claims by Mr Whitehouse and Mr Clark for damages for malicious prosecution have been settled, with an admission of liability by the Lord Advocate. The charges against the co-accused Mr Gary Withey (since deceased) were either withdrawn or dismissed on grounds of oppression due to the recovery and use of legally privileged material. In June 2017 Mr Whyte was acquitted by a jury of the two remaining charges against him.

[7] The police investigation of alleged wrongdoing in relation to the acquisition of the Club was lengthy and complex. Large quantities of documents, including voluminous email

correspondence, were recovered either by voluntary production or by execution of search warrants. The investigation generated its own voluminous documentation. It is not the purpose of this opinion to provide an exhaustive narrative of the circumstances giving rise to the prosecution of the pursuer or of the prosecution itself. The following summary focuses upon the events that are now founded upon by the pursuer as demonstrating that the prosecution was initiated and pursued maliciously and without reasonable and probable cause.

Events giving rise to the charges

Early contact

[8] The pursuer is a business consultant with a background in banking. In 2010-11 he was employed by Menzies Corporate Restructuring ("MCR"). He first met Mr Whyte in 2010. Towards the end of that year he became aware that Mr Whyte had been expressing an interest in acquiring the Club which at that time was known to have financial difficulties, including a major dispute with HMRC over its past use of employee benefit trusts to avoid tax ("the big tax case"). At a meeting in December 2010 Mr Whyte explained that he was receiving advice from Mr Withey, a partner in Collyer Bristow, solicitors, London, and from Mr Phil Betts, an asset finance broker. The pursuer offered to put together a scheme for reduction of the Club's debt to Lloyds Bank ("Lloyds").

[9] On 25 January 2011, before any formal engagement had been agreed, the pursuer had a short meeting in London with Mr Betts immediately before a meeting with, among others, representatives of Lloyds and MIH. After that meeting, the pursuer and Mr Betts went to a pub for a chat and, according to the pursuer, Mr Betts confirmed that all that he and Mr Whyte wanted MCR to do was to negotiate the debt owed to Lloyds. According to

a statement provided in April 2013 by Mr Betts to the police, however, Mr Betts also told the pursuer that Mr Whyte would be using funding from Ticketus to buy the Club.

The cash flow projection

[10] In December 2010, Mr Withey, acting on behalf of Mr Whyte, engaged Saffery Champness, chartered accountants, to carry out financial due diligence on the Club and to prepare financial projections based upon assumptions provided by Mr Whyte and Mr Betts. One of the documents produced by Saffery Champness was a forecast of monthly cash flow for a period covering 2011 and most of 2012. In its original form, this document included entries showing incoming funds of £20 million described as "Ticketus Advance". Ticketus, a subsidiary of Octopus Investments, had an existing commercial relationship with the Club in terms of which Ticketus advanced funds to be used as working capital against the security of some of the proceeds of future season ticket sales. In accordance with an instruction given on 17 March 2011 by Mr Betts to Mr Niraj Patel of Saffery Champness, the reference in the cash flow forecast to "Ticketus Advance" was amended to "Wavetower", being the name of the company that Mr Whyte intended to use to acquire the Club. Whether this amounted, on the one hand, to a fraudulent concealment from MIH of the true source of Mr Whyte's funding or, on the other, to a normal and non-suspicious commercial reluctance to reveal a funding source, has remained a matter of controversy. On 21 March 2011, a meeting was held between Mr Betts and representatives of MIH at which the document containing the reference to Wavetower (instead of Ticketus) was presented.

The "letter of comfort"

[11] By the beginning of April 2011 Mr Whyte was looking for means of demonstrating to the MIH board that he had the resources needed to purchase the Club. The MIH board members were insisting that the deal could not progress until it was demonstrated to them that funds were in Collyer Bristow's client account. Ticketus had concerns about the risk of non-repayment of its advance if the Club's appeal in the big tax case were to fail and the Club's liability exceeded its assets. A second and separate tax liability had also recently come to light. In an email dated 5 April 2011 sent to, among others, Mr Whyte, Mr Withey and Mr Betts, and forwarded by Mr Betts to the pursuer, Mr Ross Bryan, an investment manager with Octopus Investments and Mr Whyte's principal point of contact at Ticketus, sought comfort for Ticketus's investment committee regarding the likely outcome of the big tax case and the implications for Ticketus if loss of the tax case were to lead to insolvency. At 22.53 on 5 April, Mr Betts emailed the pursuer inquiring:

> "Are you around first thing tomorrow?
>
> It is imperative that we deal with this as soon as possible to make sure we send a robust response that will give our 3rd party funder the confidence to release funds to Gary Withey, with a view to completing by close of play tomorrow.
>
> There is a real fear that if we don't complete tomorrow, the deal will fall away."

[12] On 7 April 2011, the pursuer drafted a letter which has come to be referred to in these proceedings as "the letter of comfort" (although that is not a description assented to by the pursuer). The origin of the draft appears to have been an email sent by Mr Clark to the pursuer on 6 April containing "quick thoughts on the two issues for inclusion in our draft note". The pursuer used Mr Clark's email to produce a first draft the following morning, and then a letter addressed to Mr Whyte, which was sent to Mr Whyte and copied to Mr Withey and Mr Betts by email at 12.55. The letter narrated that MCR's opinion had been

sought on two matters, namely the potential to negotiate a settlement with HMRC of the big tax case, and "issues affecting a lender which has the rights to receive future income from… the sale of season tickets". In relation to the first of these matters, the pursuer's letter expressed optimism that HMRC would act reasonably and seek to agree a repayment plan with the Club. As regards the second, the pursuer noted MCR's understanding as being that the Club would "contract with a funder who will receive future benefit from the revenue created through the future sale of season tickets", and expressed the view that if the Club were to go into administration, the administrator would be bound to honour such a contract.

[13] A number of substantial amendments to the draft letter were suggested by Mr Withey and Mr Betts. At 20.53, Mr Betts sent an email to the pursuer saying:

> "Are you able to act on this tonight please, so I can forward it to our funder. Our main contact there is in Utah at the moment, so able to act on it immediately. He is standing by."

At 22.10 the pursuer requested clarification of a point by Mr Withey. At 22.18 Mr Betts sent an email to the pursuer and Mr Withey saying:

> "Thanks to you both for working on this tonight.
>
> It would be helpful to send Ross an email tonight if at all possible and then educate Craig and I on your findings/concerns tomorrow."

At 23.29 the pursuer sent an email comprising a revised draft of the letter to Mr Whyte, incorporating Mr Withey's amendments, which was copied to Mr Withey and Mr Betts. Mr Betts replied:

> "Thanks, David, very much appreciated.
>
> I will forward a copy to Ross now…"

Mr Betts duly forwarded the email to Mr Bryan with the comment "Please find attached a note from David Grier, Partner of MCR regarding the tax case. I hope this makes you and your IC feel a little more comfortable…"

[14] In fact the forwarding of the email to Mr Bryan shortly before midnight on 7 April 2011 had no direct causative effect. Earlier in the afternoon, funds had been transferred from the client account of Ticketus's solicitors, Clarke Wilmott, to a client account in the name of Collyer Bristow, to be held there jointly with Clarke Wilmott. Although the funds could not be withdrawn from that account without the consent of Ticketus or their solicitors, that transfer had been regarded by Mr Withey as sufficient to enable him to inform MIH that he held the funds necessary to repay the bank debt in a Collyer Bristow client account. The pursuer was aware, prior to producing the revised draft that went to Mr Bryan, that the transfer had occurred.

The "Don't tell David" email

[15] On 8 April 2011, Mr Withey emailed a document to Mr Whyte and Mr Betts for review. He followed this with another email in which he enquired:

> "What should I be disclosing to David. At the moment I have kept him away from the spa [ie the share purchase agreement].
>
> I don't really know what he is discussing with Mike or David but we do need to be careful that he doesn't fall foul of the takeover code nor let the bank start to feel too comfortable as there are still issues to be resolved with them."

Mr Whyte replied:

> "Don't disclose anything to David other than what is required for him to negotiate with the bank. That is all that he's engaged to do."

It is common ground that the "David" referred to in the latter email is the pursuer. This has come to be referred to as the "Don't tell David" email.

The Independent Committee meeting

[16] As part of the process of deciding whether to enter into a sale agreement with Mr Whyte, the board of directors of the Club set up a committee, referred to as the Independent Committee, to provide the board with advice. The Independent Committee comprised five of the Club's directors: Messrs Alastair Johnston, Donald McIntyre, Martin Bain, John Greig and John McLelland. It excluded those directors who had themselves expressed an interest in purchasing the Club, or who represented MIH on the board. The committee had no statutory status or power to take any decisions, but was expected to be influential in the Club's decision-making process. A meeting of the committee, chaired by Mr Johnston, was held on 24 April 2011. In attendance were Mr Whyte, Mr Withey and the pursuer. Solicitors with Dickson Minto, including one who took minutes, attended by telephone conference. According to the minutes (which the pursuer does not accept as accurate), the purpose of the meeting was to focus on certain specific areas. These included cash flow, the tax appeal, and the transfer of the bank debt to Wavetower. In relation to cash flow, the pursuer is minuted as stating that "he was very comfortable with the forecasts and the re-worked working capital position". Mr Whyte is minuted as explaining that their assumptions reflected all that they had been told in a working capital meeting that had previously taken place between the Club and Saffery Champness. The minute further records: "Mr McIntyre asked if their financial model relied upon using the season ticket income as working capital and Mr Whyte confirmed that it did…".

[17] In relation to the tax case, the minute records the following exchange:

> "Mr Bain explained the nervousness of the Independent Directors surrounding Wavetower's ability to settle the tax liability. Mr Grier said that he was comfortable that Mr Whyte had the resources and he felt that as an adviser, that was important…"

Under "Miscellaneous questions", the minute records:

> "Mr McIntyre asked if the funding for the transaction is coming from Craig Whyte the individual. Mr Whyte confirmed that it was him personally and that this transaction was nothing to do with the new fund recently launched by Merchant House."

[18] After the meeting, the chairman, Mr Johnston, also circulated a draft report based on his own notes. The draft included the following passages:

> "…(b) Whilst a working capital plan was provided by Craig's advisors it came in a format that was essentially unreadable, and it was agreed it would be re-circulated in a more user-friendly manner…
>
> …(g) Craig confirmed that it was indeed all his personal funds that were being tendered to acquire the Lloyds debt as well as provide the working capital facility commitment to funding the Club's account…"

The Independent Committee did not recommend acceptance of Mr Whyte's proposal to purchase the Club. On 6 May 2011, however, an 85.3% shareholding in the Club was sold to Wavetower for £1. Wavetower changed its name to the Rangers FC Group Limited ("RFCG"). On 9 May 2011, the Club entered into an agreement with Ticketus and, with the authorisation of Clarke Wilmott, £18 million was transferred from the Collyer Bristow client account referred to above to settle the Lloyds debt.

The Club's insolvency

[19] In late 2011, MCR was acquired by Duff & Phelps LLC, an international organisation engaged in corporate valuation, restructuring, administration and liquidation proceedings.

Mr Whitehouse and Mr Clark became partners in Duff & Phelps. The pursuer was given the title of managing director and Head of Business Advisory.

[20] On 14 February 2012, the Club was placed in administration. Mr Whitehouse and Mr Clark were appointed as joint administrators. At an early stage they began to investigate whether there had been criminality in the acquisition of the Club by Mr Whyte, in relation to the financing of the debt repayment. In April 2012 an action for damages was raised in the name of the Club (in administration) against Collyer Bristow and RFCG in the High Court in London. The administrators also reported their concerns to the police.

[21] On 22 October 2012, Clyde & Co, solicitors acting on behalf of Collyer Bristow, sent a pre-action protocol letter to Duff & Phelps intimating a claim to hold them liable for a contribution in the action raised by the administrators. The letter was accompanied by a lever arch folder ("the black folder") containing a large number of documents, including pleadings and correspondence, in support of the claim. Among the documents in the "correspondence" section was the monthly cash flow prepared by Saffery Champness in its unamended form, ie containing the reference to "Ticketus Advance" rather than Wavetower. It was accompanied by a page titled "Schedule 9 - Cash Flow Forecasts" because it had been Schedule 9 to the agreement entered into on 9 May 2011 between the Club and Ticketus.

Commencement of the police investigation

[22] On 17 January 2012, Mr Johnston made an allegation to the police of criminal conduct by Mr Whyte in connection with his acquisition of the Club. On 20 February 2012 a meeting was held between police officers and Mr Whitehouse and a member of his administration team, during which Mr Whitehouse expressed concern over how the acquisition had been funded. The police requested further information and a disagreement

arose between the administrators and the police regarding the extent of the administrators' duty to assist the police with their investigation. The administrators provided details of the London action against Collyer Bristow and RFCG. On 23 May 2012, a programme entitled "The Men Who Sold the Jerseys" was broadcast in Scotland by the BBC. The programme was primarily concerned with the big tax case but also included an allegation that in accepting appointment as administrators, Messrs Whitehouse and Clark had breached rules regarding conflict of interest. It was further alleged that the pursuer had at all times been aware that the funding for the acquisition was being provided by Ticketus. Statements were issued by Duff & Phelps and by the pursuer denying the allegations.

[23] On 22 June 2012 the Crown Office instructed Strathclyde Police to conduct a criminal investigation into the acquisition of the Club and its subsequent financial management. An incident room was set up and from that time forward the police and the Crown worked closely together. The investigation received a name: Operation Iona.

[24] On Wednesday 17 October 2012 BBC Scotland published details of an interview in which Mr Whyte stated that MCR had known everything about the agreement with Ticketus. Mr Clark issued a statement refuting the allegation.

[25] The first direct police contact with the pursuer was on 23 and 24 October 2012 when he was interviewed as a witness and statements were taken from him by (as they then were) DS James Robertson and DC Jackie O'Neill. Because these two officers received promotions in the course of the events with which this opinion is concerned, I shall refer to them, to avoid confusion, as Mr Robertson and Ms O'Neill. The second of the pursuer's statements covered *inter alia* the provision of the letter of comfort, and the pursuer is noted as having said that he was unaware at that time of who "Ross" was, or who the funder mentioned in the emails was. In relation to the Independent Committee meeting on 24 April 2011, which

he recalled lasting not more than an hour, the pursuer described being asked to comment on cash flow, explaining his experience in dealing with HMRC, and providing a "time to pay" proposal. He is noted as having been satisfied with the minutes.

[26] On Wednesday 24 October 2012, BBC Scotland published what they described as a secret recording of a meeting on 31 May 2012 between Mr Whyte and the pursuer, in the course of which the pursuer appeared to acknowledge that he had been aware of the substance of the Ticketus agreement. On 7 November 2012, the pursuer gave a third statement to the police, and provided a summary of his response to Mr Whyte's allegation.

[27] On 20 November 2012, Mr Robertson took a statement from Mr Charles Simpson, a partner and head of corporate finance at Saffery Champness. Mr Simpson was shown the cash flow projection produced by his firm in January 2011 and asked if it had been adjusted to remove the name of Ticketus. He confirmed that Mr Betts had asked for the name of Ticketus to be removed and replaced with Wavetower. He had not been told why. However, Mr Simpson did not consider this to be unusual; funders often did not want to disclose their identity until all funding approval had been put in place.

[28] Mr Robertson produced a lengthy Summary Report dated 4 December 2012, the second part of which highlighted "misrepresentations and acts of commission and omission by Craig Whyte, Phil Betts and Gary Withey which constitute criminality". This report included, within a section headed "Knowledge of the Ticketus deal", the following passages:

> "David Grier stated that he was present when Craig WHYTE and Gary WITHEY presented the Wavetower proposal to the Independent Directors of RFC at Murray Park Glasgow on Sunday 24 April 2011. It is following this meeting that the directors support the dispensation allowing the deal to progress to completion on 6 May 2011. It is noted in the minutes of the meeting that John McLelland asked Craig WHYTE 'if the funding for the transaction is coming from Craig WHYTE the individual' WHYTE confirmed that it was him personally.

> David Grier also provided that a financial forecast was provided to the directors at this meeting concerning cash flow. He stated that £20 million is shown on the sheet with Wavetower being the provider of funds. Grier stated he later (after administration) learned from Phil BETTS that Saffery Champness who provided the data initially had listed the source of the funds as 'Ticketus'. BETTS said that WHYTE instructed Saffery Champness to change this to 'Wavetower'."

In his conclusion, Mr Robertson expressed the opinion that "Craig Whyte assisted by Gary Withey and Phil Betts acquired Glasgow Rangers Football Club by fraud".

[29] By 15 March 2013, Mr Robertson's view of Mr Betts had changed. He now reported a belief, after assessment, that Mr Betts' role showed a lack of involvement in criminality, and that he was more of a paid adviser to Mr Whyte "in the same way as Cairn Financial, MCR and Saffery Champness". He indicated an intention to approach Mr Betts for a witness statement. On 27 March 2013 Mr Robertson and Ms O'Neill met Mr Betts, who was accompanied by a solicitor, at a hotel at Stansted Airport. Ms O'Neill took a manuscript note which included the following:

> "What's ur knowledge of DG's knowledge of [Ticketus] deal
>
> He knew about it
>
> When? I asked CW if DG knew, he said yes as DG was part of team - Jan/Feb 2011 walking from meeting to DG's offices & went for pint (meeting at D&W offices) CW not present.
>
> Told DG 'funded against future season tickets' wouldn't have been full breakdown as I don't think I knew myself."

[30] This meeting note was not transcribed or put to Mr Betts for signature as accurate. Instead, further meetings were held on 2, 3 and 4 April 2013 at which statements were taken from Mr Betts, again in the presence of a solicitor. These statements were transcribed and confirmed to be accurate by Mr Betts. With regard to the pursuer's knowledge of the Ticketus agreement, Mr Betts' third statement has this:

> "I told David about the deal after a meeting we had at Dundas Wilson offices in London, with Lloyds Bank…
>
> Craig Whyte was not at this meeting. I had asked him about telling David Grier of the Ticketus, either on the morning of the meeting or the day before.
>
> After the meeting, David and I walked away together and before returning to our work places, we stopped off at a pub, at the back of the Strand in London. I am not sure how it came out, but I told David, Craig Whyte was using Ticketus funding to buy the club. David didn't understand what that meant. He had never heard of Ticketus before, so I explained to him how Ticketus worked. I didn't tell him the full breakdown, but I did tell him he was raising funds against the future sale of season tickets. The meeting in the pub lasted probably about an hour."

Police suspicion of criminal activity by the pursuer

[31] By the summer of 2013 the police had decided to seek evidence that the senior MCR - now Duff & Phelps - staff (ie Mr Whitehouse, Mr Clark and the pursuer) had been aware, during the negotiations for acquisition of the Club, of the details of Mr Whyte's agreement with Ticketus. They sought and obtained a warrant to search Duff & Phelps' offices in London and Manchester. The London search was carried out on 28 August 2013. Among the items seized was the black folder, which was taken by Ms O'Neill and another officer from a cupboard to a conference room in the office from which the police were conducting their operation. Ms O'Neill carried out what was later described as an "initial sift" of the folder and found the cash flow forecast (containing the Ticketus reference) with the Schedule 9 title page. She considered that this might be a document of significance and showed it to Mr Robertson. Neither officer had in mind that the contents of the black folder might be subject to legal privilege. Mr Christopher Polwin, a Duff & Phelps senior manager, was given a handwritten schedule of the documents seized. He objected on the ground of legal privilege to the seizure of two folders marked with the initials "HFW" (ie Holman Fenwick & Willan, who were Duff & Phelps' solicitors), which were returned by

Mr Robertson. After the police had left with the documents seized, and having taken legal advice, Mr Polwin contacted the police to assert legal privilege in relation to a number of further files that had been taken, including documents in the black folder.

[32] The claim of privilege in relation to the files seized remained a matter of dispute for some considerable time. In September 2013 Mr Polwin, accompanied by Duff & Phelps colleagues and solicitors, travelled to Glasgow with files assembled by HFW that have been referred to as "the chronological bundle". Documents in relation to which privilege was claimed were removed from the chronological bundle by Mr James Clibbon, the partner in HFW responsible for dealing with the case. With regard to the documents seized during the search, the Duff & Phelps team were permitted to review them and mark those for which any form of privilege was asserted, but were not permitted to take the latter away as they had expected to do.

[33] On 23 November 2013, Mr Robertson submitted an interim report to the Crown Office stating, for the first time, his opinion that there was a sufficiency of evidence available showing that the acquisition of the Club could not have been completed without the involvement of the pursuer and Messrs Clark and Whitehouse, and that they had had full understanding of the Ticketus deal. Mr Robertson expressed the view, based on the contents of an email sent by Mike Bills, an MCR and subsequently Duff & Phelps employee, on 1 June 2011, that Duff & Phelps' motivation had been to see the Club become insolvent and obtain a lucrative appointment as administrators. Mr Robertson noted that he planned to interview the pursuer, Mr Clark and Mr Whitehouse under caution.

[34] In April 2014, Mr Robertson submitted a further interim report, said to have been prepared prior to "executive action to trace detain and interview" Messrs Whyte, Withey, Whitehouse, Clark and the pursuer. The report contained what Mr Robertson considered to

be the relevant information and evidence to support charges of (i) fraudulent scheme against all five accused; (ii) contravention of section 678(3) of the Companies Act 2006 (financial assistance) against Messrs Whyte and Withey; and (iii) attempt to pervert the course of justice against the pursuer, Mr Whitehouse and Mr Clark.

[35] Among the further enquiries that Mr Robertson proposed to pursue were:

> "To assess the documentary productions seized under warrant from the premises of Duff and Phelps both Manchester and London once legal privilege issues are resolved… Liaison is ongoing with SOCD and solicitors for Duff and Phelps.
>
> With regards to the one page document identified at initial sift (with no accompanying email) which is a financial forecast spread sheet which shows Ticketus as the funder for the acquisition, this is the spread sheet Saffery Champness prepared and was instructed to remove reference to Ticketus and replace with Wavetower. Knowledge of this has always been denied by GRIER, CLARK and WHITEHOUSE. This document will form part of the interview plans to establish how and when and to who it came to at Duff and Phelps…"

At this time the one page document with the cash flow forecast had not yet been released from the claim of privilege. However, on 20 May 2014, Mr Polwin and Mr Clibbon attended a meeting with the police at which the claim was withdrawn in relation to some of the documents held by the police, including the cash flow forecast.

[36] In response to a request from the Crown Office, Mr Robertson wrote and submitted on 8 August 2014 a Standard Prosecution Report, marked for the attention of Ms Sally Clark, a senior procurator fiscal depute in the Crown Office's Serious and Organised Crime Division. The report named Messrs Whyte, Withey, Whitehouse and Clark and the pursuer as the accused. The proposed charges included a charge against all five accused of fraudulent scheme and a charge against the pursuer of attempting to pervert the course of justice. The report included a "Summary of misrepresentation and criminality". So far as relating to the pursuer, this summary was in substantially the same terms as the April interim report. I return to the Standard Prosecution Report later in this opinion.

Appearance on petition

[37] The consequence of submission of the Standard Prosecution Report was that a decision was taken by the Crown and police on 6 October 2014 to move to "executive action", ie to detain and charge the five accused. The action was planned for Monday 17 November 2014. This was initially changed to Sunday 16 November to avoid a clash with a Scotland/England football match. It was changed again to Friday 14 November because the police received information that Mr Whitehouse was intending to fly to Portugal that morning (as indeed he was, for a family holiday). As already narrated four of the accused, including the pursuer, were detained at their homes and driven to Glasgow where they were arrested and charged, and held in custody over the weekend.

[38] The petition was drafted on 14 November by Ms Clark, who considered that there was sufficient evidence to meet the legal test to place the pursuer on petition. Due to lack of time because the executive action date had been brought forward, Ms Clark's assessment of the case against the pursuer was done by consideration of the Standard Prosecution Report, police subject sheets and Mr Betts' police statement, rather than the source evidence. She did not recall discussing the sufficiency of evidence to place the pursuer on petition with any of her colleagues.

[39] On Monday 17 November 2014 the pursuer appeared along with the three other accused at Glasgow Sheriff Court. (Mr Whyte appeared a few weeks later.) The charges, so far as applicable to the pursuer, were as follows:

> "(001) Between 1 January 2010 and 28 February 2012, both dates inclusive, at [various locations], having formed a fraudulent scheme to obtain a controlling shareholding in Rangers Football Club plc ('the Club') from Murray MHL Limited ('Murray'), in pursuance of said fraudulent scheme you [the five accused] by your own hands and

by the hands of employees of MCR, Saffery Champness, Collyer Bristow LLP, Cairn Financial and Noble Grossart directed by you;
…

(i) you did pretend to Sir David Murray, representatives of Murray, the board of directors of the Club and others that you CRAIG THOMAS WHYTE, through companies of which you were the beneficial owner, had sufficient funds to acquire the controlling shareholding in the Club and you did thereby induce said Sir David Murray and representatives of Murray to sell the controlling share in the Club and did induce said board of directors to consent to the sale of the controlling shareholding in the Club to you CRAIG THOMAS WHYTE;
…

(iv) on 24 April 2011, you DAVID HENRY GRIER and CRAIG THOMAS WHYTE did attend a meeting with the Independent Committee of the board of directors of the Club at which you did pretend that you CRAIG THOMAS WHYTE did have sufficient funds of your own to acquire the controlling shareholding in the Club and to meet the ongoing working capital requirements of the Club and you did thereby induce them to consent to the sale of said controlling shareholding in the Club to Craig Thomas Whyte;
…

(vi) you DAVID HENRY GRIER, PAUL JOHN CLARK and DAVID JOHN WHITEHOUSE did prepare a letter addressed to your client, Craig Whyte dated 7 April 2011, providing advice on matters related to the acquisition of the controlling shareholding in the knowledge that said letter would be produced by Craig Whyte to Ticketus and used to induce Ticketus to release the aforementioned £18,161,500 to a Collyer Bristow account controlled by Gary Martyn Withey
…

the truth being as you all well knew that you CRAIG THOMAS WHYTE did not hold sufficient funds to acquire the controlling shareholding in the Club and said acquisition of the controlling shareholding in the Club had been funded through the sale of the Club's season tickets to Ticketus…
…

(005) On various occasions between 23 October 2012 and 7 November 2012, both dates inclusive, at the premises of Duff & Phelps, 43 - 45 Portman Square, London, you DAVID HENRY GRIER did state to Jackie O'Neill, Detective Constable, and James Robertson, Detective Sergeant, respectively then conducting a criminal investigation into the acquisition and management of Glasgow Rangers Football Club PLC by Craig Thomas Whyte, that you had not known that said Craig Thomas Whyte had funded said acquisition of the Club through contracting with Ticketus LLP and Ticketus LLP 2 to sell 3 years' of said Club's season tickets and this you did in the knowledge that you had been aware of said contractual arrangements and this you did with intent to pervert the course of justice and you did attempt to pervert the course of justice…"

Events post-petition

[40] The police investigation continued. On 10 December 2014, Mr Andrew Gregory, a senior solicitor with DWF now instructed on behalf of Duff & Phelps, visited the police/Crown operation centre at Gartcosh, Glasgow, to attempt to resolve the issue of privilege claimed in relation to documents taken during the August 2013 search. This gave rise to a further dispute as to whether Mr Robertson and Ms O'Neill breached privilege by reading emails identified as privileged during Mr Gregory's visit. By February 2015 claims of privilege had been withdrawn by Mr Gregory in relation to most of the documents in respect of which they had previously been made.

[41] In July 2015, DI Robertson sought and obtained a warrant for a further search of Duff & Phelps' premises in Manchester and London. The London warrant was executed on 8 July. Ms Clark was present with the police. The focus was on electronically stored material relating to the period of the Club's administration. As the amount of material was likely to be very large, Mr Gregory agreed a procedure with Ms Clark whereby Duff & Phelps would review it and put to one side documents subject to a claim for privilege (by Duff & Phelps or by some other person, such as the Club). The process of reviewing and assembling the electronic material took several months. Once identified, the material was transferred to compact discs, separated into privileged and non-privileged. The discs containing material for which privilege was claimed were placed in sealed envelopes on which was written

> "These emails contain material that is subject to legal professional privilege and the envelope should not be opened and the contents should not be read without the written consent of those parties entitled to the benefit of the legal professional privilege or by an order of the court. DWF LLP".

Discs were delivered to the police between October and December 2015.

The first indictment

[42] In the meantime the Crown were proceeding towards service of an indictment. Since October 2014, Mr James Keegan QC had been the allocated advocate depute. The Solemn Legal Manager co-ordinating the case was Ms Caroline MacLeod. A number of other COPFS staff were engaged in reviewing the voluminous material coming in from the police to the operation centre at Gartcosh, and in drafting the indictment.

[43] It is standard Crown practice when preparing a case for indictment to produce a document known as a Precognition. The meaning of that term, used in this context, was explained by Lord Mulholland, who was Lord Advocate at the time of the events with which these proceedings are concerned and who gave evidence at the proof. A Precognition consists of the case papers on the basis of which decisions will be taken by Crown Counsel on what case to prosecute and where. It includes lists of witnesses, productions and labels for the assistance of the indicter who will draft the indictment. It should contain a detailed narrative of the evidence, and an analysis of whether the evidence is sufficient to support criminal charges. In modern practice it is in electronic form. For the prosecutions with which these proceedings are concerned, Ms Clark was the officer responsible for the Precognition. It was never completed or formally submitted to the Crown Office. Ms Clark did however draft lengthy chapters entitled, among others, "Role of David Grier/MCR in Craig Whyte's acquisition of the Club" and "The Independent Committee" which were accessible in electronic form by the indicters. It is a feature of Ms Clark's draft that it contains numerous action points, requesting further information or evidence, or describing a further investigation to be undertaken.

[44] The Precognition required to be countersigned. The countersigning officer was Ms MacLeod. On 9 August 2015, she made a recommendation in the following terms:

> "After a two year delay caused by the assertion of legal privilege, the evidence in Operation Iona is now being assessed. What is very clear is that rather than being exculpatory it is providing a greater clarity in the role played by the accused.
>
> The proposed draft charges for the indictment as at 9 August 2015 are simply charges 1 & 2 of the petition. In the event that the S65 application for an extension is not granted then this indictment shall be served on 10 September but will be superceded by a more comprehensive indictment in due course.
>
> It is recommended that in the case of Craig Whyte, Gary Withey and David Grier there is a clear sufficiency of evidence for Charges 1 &2.
> …
>
> The later charges of attempting to pervert the course of justice have been removed for the purpose of the draft indictment due to the fact that the RO's [ie Reporting Officer's] statement although over 28 pages long is not yet near completion.
>
> The sums of money involved in this fraudulent scheme are in excess of £20-£30 million. The allocated AD, James Keegan QC has been kept abreast of developments in the case as has the Lord Advocate.
>
> It is respectfully recommended that the case is indicted to the High Court."

[45] It is necessary to mention at this point that a second investigation was now in progress, in relation to alleged criminality connected to the acquisition of the business and assets of the Club from the administrators in June 2012 by Mr Charles Green; this was known as Operation Guyra. The two operations were treated as interlinked by the police and the Crown. On 2 September 2015, five accused, including Mr Whyte, Mr Green, Mr Whitehouse and Mr Clark (but not the pursuer) appeared on petition charged with *inter alia* a fraudulent conspiracy whereby the business and assets of the Club were acquired at a discount from their true value.

[46] On 3 September 2015 an application under section 65 of the Criminal Procedure (Scotland) Act 1995 was made by Mr Keegan to Sheriff Murphy at Glasgow Sheriff Court for

an extension of time in which to commence the preliminary hearing and the trial of pursuer and the other accused in both petitions. On 7 September the sheriff granted a three month extension. His reasons for so doing included accepting information provided to him by Mr Keegan that 39 boxes of relevant materials had been received by the Crown in July 2015, in response to the August 2013 search warrant, as a result of oversight by Duff & Phelps. In the course of the hearing of an appeal on 3 December 2015 by Messrs Whitehouse and Clark against the granting of the extension (see [2017] HCJAC 46), it was admitted by Mr Keegan that the information provided to the sheriff about recovery of documents at both an initial hearing and an adjourned hearing had been incorrect, and an apology was tendered. Having considered the matter of new, the court refused the appeal.

[47] On 15 September 2015, Mr Keegan issued a Crown Counsel Instruction ("CCI") to indict all of the accused in both petitions in the High Court. As regards the pursuer, the CCI noted that

> "there is a substantial body of evidence that points to knowledge on the part of Mr Grier 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 [the Club]".

[48] The first indictment was served on 15 September 2015. The charges, in so far as laid against the pursuer, were of fraudulent conspiracy, with particular reference to false representations and pretences to the Independent Committee (charge 1), and participation in the furtherance of the commission of serious organised crime (charge 4). The preliminary hearing took place on 16 October 2015.

The second indictment

[49] On 2 December 2015, the second indictment was served. It contained 15 charges of which seven were laid against the pursuer and others:

- Charge 1 was in the same terms as charge 1 in the first indictment;
- Charge 3 was a charge under section 330 of the Proceeds of Crime Act 2002 of failure to disclose the identity of a person engaged in money laundering;
- Charge 4 was in the same terms as charge 4 in the first indictment;
- Charges 7, 8 and 9 were charges of obtaining money from the Club by fraud by issuing invoices to the Club for services provided to Liberty Capital Ltd;
- Charge 10 was a charge under section 993 of the Companies Act 2006 of carrying on the business of the Club with intent to defraud its creditors.

[50] Most of the accused lodged minutes containing preliminary pleas and preliminary issues. A preliminary hearing on the second indictment took place on 3 and 4 February 2016, at which pleas relating to competency, relevancy and specification were heard. In the course of the hearing the advocate depute withdrew charges 4, 7, 8 and 9, and significantly amended charges 1, 3 and 10. In an opinion dated 22 February 2016, the preliminary hearing judge (Lord Bannatyne) dismissed charge 3 as irrelevant. In relation to charge 1 as directed against the pursuer, Lord Bannatyne considered that he had to hear evidence to determine its relevancy. The overall effect of the withdrawal of charges by the advocate depute and Lord Bannatyne's decision was that charges remained live against only three accused: Mr Whyte, Mr Withey and the pursuer.

[51] A further preliminary hearing was held on 26 February 2016, following which Lord Bannatyne heard evidence of the role of the Independent Committee. In the light of that evidence he issued an opinion dated 15 April 2016 in which he held that charge 1

against the pursuer was irrelevant. It did not relevantly aver the crime of fraud because no practical result was brought about by the pursuer's conduct. Lord Bannatyne described the advocate depute's submission that the pursuer's conduct in relation to the Independent Committee smoothed the path of the acquisition as "a last and desperate attempt to show that there was a practical effect". The other remaining charge against the pursuer was also dismissed as irrelevant.

[52] The Crown appealed. In its opinion dated 13 May 2016, the Appeal Court upheld Lord Bannatyne's decisions, holding that because there was no apparent link between the pursuer's alleged actings and the practical result, the essentials of a charge of fraud were not present and the libel was irrelevant. The charge of carrying on a business with intent to defraud was also held to be irrelevant because it contained no allegation that the accused was trading while the Club was insolvent.

Search of HFW premises

[53] On 5 December 2015, a few days after service of the second indictment, Mr Robertson applied to the sheriff court for, and was granted, a warrant to search the premises in London of HFW (who, it will be recalled, were Duff & Phelps' solicitors). In his application to the Crown Office for authority to apply for the warrant, Mr Robertson's stated purpose was to search for all material held by HFW in relation to their involvement in the production of the unedited chronological bundle and the revised chronological bundle subsequently produced to the police: in essence the purpose was to recover documents that had been removed from the chronological bundle by Mr Clibbon under a claim of privilege. The warrant, however, craved authority to take possession of "any material in relation to the acquisition, running, administration and disposal of the assets of [the Club]" and "all material which

James Clibbon had access to and/or were reviewed in consequence of which 'chronological bundles' of material were produced".

[54] The application was granted by the sheriff at Glasgow, Sheriff Wood. No mention was made by Mr Robertson during the hearing of the fact that a High Court indictment had been served which meant that the warrant application ought properly to have been made to the High Court and not the sheriff court. No notice of the application was given to Duff & Phelps or HFW. There was no discussion of legal privilege.

[55] The warrant was executed on 9 December 2015. The police arrived at HFW's offices without warning while a business entertainment event was in progress and seized 47 boxes of documents despite claims for legal privilege being made. On the same evening, HFW obtained an injunction from the Administrative Court of the High Court of Justice, Queen's Bench Division, prohibiting the police from examining the documents and requiring them to hold the documents in a secure room pending further orders. The court described the use of the warrant as an abuse of state power. At the same time an application was made to the High Court of Justiciary for a bill of suspension of the warrant. On 18 December 2015, the High Court of Justiciary ordered the return of the material to HFW, to be kept in a secure room and reviewed by "independent counsel". On 5 February 2016, the court passed the bill and suspended the warrant. The court noted that there had been a degree of confusion and possibly obfuscation in relation to HFW's entitlement to claim legal privilege in relation to their clients' documents. It was held, however, that because no intimation had been given to the sheriff that the documents sought were subject to an ongoing dispute in relation to a claim of legal privilege, the warrant was oppressive. The vagueness and width of the warrant also rendered it oppressive.

Return of discs to DWF

[56] By 13 May 2016 the criminal proceedings against the pursuer had ended. One further contentious matter requires, however, to be narrated. On 6 October 2017, by prior arrangement, all of the material recovered by the police under search warrants was returned to Duff & Phelps' Manchester office by Mr Robertson and Ms O'Neill. Mr Gregory and a trainee solicitor were in attendance. When Mr Robertson brought out of a box the envelopes containing the CDs provided by DWF to the police in pursuance of the search warrant dated 8 July 2015, Mr Gregory noticed that some of the envelopes, including envelopes with the script identifying the contents as privileged, had been opened. Mr Robertson claimed that he had just opened them in front of Mr Gregory; Mr Gregory stated that this was not true and that he would report the matter to his clients. Ms O'Neill reported the exchange in an email to Ms MacLeod.

Summary of the pursuer's claim

[57] The pursuer's claim is that both the police and the Crown were responsible for the commencement and continuation of a malicious prosecution of him. His detention and charge was without reasonable or probable cause and was malicious, as was the continuation of the prosecution.

[58] As regards the police, the pursuer founds his case upon the following contentions:

- Mr Betts was treated as a witness and not a suspect in order to make a case against the pursuer and his two Duff & Phelps colleagues;
- The interview with Mr Betts at Stansted Airport was not disclosed to the Crown or to the defence because Mr Betts had made remarks inconsistent with the pursuer's guilt;

- Legal professional privilege was breached during the search of Duff & Phelps' London office when the black folder was examined;
- The Standard Prosecution Report contained two deliberate misrepresentations in relation to the sending of the "letter of comfort" on 7 April 2011 and the presentation made by the pursuer to the Independent Committee meeting on 24 April 2011;
- The "Don't tell David" email was not disclosed to the defence;
- The envelopes containing the CDs produced by DWF were accessed in breach of legal professional privilege;
- Mr Robertson's conduct during interviews with witnesses was aggressive and inappropriate;
- When applying for the warrant to search HFW's offices, Mr Robertson failed to inform the sheriff that a High Court indictment had been served, and failed to acknowledge that the warrant included material over which privilege was asserted.

[59] As regards the Crown, the pursuer's case is founded on the following contentions:

- The Crown failed to carry out a proper case analysis, including the preparation of a finalised and comprehensive Precognition;
- Crown Office staff allowed the advocate depute to mislead the sheriff by providing incorrect information in support of the section 65 application for an extension of time;
- The second indictment was served for tactical reasons in case the defence appeal against the allowance of an extension of time was successful, and thus for an improper purpose;

- The Crown were complicit in the police actings in relation to non-disclosure of Mr Betts' Stansted interview, non-disclosure of the "Don't tell David" email, accessing the CDs in breach of legal professional privilege, and obtaining a warrant to search HFW's offices without adequately addressing legal professional privilege.

Malicious prosecution: the law

Introduction

[60] In *Whitehouse* v *Lord Advocate* 2020 SC 133, a court of five judges held, overruling *Hester* v *Macdonald* 1961 SC 370, that the Lord Advocate was not immune from suit in respect of a prosecution carried out maliciously and without probable cause. The decision in *Hester* v *Macdonald* was found not to have been supported by the authorities upon which the court had relied. The court in *Whitehouse* went on, *obiter*, to address and uphold an alternative argument that if *Hester* v *Macdonald* was not overruled as incorrectly decided, it should nevertheless be overruled on the ground that the ratio was no longer sustainable. In the absence of modern Scottish authority, the court examined the development of the law in other jurisdictions including England and Wales, Australia, Canada and the United States. Lord President Carloway expressed the view (at paragraph 106) that "Canada and Australia, in large part, demonstrate how matters should be analysed in modern society".

[61] In *Nelles* v *Attorney General for Ontario* [1989] 2 SCR 170, Lamer J in the Supreme Court of Canada accepted, under reference to Fleming, *The Law of Torts* (5th ed, 1977) at page 598, that there were four necessary elements which had to be proved for a plaintiff to succeed in an action for malicious prosecution:

(a) the proceedings must have been initiated by the defendant;

(b) the proceedings must have terminated in favour of the plaintiff;

(c) the absence of reasonable and probable cause; and

(d) malice, or a primary purpose other than that of carrying the law into effect.

In the present case the existence of elements (a) and (b) is accepted by the Lord Advocate. The Chief Constable accepts that element (b) is satisfied but not element (a) in relation to the police. Elements (c) and (d) are separate from one another and must both be established.

The police as "prosecutor"

[62] In Scottish criminal procedure a clear distinction is drawn between investigation of a criminal offence and prosecution. Prosecution is the responsibility of the Crown and not the police. The prosecution of indictable crime is in the hands of the Lord Advocate and subordinate public prosecutors acting under his control. The Lord Advocate is the only competent public prosecutor in the High Court (see eg Renton & Brown, *Criminal Procedure* (6th ed) at paragraph 3-02. In *Smith* v *HM Advocate* 1952 JC 66, Lord Justice Clerk Thomson put the matter thus (page 71):

> "…(T)he duty of the police is simply one of investigation under the supervision of the procurator-fiscal and the results of the investigation are communicated to the procurator-fiscal as the inquiries progress. It is for the Crown Office and not for the police to decide whether the results of the investigation justify prosecution. The two functions are quite distinct."

[63] It is, however, established in English case law that a person other than the official prosecutor may be a "prosecutor" for the purposes of the first element in an action for malicious prosecution. The circumstances in which this may occur have been considered in a series of cases, namely *Martin* v *Watson* [1996] AC 74, *Mahon* v *Rahn (No.2)* [2000] 1 WLR 2150 (CA), *AH* v *AB* [2009] EWCA Civ 1092, and *Rees* v *Commissioner of Police for the*

Metropolis [2018] EWCA 1587. In the absence of Scottish authority of direct assistance, I adopt the test enunciated in these cases. The first three are concerned with whether a person who falsely reports the commission of a crime to the police can be a "prosecutor", liable to be sued for malicious prosecution. In *Martin* v *Watson*, Lord Keith of Kinkel stated the test as follows (page 86):

> "…Where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in court of the matters in question, it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant, as was the position here, then it becomes virtually impossible for the police officer to exercise any independent discretion or judgment, and if a prosecution is instituted by the police officer the proper view of the matter is that the prosecution has been procured by the complainant."

In *Mahon* v *Rahn*, the test, so far as applicable in a "simple case", was distilled by Brooke LJ (at paragraph 268) into three questions:

> "(1) Did A desire and intend that B should be prosecuted? (2) If so, were the facts so peculiarly within A's knowledge that it was virtually impossible for the professional prosecutor to exercise any independent discretion or judgment? (3) Has A procured the institution of proceedings by the professional prosecutor, either by B furnishing information which he knew to be false, or by withholding information which he knew to be true, or both?"

In *AH* v *AB*, Sedley LJ at paragraph 37 described this as "probably as near as one can get to a working test of the identity of the prosecutor". Sedley LJ went on to observe (at paragraph 47) that it would have been necessary to establish that the complainer had

> "deliberately manipulated [the police and the CPS] into taking a course which they would not otherwise have taken if, pursuant to *Martin* v *Watson*, she was to be regarded in law as the prosecutor".

[64] *Rees* v *Commissioner of Police for the Metropolis* is of particular interest for present purposes because in that case the person alleged to be the prosecutor was the Commissioner of Police. The senior investigating police officer in a murder investigation (DCS Cook) was

found to have prompted an unstable individual to give a false witness statement that he had been present at the scene of the murder and witnessed the aftermath. Three accused persons, the charges against whom had been withdrawn, sued for damages for malicious prosecution, and the question arose of whether the police were the "prosecutor". The Court of Appeal held that they were. McCombe LJ summarised his conclusions at paragraphs 58-60:

> "58. It seems to me that the case falls squarely within what this court said in *AH* v *AB*. DCS Cook deliberately manipulated the CPS into taking a course which they would not otherwise have taken (Sedley LJ). The decision to prosecute was 'overborne and perverted' (cf Wall LJ) by DCS Cook's presentation of the material to the CPS with the implicit suggestion that its procurement was not tainted in the manner that it was.
>
> 59. This is not to say… that the mere provision of false information to a prosecuting authority leading to a prosecution makes the provider a prosecutor. I accept that the test is…'drawn more restrictively'. However, the cases are fact specific: see in this respect the very different results reached in not entirely dissimilar cases in *Martin* v *Watson* and in *AH* v *AB*. This present case was one in which DCS Cook took it upon himself to present to the independent prosecutor for a prosecution decision a case which he knew included an important feature procured by his own criminality. There is nothing more likely to have 'overborne or perverted' the decision to prosecute. The CPS were deprived of their ability to exercise independent judgment.
>
> 60. In my judgment, therefore, DCS Cook was undoubtedly a 'prosecutor' in the sense decided by the authorities."

[65] Applied to the Scottish context in which responsibility for prosecution rests upon the Crown and not on the police, the conclusion that I derive from these authorities is that before the police can be held to be the "prosecutor" for the purposes of a claim of malicious prosecution, it must be established that the Crown was (a) deprived of the ability to exercise independent judgement by (b) presentation of information by the police which they knew to be false or (per *Rees*) so tainted by criminality or other impropriety as to be worthless as evidence.

Absence of reasonable and probable cause

[66] In *Whitehouse* v *Lord Advocate*, Lord President Carloway cited with approval (at paragraph 108) the following observations of the majority of the High Court of Australia in *A* v *New South Wales* (2007) 233 ALR 584 at paragraph 38:

> "[J]ustice requires that the prosecutor, the person who effectively sets criminal proceedings in motion, accept the form of responsibility, or accountability, imposed by the tort of malicious prosecution. Insofar as one element of the tort concerns reasonable and probable cause, the question is not abstract or purely objective. The question is whether the prosecutor had reasonable and probable cause to do what he did; not whether, regardless of the prosecutor's knowledge or belief, there was reasonable and probable cause for a charge to be laid. The question involves both an objective and a subjective aspect."

These observations accord with Lamer J's analysis in *Nelles* that there must be actual belief on the part of the prosecutor, and that the belief must be reasonable in the circumstances. The belief to which Lamer J was referring, this time under reference to *Hicks* v *Faulkner* (1878) 8 QBD 167, Hawkins J at page 171, was

> "an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed".

[67] In so far as the dictum of Hawkins J might suggest that the prosecutor must have an honest belief that the person charged was "probably guilty of the crime imputed", subsequent English authorities indicate that this would, without qualification, set the test too high. In *Glinski* v *McIver* [1962] AC 726, Lord Denning commented on it at page 758 as follows:

> "In the first place, the word 'guilty' is apt to be misleading. It suggests that, in order to have reasonable and probable cause, a man who brings a prosecution, be he a police officer or a private individual, must, at his peril, believe in the guilt of the accused. That he must be sure of it, as a jury must, before they convict. Whereas in truth he has only to be satisfied that there is a proper case to lay before the court…"

To the same effect, Lord Devlin observed at page 766-7:

> "…[R]easonable and probable cause… means that there must be cause… for thinking that the plaintiff was probably guilty of the crime imputed: *Hicks* v *Faulkner*. This does not mean that the prosecutor has to believe in the probability of conviction: *Dawson* v *Vandasseau* (1863) 11 WR 516, 518. The prosecutor has not got to test the full strength of the defence; he is concerned only with the question of whether there is a case fit to be tried."

In *Willers* v *Joyce* [2018] AC 779, Lord Toulson summarised the views of Lord Denning and Lord Devlin at paragraph 54:

> "In order to have reasonable and probable cause, the defendant does not have to believe that the proceedings will succeed. It is enough that, on the material on which he acted, there was a proper case to lay before the court…"

[68] In *Rees* v *Commissioner of Police for the Metropolis*, in relation to reasonable and probable cause, McCombe LJ at paragraph 69 posed the question: Does a prosecutor have subjective reasonable and probable cause for a prosecution if he presents a case heavily reliant upon evidence which, because of his own misconduct, he knows is "certain or at least highly likely" to be ruled inadmissible by any trial judge? He concluded, under reference to *Glinski* v *McIver*, that the case presented by the police officer to the Crown Prosecution Service was not a "proper" one, nor "fit to be tried". It could not therefore be said that, as a prosecutor, the police officer believed that he had reasonable and probable cause to lay murder charges against the accused. It made no difference that there might, objectively, have been sufficient evidence without the tainted witness evidence to provide reasonable and probable cause to prosecute.

[69] The requirement of absence of reasonable and probable cause was examined in greater detail by the Supreme Court of Canada in *Miazga* v *Kvello* [2009] 3 RCS 339. Guidance had been sought on two matters, namely (1) the standard of belief which should inform the prosecutor's decision to initiate or continue a prosecution; and (2) whether the

third element should turn solely on the existence or absence of objective grounds, leaving any inquiry into the prosecutor's subjective state of belief to the fourth element, the question of malice. The court's analysis includes the following propositions:

(i) The reasonable and probable cause inquiry in a public prosecution is not concerned with the prosecutor's personal views as to the accused's guilt, but with his or her professional assessment of the legal strength of the case. Belief in "probable" guilt therefore means that the prosecutor believes, based on the existing state of circumstances, that proof beyond a reasonable doubt could be made out in a court of law (paragraph 63).

(ii) As a matter of logic, the plaintiff, who bears the burden of showing an absence of reasonable and probable cause, can succeed on the third element by showing *either* an absence of subjective belief *or* an absence of objective reasonable grounds (paragraph 70).

(iii) That the plaintiff should succeed by showing an absence of objective grounds, even though the prosecutor believed they existed, is consistent with the rationale underlying the third element of the tort. A purely subjective belief in a person's guilt without any basis in actual fact does not constitute sufficient justification for initiating a criminal prosecution against the plaintiff (paragraph 71).

(iv) Conversely, however, the prosecutor's mere lack of subjective belief in sufficient cause, where reasonable grounds do in fact exist, cannot provide the same determinative answer on the third element in the context of a public prosecution. Where objective reasonable grounds did in fact exist at the relevant time, it cannot be said that the criminal process was wrongfully invoked (paragraph 73).

(v) It follows that the third element of the test necessarily turns on an objective assessment of the existence of sufficient cause. The presence or absence of the prosecutor's subjective belief in sufficient cause is nonetheless a relevant factor on the fourth element, the inquiry into malice (paragraph 73).

[70] The second and third of these propositions taken together, ie that a claimant can succeed on the third element by showing an absence of objective grounds (regardless of the prosecutor's subjective belief) finds support in *A* v *New South Wales* at paragraph 77 where the court stated that

> "…the negative proposition that… the defendant prosecutor acted without reasonable and probable cause… may be established in either or both of two ways: the defendant prosecutor did not 'honestly believe' the case that was instituted or maintained, or the defendant prosecutor had no sufficient basis for such an honest belief…"

It is also consistent with Lord Denning's analysis in *Glinski* v *McIver* at page 759:

> "…Honest belief in guilt is no justification for a prosecution if there is nothing to found it on. [The prosecutor's] belief may be based on the most flimsy and inadequate grounds, which would not stand examination for a moment in a court of law. In that case he would have no reasonable and probable cause for the prosecution. He may think he has probable cause, but that is not sufficient. He must have probable cause in fact. In this branch of the law, at any rate, we may safely say with Lord Atkin that the words 'if a man has reasonable cause' do not mean 'if he thinks he has': see *Liversidge* v *Anderson* [1942] AC 206."

[71] I am not aware of any Scottish authority that is inconsistent with that analysis. The point did not require to be addressed in *Whitehouse* v *Lord Advocate*. In *Craig* v *Peebles* (1876) 3R 441, to which I referred at some length in my opinion at 2021 SLT 833, the observations of Lord Young, Lord Justice Clerk Moncrieff and Lord Gifford are concerned with objective probable cause. The point at issue there was a point of law and no mention is made of the prosecutor's subjective belief. In my opinion it is appropriate for Scots law to adopt the same approach as English, Canadian and Australian law and to hold that the third element

of the test is satisfied if it is proved that the prosecution had no objective reasonable and probable cause, without also having to prove that the prosecutor had no subjective belief that there was a proper case to lay before the court. There is less agreement among the other jurisdictions as to the converse, ie whether the third element is satisfied if it is proved that there was objective probable cause but the prosecutor had no subjective belief that he had sufficient cause (compare, eg, *Miazga* at paragraph 73 with Lord Devlin in *Glinski* at page 777). In the light of my findings in fact later in this opinion, it is unnecessary to address this conflict in order to decide the present case.

Malice

[72] There is general agreement across the jurisdictions regarding the meaning of malice in the context of an action founded on malicious prosecution. It has a broader meaning than the non-technical concept of personal spite. It is not to be inferred from a finding of absence of reasonable cause and is not even necessarily to be inferred from an absence of subjective belief in the adequacy of the grounds for prosecution. In *A* v *New South Wales* at paragraph 89, the court cited with approval the following passage from Fleming on Torts at page 685:

> "At the root of it is the notion that the only proper purpose for the institution of criminal proceedings is to bring an offender to justice and thereby aid in the enforcement of the law, and that a prosecutor who is primarily animated by a different aim steps outside the pale, if the proceedings also happen to be destitute of reasonable cause."

The Australian High Court went on (at paragraph 91) to hold that, to constitute malice, the sole or dominant purpose actuating the prosecutor must be a purpose other than the proper invocation of the criminal law: an "illegitimate or oblique motive".

[73] A similar approach has been taken in the Canadian cases. In *Nelles*, Lamer J described malice (at page 193) as "a deliberate and improper use of the office of the Attorney General or Crown attorney"; see also *Miazga* at paragraphs 79-89.

[74] In *Glinski* v *McIver*, Lord Devlin at page 766 noted that it was agreed that malice covers "not only spite and ill-will but also any motive other than a desire to bring a criminal to justice". This was expanded upon (*obiter*) by Lord Toulson in *Willers* v *Joyce* at paragraph 55:

> "[Malice] requires the claimant to prove that the defendant deliberately misused the process of the court. The most obvious case is where the claimant can prove that the defendant brought the proceedings in the knowledge that they were without foundation… But the authorities show that there may be other instances of abuse. A person, for example, may be indifferent whether the allegation is supportable and may bring the proceedings, not for the bona fide purpose of trying that issue, but to secure some extraneous benefit to which he has no colour of a right. The critical feature which has to be proved is that the proceedings instituted by the defendant were not a bona fide use of the court's process."

On the basis of what was said by Lord Devlin in *Glinski* and by Lord Toulson in *Willers*, the Court of Appeal held in *Rees* v *Commissioner of Police of the Metropolis* that where the police officer deliberately misused the processes of the court to present evidence tainted by the suborning of the witness, the prosecution was malicious.

[75] There is also general agreement that proof of malice is (and should be) a high hurdle for a claimant to overcome. In *Whitehouse* v *Lord Advocate* at paragraph 107, Lord President Carloway cited with approval the following passage from *Miazga* (paragraph 81):

> "…[T]he malice element of the tort… ensures that liability will not be imposed in cases where a prosecutor proceeds, [in the absence of] reasonable and probable grounds, by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence."

Lord Justice Clerk Dorrian's observations at paragraph 148 are to the same effect. It may be noted, however, that in *Robertson* v *Keith* 1936 SC 29, a decision of a court of seven judges,

Lord Justice Clerk Aitchison considered (page 47) that malice may be inferred from recklessness, a view consistent with Lord Toulson's reference in *Willers* to indifference as to whether the allegation is supportable.

Assessment of witnesses

[76] In addition to giving evidence himself, the following (some of whom have already been mentioned) were called as witnesses by the pursuer:

- Michael Rainford, solicitor, Manchester.
- Paul Smith, a managing director in Duff & Phelps' Manchester office.
- Philip Duffy, a managing director in Duff & Phelps' London office.
- Christopher Polwin, a senior manager in Duff & Phelps' London office.
- Andrew Gregory, solicitor and former partner in DWF LLP, Manchester.
- Mairi Boyle, Crown Office.
- Sheriff Lindsay Wood.
- Lord Mulholland.

[77] The following were called as witnesses by the Chief Constable:

- DCI James Robertson.
- DI Jacqueline O'Neill.
- Christina Herriot, Solemn Manager, Glasgow Sheriff Court.
- DC Gordon Stevenson.
- DC Stephen Divers.
- Ruaraidh Nicolson, retired Deputy Chief Constable.
- Kenneth Thomson, retired Detective Superintendent.
- DC Veronica McLean.

- Brian Wright, retired Detective Chief Inspector.

In addition, it was agreed that witness statements by Inspector Margaret Seagrove and DI Graeme Everest would be treated as equivalent to parole evidence.

[78] The following were called as witnesses by the Lord Advocate:

- Sally Clark, Crown Office.
- Caroline MacLeod, Crown Office.
- Helen Nisbet, Crown Office.
- Jonathan Willis, Crown Office.
- Alistair Logan, Crown Office.
- Alan MacDonald, Crown Office.
- James Keegan QC.
- William McVicar, advocate.

[79] Subject to what follows, I found the witnesses to be credible and generally reliable and am satisfied that they were doing their best to assist the court. I deal separately below with the expert evidence.

The pursuer

[80] Although submissions were made on behalf of both the Chief Constable and the Lord Advocate regarding the pursuer's credibility and reliability, both senior counsel recognised that this was only indirectly relevant to the issues to be determined in these proceedings. The pursuer was acquitted of all charges and it was not in dispute that that acquittal cannot now be called into question. It was, however, submitted that in so far as his explanations of contemporaneous events and documents was found to be unsatisfactory, this supported the defenders' contentions that inferences drawn by the police against the

pursuer had been reasonable and that there had accordingly been reasonable and probable cause for the prosecution. For present purposes it is sufficient for me to state that I did not find any of the pursuer's explanations so obvious as to constitute, of themselves, evidence of either absence of subjective reasonable and probable cause or malice on the part of either the police or the Crown. In any event, in order to be relevant, the explanations would have to have been furnished to the police at the time of the investigation. It is neither necessary nor appropriate for me to make findings as to the pursuer's credibility and reliability in relation to the events which resulted in his detention, charge and eventual acquittal. As regards events at and after the time of his detention, I accept his evidence as credible and reliable.

DCI Robertson

[81] The pursuer's claim of malicious prosecution focused primarily on the actions of Mr Robertson and Ms O'Neill, especially the former. The presence of malice was said to be supported by two matters in particular, namely Mr Robertson's disregard of legal professional privilege and his inappropriately aggressive behaviour when interviewing witnesses. In relation to both of these matters I found Mr Robertson's evidence to be evasive and unreliable.

[82] Mr Robertson's view of legal professional privilege, at the time of the investigation and at the time of the proof, appeared to be that it was a device used by lawyers to conceal their clients' wrongdoing. His explanation that he had opened the DWF envelopes clearly marked as privileged because of excusable confusion was patently untrue. His narrative of the events in 2017 when the discs were returned to DWF was equally improbable. He expressed distrust of Mr Gregory but on further investigation it appeared that this referred to Mr Gregory's likely reaction to discovering that the envelopes had been opened. At one

time he proposed the detention of Mr Clibbon for obstructing the police enquiry; this was resisted by Mr Keegan. I am unable to accept as credible or reliable any evidence given by Mr Robertson on his handling of material in respect of which privilege was claimed.

[83] As regards behaviour during interviews, there was evidence, which I accept, from Mr Smith, corroborated by Mr Rainford, and Mr Duffy (neither of whom was suspected at any time of an offence) of unacceptable intimidatory and threatening behaviour by Mr Robertson during interviews: for example, telling Mr Smith that he would arrest him and did not care how many people he arrested; telling Mr Rainford (Mr Smith's solicitor) to "shut up or I will put you out"; and telling Mr Duffy "Don't get smart with me, sonny" and describing the Duff & Phelps principals as "thick as thieves". None of these witnesses was challenged on their accounts, and I do not believe Mr Robertson's denials.

[84] In other respects I found Mr Robertson's evidence unsatisfactory. At the outset he attempted to decline to provide any oral evidence on the basis that his evidence was in his written statements, and he had to be instructed to answer questions. At some times he professed lack of memory because of the passage of time; at others he demonstrated a detailed recollection of events when it was in his interest to do so. I have not accepted his evidence on contentious matters without support from other sources.

DI O'Neill

[85] My impression was that Ms O'Neill was generally doing her best to assist the court. This was not the case, however, when she was asked questions about wrongdoing by Mr Robertson. I reject as untruthful her evidence that she did not discuss the finding of the cash flow schedule in the black folder during the search of Duff & Phelps' office with Mr Robertson, and that she only noticed it in the folder because it was "obvious". I give my

reasons below for rejecting her evidence in relation to the return of the discs to DWF. I found her evidence evasive in relation to Mr Robertson's aggressive conduct during interviews. On other matters, however, I find no reason not to accept her evidence. In particular I accept her evidence as to why it was thought appropriate to hold a meeting with Mr Betts and his solicitor at Stansted prior to the formal interviews during which his evidence would be noted and transcribed into a formal statement.

The pursuer's case against the Chief Constable

Introduction

[86] It is accepted by all concerned that in the court's assessment of whether the test for malicious prosecution is met, regard must be had to the actions and beliefs of the prosecutor (or alleged prosecutor) at and during the time when the prosecution was commenced and continued. It would be incorrect to consider whether, with the benefit of hindsight, there was or was not a sufficiency of evidence linking the person prosecuted with the offences alleged.

The case presented by the investigating officers to the Crown

[87] The case presented to the Crown for decision on whether to proceed with a prosecution is, in my view, most appropriately to be derived from the Standard Prosecution Report presented by Mr Robertson on 8 August 2014. It ran to over 150 pages and included a chronology of the events of 2011 and of the police investigation, lengthy extracts from communications and witness statements, lists and details of proposed witnesses and productions, and the "Summary of misrepresentation and criminality" to which I have already referred.

[88] So far as the pursuer was concerned, Mr Robertson summarised the evidence of misrepresentations as follows:

> "On 25 January 2011 the witness Phil Betts first explained the Ticketus deal to David GRIER. On 6 April 2011 after a meeting with CLARK and GRIER, Gary WITHEY emails CLARK a synopsis of the Ticketus deal. On 7 April 2011 David GRIER on behalf of MCR sends a letter to WHYTE via WITHEY to be used as comfort for the Ticketus Investment Committee to release the funds to WHYTE. Information later denied and or misrepresented by GRIER, WHITEHOUSE and CLARK to protect their appointment as administrators.
> …
>
> On 24 April 2011 in Glasgow WHYTE, WITHEY and GRIER presented false information concerning the source of WHYTE's funding to the Independent Committee of Rangers Directors.
> …
>
> On 11 May 2011, less than 1 week after acquisition, GRIER emailed an attachment to the witness Mike Bills with no instruction or comments. The attachment was a financial forecasts, profit and loss cash flow and balance sheet forecasts. It also had other tabs of information which was information of the specific years of season tickets sold to Ticketus. It was for the next 4 years and showed money coming in from Ticketus and money (circa £20 million) going out to Lloyds. This email originated from the witness Ross Bryan via Phil Betts to GRIER.
>
> On 1 June 2011 the witness Mike Bills sends an email to the witness John Norris where he outlines the deal WHYTE did to acquire the Club, he names GRIER, WHITEHOUSE and CLARK as involved and states the 'end game' for MCR (Duff and Phelps) is when the Club goes 'bust'.
> …
>
> That after administration and to protect their appointment as Administrators David GRIER, David WHITEHOUSE and Paul CLARK did present as true, information they knew to be false, concerning their knowledge of how Craig WHYTE funded the acquisition of the Club and the Ticketus deal to police officers in the form of signed witness statements, to Lord Hodge in the form of a signed report (WHITEHOUSE and CLARK), to the Insolvency Practitioners Association in the form of a report and to the public in general in the form of prepared media statements."

[89] Mr Robertson described the cash flow summary, which by the time of preparation of the Standard Prosecution Report had been released from the claim of privilege, as follows:

> "From the search under warrant at Duff & Phelps London, a 3 page document recovered from a ring binder folder has been identified as significant. The document

> is a cash flow document with a cover sheet and was preceded in the folder with emails dated 19 April 2011 and followed by a CV document of David GRIER, Gary WITHEY and Craig WHYTE dated 22 April 2011. The cash flow part of the document details the agreement WHYTE completed with Ticketus on 9 May 2011. Ticketus name is included in the document as providing an advance of £20 million excluding VAT with a season by season breakdown also included.
>
> This clearly contradicts statements and evidence provided by Duff and Phelps that they were unaware of the Ticketus deal prior to acquisition. David GRIER in particular presented a version of this document on and around 24 April 2011 to the Rangers Directors and Murray Group personnel which had Ticketus name removed and replaced with Wavetower…"

Although Mr Robertson noted that "As yet it has not been established how the document came to be with Duff & Phelps", the report contains no indication as to what, if any, enquiry was being pursued to ascertain how the "ring binder folder" (ie the black folder) had come into the possession of Duff & Phelps.

[90] Reference had been made earlier in Mr Robertson's report to the taped conversation between the pursuer and Mr Whyte on 31 May 2012 which was published by the BBC and which contained the following exchange:

> "DG: You know we we we went to see counsel yesterday for a full sort of debrief of all the email correspondence
> CW: Yeah
> DG: Now the fact is that we probably did know what was going on with Ticketus
> CW: Yeah
> DG: But there's no email traffic whatsoever
> CW: [Undecipherable] that says that you did
> DG: That says we did
> CW: But we all know you
> DG: Yeah
> CW: You did
> DG: Yeah yeah but there's
> CW: And fucking hell no no
> DG: But we were not involved in dealing with Ticketus directly
> CW: Yeah so you knew you knew the structure of the deal but you were dealing with Lloyds and
> DG: Absolutely
> CW: The the Ticketus part was Saffery
> DG: Safferys
> CW: Yeah

DG: So we've maintained that line quite rigorously
CW: Yeah"

No mention is made of this in the summary and it unclear what weight, if any, Mr Robertson attached to it in his assessment of the evidence.

[91] The evidence relied on by the police to support their conclusion that the pursuer had committed the offences of fraud and attempting to pervert the course of justice, and on the basis of which the pursuer's arrest and charging proceeded, was therefore as follows:

- Mr Betts' statement that he had told the pursuer on 25 January 2011 that money from Ticketus would be used by Mr Whyte to fund the acquisition of the Club;
- The provision on 7 April 2011 by the pursuer to Messrs Whyte and Withey of the letter to be used as comfort to the Ticketus investment committee to release funds to Collyer Bristow;
- Presentation of false information to the Independent Committee on 24 April 2011;
- The sending by the pursuer of an email after the acquisition with an attachment containing a cash flow schedule showing money coming in from Ticketus and money going out to Lloyds Bank;
- The email by Mr Bills to a colleague on 1 June 2011 which appeared to state that the pursuer, along with Messrs Whitehouse and Clark, had known that the purchase was being funded by sale of future season ticket revenue;
- The pursuer subsequently denying knowledge of the Ticketus deal;
- (Possibly) the comments made by the pursuer during the taped telephone conversation with Mr Whyte.

The cash flow statement was clearly also regarded at this time as a significant piece of evidence, demonstrating that the pursuer and others were untruthful in stating that they had been unaware of the Ticketus deal prior to the acquisition.

[92] As is now acknowledged by the police, the above analysis contained significant errors. The letter drafted by the pursuer, revised by others and eventually sent as an email to Mr Whyte and others shortly before midnight on 7 April 2011 did not persuade the Ticketus investment committee to release funds because these had been transferred earlier that day to an account which was nominally a client account of Collyer Bristow, albeit that withdrawal from that account remained subject to the consent of Ticketus or their solicitors. The pursuer did not present the cash flow statement containing Wavetower's name to the Independent Committee at the meeting on 24 April 2011. The version of the cash flow statement containing the reference to Ticketus Advance found by the police in the black folder did not come into the possession of Duff & Phelps until October 2012, and was accordingly of no evidential value. If these matters are stripped out of Mr Robertson's evidence of misrepresentations, there remains little more than *ex post facto* statements by Mr Betts, Mr Bills and, perhaps, the pursuer himself that he knew prior to the acquisition that funds from Ticketus were being used to finance the purpose.

[93] The question of whether the pursuer has proved all of the elements of malicious prosecution must, however, as I have already observed, be addressed having regard to the evidence as it was summarised and presented at the time. Especially in relation to assessment of the existence of subjective reasonable and probable cause and malice, it would be wrong to disregard factors that were relied upon in error but which were nevertheless relied upon. Against the background of the Standard Prosecution Report, I now turn to consider whether all of the elements of malicious prosecution have been proved.

Objective reasonable and probable cause

[94] I begin by considering whether the conclusion of the police that the pursuer had committed the offences with which he was charged had objective reasonable and probable cause. In my opinion it did not. Although the charges recommended in the Standard Prosecution Report were not identical to those in the indictment that were eventually held by the court to be irrelevant, they were undermined by similar flaws. The essence of the proposed charge of fraud was that the pursuer participated in the presentation of false information to the Independent Committee, knowing that it was false. The reason given by the court for dismissing the charge in the indictment as irrelevant, namely that there was no link between representation and practical result, is equally applicable to the charge recommended in the Standard Prosecution Report which formed the basis of the first charge in the petition. The essentials of the crime of fraud were no more present in the Standard Prosecution Report than they were in either indictment.

[95] The police reliance on the 7 April 2011 email (the letter of comfort) adds nothing to this because as a matter of fact it did not induce the release of funds. Once that too has been removed, all that remains is a collection of circumstantial evidence that the pursuer was aware at the material time of the true nature of the deal with Ticketus. Even if that were true, in the context of a charge of fraud it amounts to nothing without any link to a practical result.

[96] In support of his argument that there had been objective reasonable and probable cause for the police reporting, senior counsel for the Chief Constable submitted that undue emphasis had been placed by the pursuer on the two errors in the police analysis and that there had been "a substantial body of evidence" that permitted inferences to be drawn by

the police (a) that the pursuer had known the true nature of the acquisition funding prior to the transaction and (b) that he had been involved in key steps in securing that funding and in concealing it from important protagonists. The difficulty with that approach is that it fails to take account of the reasons why the fraud charge was ultimately held to be irrelevant. Knowledge, even if established on the basis of *ex post facto* witness statements, would not of itself amount to the commission of an offence, and when one attempts to identify the "key steps" in which the pursuer was considered by the police to have been involved, there is nothing to be found except participation in the drafting of the letter of comfort and attendance at and participation in the Independent Committee meeting. As neither of those "involvements" was linked to any practical result, I find that there was no objective reasonable and probable cause for the police conclusion that the pursuer had committed the offence of fraud.

[97] Nor, in my opinion, was there objective reasonable and probable cause for the police conclusion that the pursuer had committed the offence of attempting to pervert the course of justice. The essence of that charge was denying knowledge of the true nature of the Ticketus deal. In *HMA* v *Turner* 2021 JC 92, Lord Turnbull held at a preliminary hearing that the scope of the offence did not extend to denial by an accused person of guilt of the charge against him. Lord Turnbull observed at paragraph 36:

> "…The Crown has arrived at a decision as to the conclusions which it will ask the jury to reach in relation to charge 1. However, arriving at that decision simply triggers the process of assessment. It may be or it may not be that the Crown's analysis of the events will come to be accepted. The Crown's analysis may be right or it may not be. The accused's account may be true or it may not be. The eventual decision arrived at after trial, whether it is one of guilt or innocence, will be the point at which justice is reached and delivered. That process of reaching justice will require full weight and consideration to be given to the accused's account of events. The fact that an accused person gives an account which is inconsistent with the case brought against him by the Crown does not constitute an 'interference' with what would otherwise be expected to have come to pass in the ordinary and uninterrupted

> course of justice in the particular case. The fallacy, it seems to me, in the Crown's approach lies in the inherent implication of a claim to be the proprietor of justice. The Crown's theory is that the account given by the accused must be an attempt to pervert the course of justice because, if accepted, it defeats the basis upon which the principal charge is brought. In my view, the uninterrupted flow of the course of justice includes an assessment of the accused's defence. The course of justice is not 'interfered' with by having to take account of a claim to be innocent, whether that claim is in the end rejected or not. On the contrary, the uninterrupted course of justice requires that such a claim is fully weighed…"

[98] Lord Turnbull's decision post-dated the events with which the present case is concerned. His analysis is not, as I understand it, necessarily accepted to be correct by either of the defenders in this case. For my part, I respectfully find it persuasive. However it seems to me that the circumstances here are more clear cut than in *HMA* v *Turner*. The charge of attempting to pervert the course of justice was based upon the police conclusion that the pursuer knew the true nature of the Ticketus deal. Where, for the reasons above, such knowledge did not amount to the commission of an offence, it cannot be said that the course of justice was affected by the pursuer's denial of knowledge, whether true or not. Because of the irrelevant nature of the fraud charge, the proper course of justice in the present case was acquittal, and there was no alternative outcome with which the pursuer's denial was capable of interfering.

[99] For these reasons I hold that there was no reasonable and probable cause for the police report recommending the prosecution of the pursuer on any criminal charge. In accordance with my analysis above, having decided that there was no objective reasonable and probable cause, the third element of the malicious prosecution test is satisfied and it is unnecessary to address subjective reasonable and probable cause. I shall however do so, not merely for the sake of completeness but because it is interlinked with the other two elements of the test, namely characterisation of the police as prosecutor, and proof of malice.

Subjective reasonable and probable cause

[100] On behalf of the pursuer it was contended that absence of subjective reasonable and probable cause had been proved. Regardless of any contrary assertions by the individual officers concerned, it could be inferred from their actings that they knew that, or were at least reckless as to whether, without improper manipulation, the case against the pursuer was unfit to lay before a court. The police had deliberately breached their obligation to disclose evidence that might be relevant to the case for or against the pursuer in relation to (i) the "Don't tell David" email and (ii) the interview with Mr Betts at Stansted Airport. They had also acted improperly (iii) by accessing privileged material (the cash flow statement in the black folder and the CDs produced by DWF in sealed envelopes marked as privileged) and (iv) later, by failing when seeking the HFW search warrant to inform Sheriff Wood that High Court proceedings had been commenced.

[101] The response to these allegations on behalf of the Chief Constable was as follows:

(i) The "Don't tell David" email. Mr Robertson did not draw this to the attention of the Crown because he did not consider it to be exculpatory. The email chain was provided by the police to the Crown and was disclosed by the Crown to the defence on 6 June 2015. The defence team were in any event aware of it. The view of the Crown was that it had little exculpatory significance when considered against a larger body of evidence which indicated that the pursuer knew how the deal was being funded.

(ii) The interview with Mr Betts. There was nothing wrong in principle with meeting Mr Betts and his solicitor in advance of other meetings at which formal statements were taken. Ms O'Neill's description of the meeting as an initial discussion to understand his knowledge of various topics should be accepted. The

notes of the meeting were not going to be relied on as evidence. In any event there was no material difference between the content of the notes and of the statements. Omission of the words "as I don't think I knew myself" from the witness statement was no more than an indication that Mr Betts did not say this.

(iii) Accessing privileged material. The police had been in possession of the cash flow schedule (referring to "Ticketus Advance") before the search of Duff & Phelps' London office, having been provided with copies by Mr Clark and Saffery Champness. Information from the pursuer had made them aware of the alteration. No claim of privilege was made during the search in relation to the black folder. Ms O'Neill's "initial sift" had been carried out to identify whether the folder was covered by the warrant. She had been unaware of the significance of the fact that the folder related to a litigation. The claim to privilege in respect of the folder was made after the police had left the premises. The folder had not been accessed again until after it was released from privilege in May 2014. In any event there was no evidence that the document was in fact privileged. As regards the envelopes containing CDs, it was acknowledged that Mr Robertson had opened these envelopes and looked at certain discs, in breach of a clear instruction not to do so. However there was no suggestion that the discs at issue had any relevance to the criminal case against the pursuer. Mr Robertson's evidence was that it was confusion that led him to access the discs. He made no secret of the fact that he had done so. He did not look at the contents of the discs. The events of October 2017 had no relevance to the questions of subjective reasonable and probable cause or malice at the time of preparation of the Standard Prosecution Report, and it was difficult in any case to be certain as to what had happened that day.

(iv) The HFW search warrant. Mr Robertson had been acting under the supervision and direction of the Crown. The application had been made with the knowledge of the advocate depute, Mr Keegan. The question of whether the sheriff was told about the High Court proceedings was irrelevant when the Crown were directing the application. It had not been one of the reasons why the bill of suspension was passed. The sheriff should have been alive to issues of privilege when deciding whether or not to grant the warrant. The purpose of the warrant had not been to see if HFW had a copy of the cash flow schedule. Lord Justice General Carloway had observed in the Bill of Suspension proceedings that the Crown's actings had not been motivated by bad faith and that there had been at least some basis for seeking recovery of a limited part of the material covered by the warrant.

[102] I have already observed that I formed an unfavourable impression of Mr Robertson as a witness. I am, however, in no doubt that at the time when the Standard Prosecution Report was submitted, the police officers primarily responsible were genuinely of the view that there was evidence to indicate that the pursuer was a participant in a fraudulent scheme to acquire the Club. Mr Robertson's reprehensible actings, including in particular his wilful disregard for legal professional privilege and his improper behaviour during interviews of witnesses, were largely driven by his groundless suspicion that the Duff & Phelps witnesses and their lawyers Mr Clibbon and Mr Gregory were deliberately obstructing the investigation. However, as a distinction between the present action and *Rees* v *Commissioner of Police of the Metropolis*, the case that Mr Robertson presented to the Crown was not, in my judgement, tainted by misconduct on his part that would have rendered the evidence inadmissible. I am satisfied that the errors that infected his analysis of the evidence in relation to the letter of comfort and the pursuer's contribution at the Independent

Committee meeting were honest ones, albeit that the fact that they were made does not reflect well on the quality of his investigation. I find no basis in the evidence for the submission on behalf of the pursuer, which was never directly put to any of the police witnesses, that they consisted of a deliberate misrepresentation to the Crown. Given the police's mistaken belief as to the extent of the pursuer's participation in the facilitation of Mr Whyte's acquisition of the Club, together with the statements of Mr Betts and Mr Bills, I am satisfied that Mr Robertson and the other officers concerned in the investigation honestly believed, to adopt the phraseology of Lord Toulson in *Willers* v *Joyce*, that there was a proper case to lay before the court. That is sufficient to satisfy the test of subjective reasonable and probable cause although, because I have held that there was no objective reasonable and probable cause, the matter is to that extent academic.

[103] In relation to the four matters founded upon by the pursuer, I find as follows. The existence of the email chain that contained the "Don't tell David" email was disclosed by the police to the Crown in June 2014. Mr Robertson did not draw attention to the email because he did not regard its terms as exculpatory. It was not, of course, for Mr Robertson alone to make that assessment, but I do not regard the terms of the email as so obviously exculpatory that he was under a duty to flag it up expressly. By at latest 16 June 2015 the pursuer's defence team were aware of it and were founding upon it as a reason why the Crown ought to terminate the prosecution of the pursuer. In these circumstances I find that no deception or deliberate concealment took place on the part of the police in relation to the existence of this email.

[104] Nor, in my view, was there anything sinister about the non-disclosure by the police of the meeting with Mr Betts at Stansted Airport. I accept the evidence of Ms O'Neill that this was of the nature of a preliminary discussion to ascertain in general terms the matters

upon which Mr Betts should be asked to provide a statement. The notes of the meeting were not made with a view to transcribing them into a formal statement and they were never put to Mr Betts to check their accuracy. I see nothing untoward in the fact that Mr Betts had a solicitor present during this meeting as well as during the others: the criminal investigation was at an early stage and Mr Betts might then or subsequently have been suspected of having committed an offence. Formal statements were of course taken from Mr Betts within a few days after the meeting at Stansted. Nothing of significance can be taken from the absence from the formal statements of the phrase "as I don't think I knew myself" in Ms O'Neill's notes in relation to the pursuer's knowledge of the Ticketus deal. Even if Mr Betts is accurately recorded as having said those words during the initial meeting, their absence from the formal statement appears to mean no more than that he did not say them when the statement was taken, possibly because he no longer regarded them as correct. The point for present purposes is that in both versions Mr Betts told the police that the pursuer knew about the deal but not "the full breakdown", and there was in my view no significant difference that required the handwritten notes to be disclosed as if they were a separate statement.

[105] I am in no doubt that one of the objectives of the search of Duff & Phelps' offices in August 2013 was to try to discover a copy of the cash flow forecast in its original form in their possession. I am satisfied that one of the purposes of Ms O'Neill's "initial sift" of the black folder was to look for a copy of that document. It would have been clear without detailed examination, firstly, that the folder related to Rangers and, secondly, that it had the name of a firm of solicitors on it, creating at least a possibility that it was subject to privilege. In these circumstances there was no justification for Ms O'Neill's search of it for what she and Mr Robertson were at that time viewing as incriminatory evidence. Discovery of the

document had the very unfortunate consequence of reinforcing the police view that evidence was being withheld or concealed from them by the Duff & Phelps staff and their legal advisers. It was still being referred to as "significant" when the Standard Prosecution Report was presented, and it remains unclear, at least to me, how long it was before the police disclosed to the Crown that they had realised that the document had come into Duff & Phelps' possession too late to have any evidential value.

[106] There is, however, no evidence that the police used the cash flow forecast to falsify the case they were presenting to the Crown. Although they were obviously aware of its presence in the black folder, the police made no use of it until it had been released from the claim of privilege. As a matter of fact there was nothing about it that attracted privilege. In these circumstances I find that any impropriety attaching to the means by which the document was seized does not affect my conclusion that the police believed that they had a proper case to lay before the court.

[107] As regards the discs produced by DWF during late 2015 and returned in October 2017, I accept Mr Gregory's evidence as truthful and accurate. I find that Mr Robertson had opened sealed envelopes clearly marked as containing privileged material and that there had been no reasonable basis for any confusion on his part. What he did with the discs themselves is unclear but the opening of the envelopes was of itself a serious breach of his duty to conduct the investigation with propriety. I find that when the time came to return the discs, he and Ms O'Neill were aware that Mr Gregory would discover what had been done and attempted to create a scenario in which it might appear that the envelopes had been opened as part of the exercise of checking off the material being returned. I do not believe that Ms O'Neill made any report to a senior officer of improper conduct. Her superior had no recollection of such a report being made. Her email to

Ms MacLeod adopted the police position that the envelopes had been opened during the visit to return them and in my judgment was sent as a pre-emptive alert of a possible complaint by Mr Gregory.

[108] Once again, however, I find nothing in Mr Robertson's willingness to disregard claims of privilege or in his efforts to conceal his breach of privilege that amounts to misrepresentation to the Crown of the case against the pursuer. The discs did not come into the hands of the police until after the first indictment had been served. They were not returned until after the prosecution had come to an end. There was no evidence that anything that was accessed on the discs played any part in either the police investigation or the prosecution of the pursuer. Mr Robertson's actings may be indicative of his mindset but do not affect my conclusion that he believed he had a proper case to lay before the court.

[109] Finally in this chapter, as regards the application for the HFW search warrant, I accept that the sheriff ought to have been alerted to the service of the indictment and that consideration ought to have been given to legal privilege. Having regard, however, to the late stage at which this warrant was sought, it appears to me that the primary responsibility for these omissions rests with the Crown who instructed the application without giving them proper consideration. Moreover, the measures to be taken to respect potential claims to legal privilege in a search of solicitors' offices ought, in my view, to have been raised and scrutinised by the sheriff who heard the application. On this matter I accept Mr Robertson's evidence that the object of the search was not to trace the origins of the cash flow forecast in the black folder (whose evidential value had by then been discounted) but rather to recover documents not included in the chronological bundle. The criticism directed against the warrant by both the High Court in London and by the Appeal Court in Edinburgh concerned the scope of the warrant and the failure to hear representations in relation to

privilege. In all of this I regard the police as having played only a supporting role and again I do not find anything to affect my view that the police had had subjective reasonable and probable cause at the time when the Special Prosecution Report was presented almost a year and a half previously.

Were the police a prosecutor?

[110] The factors that I have identified in relation to subjective reasonable and probable cause are also of significance in deciding whether the first element of the test for malicious prosecution is met, namely whether the police were a prosecutor.

[111] At paragraph 65 above, I set out my conclusion that it had to be established that the Crown was deprived of the ability to exercise independent judgement by presentation of information by the police which they knew to be false or tainted by criminality or other impropriety. In my opinion that test has not been met. I have found that the information presented to the Crown in the Standard Prosecution Report was not known or believed by the police to be false or tainted by criminality or other impropriety. Important elements of it were factually incorrect but that is not enough of itself to clothe the police with the designation of prosecutor. The decision to proceed to detain and charge the pursuer, along with the other accused, was made by the Crown. It was submitted on behalf of the Chief Constable that the errors had been discoverable by the Crown. I do not accept that this was so at the stage of the decision to proceed with detention and charge. The Standard Prosecution Report was very long and difficult to absorb because of the amount of unprocessed material that it contained. It did not present the evidence in way that would alert the reader to the possible presence of the errors in relation to the letter of comfort and the Independent Committee meeting. The Crown officials were entitled to and did rely on

the accuracy of the report. That is not, however, according to the authorities, enough to satisfy the first element of the malicious prosecution test.

Malice

[112] My summary of the law in relation to malice, the fourth element of the test for malicious prosecution, is at paragraphs 72 to 75 above. In my opinion that test is not met either. I find that the police had no motive other than to bring an individual perceived to be a criminal to justice. It was emphasised by the court in *Whitehouse* v *Lord Advocate* that malice was not to be inferred from, among other things, incompetence, poor judgment, lack of professionalism or recklessness. Much of the police investigation suffered from these faults but that is not enough to meet the test. No "illegitimate or oblique motive" or deliberate misuse of the process of the court has been demonstrated. In so far as the police recommendation to charge the pursuer might be characterised as reckless, I use that word in the sense of over-zealousness, as opposed to indifference as to whether the case against him was supportable and I do not therefore consider that it is recklessness of a kind from which an improper motive can be inferred.

[113] The pursuer placed emphasis on the decision made by the police to treat Mr Betts as a witness and not as a suspect. It was submitted that it was impossible to understand why it had been thought that Mr Betts had committed no criminal offence yet the pursuer had. Mr Robertson had declared himself satisfied that there was no criminality involved in Mr Betts' instruction to Saffery Champness to alter the cash flow schedule by inserting Wavetower as the source of funds, yet knowledge by the pursuer of that alteration was regarded as an important part of the case against him, and the only inference to be drawn was that there was an improper drive to "get" the Duff & Phelps employees, including the

pursuer. It appears to me that Mr Robertson's approach was driven by his view that Mr Betts had been frank and truthful about the making of the alteration whereas the pursuer had stated untruthfully that he had been unaware of the alteration when he attended the Independent Committee meeting on 24 April 2011. This suggests that Mr Robertson formed an unduly early view as to the relative trustworthiness and reliability of Mr Betts and the pursuer which coloured his attitude to the investigation thereafter and led him, for example, to place weight on Mr Betts' evidence that he told the pursuer about the Ticketus deal in January 2011. It does not, however, in my opinion afford evidence of an improper motive for charging the pursuer.

Conclusion

[114] For these reasons I hold that the pursuer's case of malicious prosecution against the Chief Constable has not been made out.

The pursuer's case against the Lord Advocate

Petition stage

[115] I do not understand it now to be contended that the test of malicious prosecution was met by the Crown at the stage when the pursuer appeared on petition. The pursuer's position, as I understand it, is that at that stage the Crown were being misled by the police. In relation to the cash flow schedule it was submitted that the Crown knew that it was being relied upon by the police at a time when privilege had not been resolved; however as set out above privilege had been resolved before the petition was drafted and I do not consider that there is any point to be made.

[116] I should however state that my conclusions in relation to the absence of objective reasonable and probable cause at the time when the police presented the Standard Prosecution Report apply equally to the petition. There was no material difference between the charges recommended by the police (who had had drafting assistance from Ms Clark) and the charges in the petition. My reasoning above therefore applies to the Crown in relation to the petition as it does to the police in relation to the recommendation in the Standard Prosecution Report. Given that it is not now contended that any of the other requirements of the test for malicious prosecution by the Crown were met at the petition stage, this is of no practical consequence.

Indictment stage

[117] I have previously held that there was no objective reasonable and probable cause for the prosecution at the indictment stage and I turn now to address the other elements of the test for malicious prosecution.

Argument for the pursuer

[118] A number of matters were founded upon by the pursuer as evidencing both absence of subjective reasonable and probable cause and malice. Of these, the greatest weight was placed upon two: pursuit of the prosecution without a proper and adequate case analysis, and the misleading of the court by Ms MacLeod in order to obtain an extension of time.

[119] In respect of the first of these, it was submitted that the internal Crown Office regulation that required preparation of a completed Precognition was not complied with. The consequence was that there was no proper analysis of the evidence and no-one with a sufficient understanding of the evidence to make an informed decision on whether the

prosecution of the pursuer should proceed. The draft Precognition that was in course of preparation by Ms Clark betrayed ignorance of the facts on an incomplete factual background. For his part, Mr Keegan was ignorant of many important aspects of the case, such as the Stansted meeting which ought, he said, to have been reported to the defence, and the misconduct of the police. The issue of the CCI was qualified and without any proper analysis of the evidence. This too was a departure from procedure. There could not have been subjective reasonable and probable cause when the information was so lacking. It had been a major feature of the decision to admit liability for the malicious prosecution of Messrs Whitehouse and Clark that there had been a failure to prepare a Precognition and carry out an analysis of the evidence. The same concession ought to have been made to the pursuer.

[120] As regards the application for extension of time, the sheriff's decision had been a marginal one. If it had not been granted, as the Crown were not in a position to proceed the proceedings would have become time barred. Ms MacLeod had essentially perpetrated a fraud on the court by making the application and allowing it to continue on false information. It was an attempt to defeat the ends of justice and a clear indicator of malice.

[121] Other matters founded upon were knowledge of the police accessing the privileged discs; complicity in failing to disclose the "Don't tell David" email and in the application for the warrant to search HFW's offices; and the service of the second indictment "tactically" to beat the time limit in case there was a successful appeal against the grant of an extension of time to serve the first indictment.

[122] For these reasons, it was submitted that (i) absence of subjective reasonable and probable cause and (ii) malice had been demonstrated.

Argument for the Lord Advocate

[123] On behalf of the Lord Advocate it was emphasised that a number of individuals were involved in the decision to proceed with the prosecution. As the Australian High Court had observed in *A* v *New South Wales* (above, at paragraph 42), it was more difficult to prove that a prosecutor was acting with an improper purpose in a bureaucratic setting, where the prosecutor's decision was subject to layers of scrutiny and potential review. According to the evidence of Lord Mulholland, the prosecution of the pursuer had been directed by Mr Keegan and "the prosecution team" whose members included Ms Clark, Ms MacLeod, Mr Logan, Mr MacDonald, and Ms Nisbet (Deputy Head of SOCD). All had given evidence that they had considered that there was a sufficiency of evidence against the pursuer. When Mr Keegan had, in the exercise of his discretion, withdrawn some of the charges against the pursuer, he had continued to believe that there was merit in the others. He had not regarded as critical either the timing of the sending of the letter of comfort or the identity of the person who presented the cash flow statement to the Independent Committee.

[124] It was accepted that there had been failures in the procedure leading up to the first indictment, starting with the failure to complete the Precognition. However, this did not demonstrate doubt about the indictment of the pursuer, Mr Whyte and Mr Withey. When Mr Keegan had issued the CCI it was his opinion that there was a sufficiency of evidence against the pursuer, and the other members of the team had been in agreement with that assessment. The decision to indict was not final. Mr Keegan could have terminated the prosecution at any stage if he were of the opinion that the evidence or the law did not support the charges. There had been no impropriety in serving the second indictment in case the appeal against the extension of time was successful.

[125] In relation to the application to the sheriff for an extension of time, the incorrect reference to 39 boxes of material had been an error for which an apology had been tendered to the Appeal Court. If the pursuer had wished to raise this as a matter of alleged criminality, it would have been necessary to do so expressly and to raise the possible need for a warning to Ms MacLeod against self-incrimination. There was no basis for the allegation that Ms MacLeod had induced the advocate depute to make a false statement to the sheriff.

[126] It was also acknowledged that serious mistakes had been made in relation to the HFW search warrant in December 2015. Mr Keegan had sanctioned it without properly applying his mind to the issue of privilege.

[127] None of this, however, was sufficient to meet the legal test of malice. The pursuer's case did not fall to be judged relative to the prosecution of any of the other accused nor the state of preparation of the prosecution as a whole: the question was whether there was a malicious prosecution of the pursuer. This had not been a case where the prosecution was mounted in the knowledge that there was no evidence against the pursuer. Assessment of the available evidence was a matter of professional judgment. It had been legitimate to serve an indictment immediately lest a successful defence appeal against the extension of time rendered a later prosecution time barred.

Decision

[128] As a matter of generality, there is force in the submission on behalf of the Lord Advocate that it is less likely that malice will be present where a decision to prosecute is taken in the bureaucratic setting of the office of a public prosecutor than where the "prosecutor" is a private individual. In the bureaucratic setting, the establishment of malice

would generally require a finding that the prosecution had an improper purpose (as defined above) which was known to and shared by all of those principally concerned in its instigation and continuation. Such collective responsibility may, however, break down where, as in the present case, there were significant failures to follow the normal procedure designed to ensure that decisions to prosecute are subject to rigorous checks and controls.

[129] Reliance has been placed by the Lord Advocate on the draft Precognition as demonstrating the analysis underlying the decision to proceed to indict the pursuer on charges of fraud and other criminal conduct. In my opinion much of that reliance is misplaced. Firstly, the document was never completed. It was clearly a work in progress full of questions and instructions for further investigation which indicate that even in mid-2015 there were many uncertainties requiring to be resolved. The fact that the process of indictment proceeded in the absence of such resolution was a serious breach of standard procedure. Secondly, the document was never formally submitted to the Crown Office. The advocate depute who had the responsibility for issuing the CCI did not see it. It must therefore be doubtful whether it has any relevance at all to the central question of whether the prosecution that proceeded had an improper purpose.

[130] Thirdly, the draft Precognition displayed similar flaws to those already described in relation to the police's Standard Prosecution Report. The evidential basis for a belief that criminal offences might have been committed by the pursuer was strikingly sparse. In its essence it depended, as did the police analysis, on acceptance of Mr Betts' evidence that he told the pursuer in January 2011 that the deal was being financed by funds from Ticketus. Everything that followed in the draft proceeded upon the assumption that that evidence was truthful and accurate. In particular, the evidence regarding the pursuer's contributions during the meeting with the Independent Committee was assessed on this assumption.

Whilst I recognise that corroboration was not, as a matter of law, required for what were no more than individual elements of the narrative of the fraudulent conspiracy charge against the pursuer and the other accused, it might be thought that without corroboration the evidence of Mr Betts ought to have been subjected to closer scrutiny. There is a reference in the draft Precognition to an email by Mr Withey on 6 April 2011 as "clearly spelling out the Ticketus arrangements" which, in fact, clearly spells out the pre-existing unexceptionable arrangement with Ticketus. Otherwise the only supporting evidence consists of Mr Bills' emails which are construed as demonstrating knowledge by the pursuer during the negotiations that Ticketus were funding the acquisition. At best, the draft Precognition is evidence of a subjective belief on the part of Ms Clark that there was reasonable and probable cause to proceed with indictment of the pursuer. Because it was not completed or submitted to the advocate depute, I do not attach weight to it in deciding whether malicious prosecution has been established.

[131] Ms MacLeod's recommendation that there was a sufficiency of evidence against the pursuer was based on her reading of the draft Precognition chapters. I set out her recommendation at paragraph 44 above. It is brief and contains no reasons for the recommendation. In her oral evidence she was clear that the decision-maker was the advocate depute, Mr Keegan. She did not recall giving Mr Keegan an assurance that there was sufficient evidence, or of providing him with the analysis that he had sought of how the case was to be proved. In these circumstances I find that Ms MacLeod's participation in the decision-making process provides no assistance to the Lord Advocate's case. Nor, on the other hand, does it afford evidence of an improper purpose. I address the point regarding the application for an extension of time below.

[132] I derive little assistance from the evidence of Ms Nisbet. In a statement prepared for the actions at the instance of Messrs Whitehouse and Clark and annexed to her witness statement for the purposes of this action, Ms Nisbet asserted that in August and September 2015 she had no view as to sufficiency of evidence and deferred to the views of other members of the team. Her view that there was a stronger case against the present pursuer than against Messrs Whitehouse and Clark was based upon him having been directly involved in the email communications regarding the letter of comfort, and having been the "front man" for MCR in dealings with Messrs Whyte, Betts and Bryan. She was not a decision-maker in relation to proceeding to indict.

[133] Lord Mulholland described his role as being to supervise the enquiry, receiving updates on the progress of the case and being advised of the case strategy as it developed. He took the decision to serve the indictment within the unextended period, to avoid the risk that an extension, if granted, would not be upheld on appeal. He did not however take the decision to indict. He did not see the draft Precognition. He formed no opinion of his own on the sufficiency of the evidence against the pursuer, regarding that as a matter for the allocated advocate depute and his team. He was content that Mr Keegan would exercise his own judgment in deciding whether to indict the pursuer. When cross-examined as to whether he had had his "hands on the tiller", he reiterated that the tiller had been operated by Mr Keegan and the prosecution team, and that he (Lord Mulholland) had had a supervisory role. Again, therefore, I find his evidence to be of little assistance in addressing the question whether all of the elements of the malicious prosecution test have been met.

[134] I turn then to consider the evidence of those individuals who were most closely associated with the decision to indict the pursuer. As already noted, Mr Keegan issued the CCI. As the advocate depute responsible for conducting the prosecution, his state of

knowledge and understanding from time to time are of particular importance. When he was allocated as advocate depute in September 2014, the primary sources of his knowledge of the case were the Standard Prosecution Report and a summary of the evidence prepared for the purposes of the drafting of the petition. Thereafter, according to his oral testimony, he was provided with large amounts of information and documentation, including witness statements, in a haphazard manner. He repeatedly asked to be provided with an analysis of the evidence, but none was supplied until 19 February 2016 when a note analysing the evidence against the pursuer was prepared by Irene Brisbane, a fiscal who worked part time at SOCD. When Mr Keegan issued the CCI, he was worried about having to indict at a time when the case was still being investigated. The tactical decision that was taken was to indict (ie the first indictment) within the unextended time available, in case the appeal against the extension of time was successful, with a view to issuing a second indictment later.

[135] In cross-examination Mr Keegan was referred to a passage in Ms O'Neill's handwritten notes of the meeting with Mr Betts at Stansted Airport, stating "Instructions from CW/GW not to [discuss] Ticketus deal. Ticketus didn't want anyone else to know in case the Club wanted them to front deal and Ticketus won't deal with club." He had not been provided with the notes and agreed that it would have been extremely useful to have had this information when considering Mr Betts' official statements and assessing him as a witness.

[136] Mr Keegan was nevertheless able to form a view that there was a sufficiency of evidence against the pursuer of conspiracy to commit fraud. As regards the letter of comfort, he had been aware that the funds had been transferred before any email was sent to Mr Bryan, but did not regard that as significant because they could not be withdrawn without Ticketus's consent. He saw the pursuer's involvement in the drafting of the letter as

evidence of his knowledge of an arrangement to borrow money secured on the future income of the Club, and therefore as a step in a conspiracy among Mr Whyte, Mr Withey and the pursuer. His view in relation to the Independent Committee meeting, based on the minutes, was that the pursuer had participated in misrepresentations which, though not decisive by themselves, formed part of the course of a conspiracy to acquire the Club by fraud. His position, set out at greater length in his witness statements, was summarised in the course of re-examination as follows:

> "I felt at that time that there was a sufficiency against Mr Grier, based on what I've already said. Based on his communications, his activities with Whyte in particular, based on evidence from Betts, based on what we understood to be the position in relation to the letter at that point in time, based on what we understood the position to be in relation to representations to the Independent Committee…"

(Mr Keegan also referred to post-acquisition events in the running of the Club, but after objection that aspect was not pursued.)

[137] Mr Keegan discussed the charges against the pursuer with Mr Logan and Mr MacDonald, the recipients of his instruction to prepare the indictment. They too were independently of the view, based upon the same material as that relied upon by Mr Keegan, that there was a sufficiency of evidence against the pursuer in relation to all of the charges against him in each of the two indictments. Both adopted witness statements explaining the basis for their respective views. Neither was cross-examined.

[138] I accept the evidence of the Crown witnesses regarding their respective roles in the decision to indict the pursuer and to proceed with the prosecution, the views that they held at the time of service of each of the indictments, and the reasons they held those views. Not all of those views have proved, in the light of subsequent events, to have been sustainable. Some, such as the credibility and reliability of Mr Betts, have never been tested in court. However I am satisfied (i) that all of the individuals concerned in the prosecution of the

pursuer were subjectively of the view that there was reasonable and probable cause to indict the pursuer for the offences with which he was charged and, separately, (ii) that their actings were not motivated by any purpose other than the pursuit of the interests of justice. I have not dealt in detail with all of the charges in each of the two indictments because the conclusion that I have reached applies equally to all of them; nor, in this regard, do I consider that any different considerations apply to the first and second indictments respectively.

[139] Turning to the application for an extension of time, I accept Mr Keegan's evidence that he was not alerted by Ms MacLeod to the possibility that the factual basis upon which he was presenting the application was inaccurate. I regard that as reprehensible. It is clear from Ms MacLeod's evidence that she was aware over the weekend that intervened between the days of the hearing that there was uncertainty about what documentation had been received, from whom and when, and in particular whether the figure of 39 boxes was correct. When the hearing resumed she had not received a clear explanation from the police. In these circumstances she owed a duty to the court to alert Mr Keegan to the risk that he had presented the application on an inaccurate basis, and it is difficult to understand why she did not do so.

[140] I am not, however, persuaded that her acquiescence in the presentation of incorrect information is demonstrative of malice in the relevant sense. It is not, in my view, comparable to the presentation of tainted evidence that was held to constitute malice in *Rees* v *Commissioner of Police for the Metropolis*, where the actings of the policeman were intended to procure a prosecution that he was concerned would not otherwise take place. The failure of one member of staff to ensure that the submission in support of the application for an extension was accurately presented is not in my view an indication of an

improper motive on the part of the Crown in relation to the prosecution as a whole. Nor in the event did it have any practical consequence. On appeal the court, properly apprised of the facts, addressed the matter of new and upheld the granting of the extension of time. And in any event the first indictment was served, on the Lord Advocate's instructions, within the unextended time limit.

[141] I am not persuaded that any of the other matters founded upon by the pursuer are supportive of a finding of improper motive. There was no conclusive evidence that the Crown officials knew of, far less were party to, the accessing of privileged material by the police. The existence of the "Don't tell David" email was not at any time concealed from the defence by the Crown. Mr Keegan candidly admitted to errors in connection with the HFW search warrant but there was no evidence of any improper motive on his part or on the part of any other Crown official. The issue of "tactical" service arose in relation to the first and not the second indictment, and was done for the reasons already explored, which contain no impropriety.

Conclusion

[142] For these reasons I hold that the pursuer's case of malicious prosecution against the Lord Advocate has not been made out.

[143] I recognise that comparisons may be drawn between my decision in this case and the outcome of the actions at the instance of Mr Whitehouse and Mr Clark, in each of which the Lord Advocate admitted liability for malicious prosecution. I do not regard it as appropriate to attempt to identify reasons why admissions of liability were made in those cases but no finding of liability is made in this case. The admissions of liability were decisions taken by the Crown in the light of the factual circumstances as they were perceived. My task is to

assess the evidence presented to the court by the parties in relation to the claim by the present pursuer, without being 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.

Causation

[144] The parties were sharply divided on the approach that the court ought to take to the question of causation of loss. As I have held that the pursuer's case against the Chief Constable and his case against the Lord Advocate both fail, the question of causation is academic. I should however express my opinion as to the correct approach to be taken.

Argument for the pursuer

[145] On behalf of the pursuer it was submitted that the court did not require to consider what wrong caused what damage to the pursuer. The pursuer's detention, appearance on petition and prosecution on indictment led to a single loss. In the absence of any plea by either defender that there should be apportionment between them (which would have required a third party notice in each case to convene the other defender), the court could not and should not make any finding as to which part of the loss is attributable to which wrong. The law was clear: as long as a wrong materially contributed to the overall ultimate loss then the entire damages were payable for the whole loss, regardless of whether the loss was caused by "innocent causes" as well as "guilty" causes, or was caused by more than one "guilty" action. In *Simmons* v *British Steel plc* 2004 SC (HL) 94, Lord Hope of Craighead had made clear that a pursuer was entitled to the whole damages where the negligence made a material (ie not *de minimis*) contribution to the whole. In the present case the loss suffered by the pursuer was caused by the wrongful conduct of both defenders. Accordingly, decree

was sought against both for the full sum. There was nothing wrong with granting two decrees for the same loss (see eg *Steven* v *Broady Norman & Co* 1928 SC 351). The pursuer would not be permitted to enforce his decrees for more than the total amount of his losses but could choose against whom to enforce them.

Argument for the Chief Constable

[146] On behalf of the Chief Constable it was submitted that the line of authority to which Lord Hope had referred in *Simmons* v *British Steel plc*, relating to industrial disease where there was scientific or medical uncertainty about causation, was not in point. The pursuer's losses were not indivisible. Where loss was caused cumulatively by different factors, and it was possible to identify the extent of the contribution made by a defender's particular legal wrong, the defender was only liable to the extent of that contribution. The pursuer had failed to discharge the onus upon him to prove the nature and extent of the losses he claimed to have suffered as a result of the prosecution. Firstly, as the pursuer had ultimately accepted in cross-examination, he had suffered damage as a result of the allegations broadcast by the BBC. Secondly, if the pursuer had sustained any loss as a consequence of malicious prosecution by the police, the chain of causation was broken when the Crown exercised independent judgement to proceed with the prosecution after the petition stage.

Argument for the Lord Advocate

[147] On behalf of the Lord Advocate it was submitted that there had been multiple factors that may have impacted on the pursuer's business reputation and earning capacity: his association with Craig Whyte; the BBC broadcasts; his detention, arrest and charge by the police; his appearance on petition; and his indictment. Only the last two concerned the

Lord Advocate. Where, as here, there were sequential wrongful acts by different wrongdoers each inflicting damage, the wrongdoers were not jointly and severally liable for the aggregate of the loss. A later wrongdoer was not liable for the loss caused by a predecessor, even if the later wrong could itself have caused that same loss. It was necessary to identify the loss caused by each wrongdoer. Chronologically, the first damage was inflicted by the BBC broadcasts. The pursuer did not specify the damage, nor was there any evidence to enable it to be quantified. Next came detention, arrest and charge, most of which occurred before any Crown involvement and which attracted considerable publicity. There was no specification by averment or evidence of whether the indictments themselves caused any further detriment to the pursuer's reputation and earnings. These difficulties could not be avoided by granting decrees for the whole loss against both the police and the Crown, allowing the pursuer to enforce one or other at will.

Decision

[148] In my opinion the submissions on behalf of the Chief Constable and the Lord Advocate are correct. I reject the proposition that the present case is on all fours with the industrial disease cases where it was not scientifically possible to separate the damage caused by the defender's fault from damage from another cause. Not surprisingly, it appears to be accepted by the pursuer that at least some damage to his reputation and earning potential was caused by the BBC broadcasts which preceded any alleged wrongdoing by either the police or the Crown. I understand that the pursuer has raised an action against the BBC for defamation which is sisted to await the outcome of these proceedings. On the hypothesis upon which these actions proceed, there was then further damage attributable to police action, including in particular the pursuer's detention, arrest

and charge, all of which received widespread publicity, and still later damage attributable to his appearance on petition and his subsequent indictment and court appearances, which were also widely reported. There is in my view no single indivisible wrong but rather a consecutive series of alleged wrongs, each of which had its own consequences.

[149] In *Performance Cars Ltd* v *Abraham* [1962] 1 QB 33 (CA), the defendant negligently collided with the plaintiff's Rolls Royce and it was agreed that the lower part of the car would have to be resprayed. As it happened, however, the car had been in a collision two weeks previously which also necessitated its respraying. Judgment had been obtained against the person responsible for the first collision but the plaintiff was unlikely to recover anything from it. The Court of Appeal held that the plaintiff was not entitled to recover the cost of respraying from the defendant in relation to the second collision. The car had been in a damaged condition and the expense of respraying would have been necessary in any case. This decision has been cited with approval and applied in a number of subsequent cases, of which *Steel* v *Joy* [2004] 1 WLR 3002 (CA) is of interest for present purposes. The claimant was injured in an accident involving the first defendant. Some two years later, he was injured in an accident involving the second defendant. His actions against the two defendants were consolidated. Both admitted liability. According to the evidence, the second accident aggravated the pre-existing problems producing a temporary exacerbation of these. The court held that the historical fact of damage having occurred as a result of the first accident could not be expunged simply because the same damage would have been caused by the second accident if the first accident had not occurred. The two defendants were not joint wrongdoers whose respective contributions were to be fixed by the court.

[150] *Performance Cars* was also cited with apparent approval by the House of Lords in *Baker* v *Willoughby* [1970] AC 467. In that case the plaintiff suffered leg injuries in a road

accident for which the defendant was held 75% to blame. Three years later the plaintiff, while at work, was shot in his injured leg by a robber. The leg then had to be amputated. The House of Lords held that the occurrence of the second injury did not diminish the damages payable by the wrongdoer who caused the first injury. In the course of his judgment, Lord Reid referred to *Performance Cars* and another case, observing:

> "These cases exemplify the general rule that a wrongdoer must take the plaintiff (or his property) as he finds him: that may be to his advantage or disadvantage. In the present case the robber is not responsible or liable for the damage caused by the respondent: he would only have to pay for additional loss to the appellant by reason of his now having an artificial limb instead of a stiff leg."

[151] In the present case, on the hypothesis that the pursuer suffered loss and damage as a consequence of malicious prosecution by the police, such damage was inflicted after the occurrence of whatever damage he sustained as a consequence of the adverse publicity that he had received in the BBC broadcasts in May and October 2012. On the hypothesis that he suffered loss and damage as a consequence of malicious prosecution by the Crown, such damage was inflicted after the occurrence of whatever damage he sustained as a consequence of both the adverse publicity and the malicious prosecution by the police. It is also possible, in a manner analogous to *Baker* v *Willoughby*, that damage occasioned by the BBC broadcasts continued to accrue after the events which form the subject matter of this action, and/or that damage occasioned by the actings of the police continued after the events founded upon as wrongdoing by the Crown. In such eventualities, apportionment of loss would be required.

[152] In my opinion, all of these issues would have to be addressed in order to identify losses for which the Chief Constable or, separately, the Lord Advocate would be liable if the pursuer's claim succeeded against one or other or both. There was, however, no evidence led that would enable me to carry out such an assessment. Nor were the two expert

witnesses on quantum provided with data that would have enabled them to offer a view upon it. There is at least some basis in the evidence relating to quantum to suggest that material damage was occasioned to the pursuer by adverse publicity prior to his detention, arrest and charge. Within the restructuring division of Duff & Phelps, the pursuer in 2011 was ranked no 1 as "Referral MD" (out of a total of 18 or 19 fee earners) with over £3.6 million of work won. In that year he was ranked no 12 as "Project MD". In 2012 his rankings as Referral MD and Project MD were 6 and 14 respectively, with £1.7 million of work won. In 2013 his rankings were 19 and 17 with £320,000 of work won, and in 2014 they were 19 and 16 with £106,000 of work won. I found the pursuer's explanation that future income from a project would be allocated to the insolvency practitioner responsible for the case unconvincing as a reason for such a dramatic decline. The pursuer also acknowledged that the allegations in the BBC broadcasts had had an effect on his business relationship with HMRC. I do not accept the position initially taken by the pursuer in his evidence to the court that the 2012 publicity was not damaging. Nor do I accept that because the BBC broadcasts focused on alleged conflicts of interest of the administrators (which did not concern the pursuer), the allegations made against him that he had been aware of the true nature of the Ticketus deal caused little or no damage to him. Such limited evidence as there is suggests that they may have had a significant effect before any prosecution had begun.

[153] In these circumstances there is an unquantified, and on the material placed before me unquantifiable, gap in the evidence in relation to causation of the pursuer's loss. Had I found in the pursuer's favour on the merits of his case against the Chief Constable and/or the Lord Advocate, I could not have pronounced decree for payment of a sum or sums arrived at on a sound evidential basis. Allowance would have had to be made for damage sustained by the pursuer prior to the police action, and for such proportion, if any, of

damage sustained thereafter as remained attributable to the pre-detention publicity as opposed to the police action and subsequent prosecution by the Crown.

Quantum

Introduction

[154] In the light of my conclusions on the merits and on the evidence as to causation, my decision in relation to quantification of the pursuer's claim is doubly academic. However, in recognition of the work and time expended upon it in preparation for and at the proof, I shall again express my views briefly. It was common ground that in quantifying the loss sustained by the pursuer as a consequence of malicious prosecution, three elements would require to be assessed: (i) lost earnings; (ii) solatium; and (iii) expenses of defending the criminal proceedings.

Lost earnings

[155] In respect of lost earnings, expert evidence on behalf of the pursuer was provided by Ms Sally Longworth, a chartered accountant and managing director of Longworth Forensic Accounting Ltd. Ms Longworth has over 25 years of experience as a forensic accountant, having previously been a partner in GLF (part of Baker Tilly), a director in Deloitte LLP and a partner in Grant Thornton UK LLP's forensic and investigation services team. On behalf of both defenders, expert evidence was given by Ms Catherine Rawlin, a chartered accountant and partner in Baker Tilly, with a specialisation in forensic accounting since 1988. I found both expert witnesses amply qualified to express their opinions on the matters covered by their respective reports and oral evidence.

[156] In preparation for the proof, Ms Longworth and Ms Rawlin had discussed their reports and produced a very helpful joint report setting out their areas of agreement and disagreement, including a calculation of the sums produced by their respective approaches to quantification. In making my assessment of quantum I have used the figures in the tables in the joint report (subject to an arithmetic correction intimated by Ms Rawlin at the outset of her oral evidence).

Matters not in dispute

[157] The pursuer was aged 60 at the date of the proof. His role within Duff & Phelps at the material time had been a bespoke one, not directly comparable with any of his colleagues. Following the completion of the sale of MCR to Duff & Phelps, the pursuer was in a lock-in arrangement that was due to expire in late 2014. His gross base annual salary was £210,000, to be reviewed annually with no contractual entitlement to an increase. His base salary did not in fact increase from £210,000 between 2012 and 2021. The pursuer received bonuses in 2013, 2014 and 2015 of £68,000, £122,000 and £203,000 respectively. He received no bonus in any subsequent year. His total earnings for the period from 2015 to 2021 were approximately £1,483,000. He has been on administrative leave since December 2015. In 2019 there was some discussion of his moving to an administrative role within Duff & Phelps' Chief Revenue Office but this has not happened and the pursuer continues to be paid but does little or no work.

[158] Both experts calculated future loss of earnings on the assumption that the pursuer would retire at age 65. A discount factor of -0.75% pa was applied.

Ms Longworth's calculation

[159] Ms Longworth calculated the pursuer's lost earnings by means of two comparisons. In the first, she used the earnings of partners/members in a number of comparable businesses, including the "big four" and other large accountancy practices whose activities included a financial advisory service comparable to the business of Duff & Phelps. Having calculated the average profits per member in the comparator firms, she compared this with the pursuer's earnings in the years ending 2013, 2014 and 2015. During those years his earnings had been gradually increasing by reference to the comparators, and Ms Longworth assumed that from 2016 onwards, the pursuer would have had earnings equal to the average for each year. On this basis she calculated (after correction) a net loss of earnings to 2021, after tax and NIC, of £1,305,000.

[160] Ms Longworth's second comparator was the pursuer's Duff & Phelps colleague Mr Duffy, to whom reference has already been made as he gave evidence at the proof (although he was not asked any questions on quantum-related matters). The pursuer suggested that Mr Duffy was at a similar level to himself. Mr Duffy's base salary in 2013 was £400,000 (ie almost double the pursuer's) and had not increased since then. His bonus entitlement had been affected by the impact of the court actions on the business as a whole. Ms Longworth assumed, in accordance with Duff & Phelps' income model, that Mr Duffy's base salary would amount to about 60% of his expected income (after bonuses etc) and used the grossed-up figure as the amount that the pursuer would also have earned. On this basis she calculated (after correction) a net loss of earnings to 2021, after tax and NIC, of £1,672,000.

[161] For loss of future earnings, Ms Longworth used the same two comparators. In respect of each, she carried out two calculations, one on the assumption that the pursuer

would continue to be employed until age 65 at his current level of earnings, and the other on the assumption that he would be made redundant at the conclusion of these proceedings. After application of the annual discount and arithmetic corrections, the aggregate net future loss produced by each of these combinations of assumptions was as follows:

Average profits per member; no redundancy	£1,173,000
D&P colleague; no redundancy	£1,558.000
Average profits per member; redundancy	£1,503,000
D&P colleague; redundancy	£1,883,000

Ms Rawlin's calculation

[162] Ms Rawlin carried out calculations of past loss on five different scenarios, as follows:

- Scenario A: The pursuer's expected earnings were his base annual salary of £120,000 plus an annual bonus of £130,936 which equated to his average bonus between 2012 and 2016. This produced a total net loss, attributable solely to loss of bonuses, after arithmetic correction of £398,000.
- Scenario B1: The pursuer's base salary increased incrementally from £210,000 in 2016 to £400,000 in 2021, with a 30% annual bonus. This produced a total net loss after correction of £605,000.
- Scenario B2: The pursuer's base salary increased incrementally from £210,000 in 2016 to £400,000 in 2021, with a 67% annual bonus, in line with Duff & Phelps' income model. This produced a total net loss after correction of £961,000.
- Scenario C1: The pursuer's expected earnings were calculated by reference to the relationship in 2011-2015 between his pre-arrest earnings and the average

profits per member of the firms used by Ms Longworth. For this purpose the pursuer's earnings were taken to be 59.5% of the average profits per member, continuing the pre-arrest relationship. This produced a total net loss after correction of £439,000.

- Scenario C2: The pursuer's expected earnings were calculated by reference to the relationship between his pre-arrest earnings and the average profits per member of those firms used by Ms Longworth which were directly comparable with Duff & Phelps, ie excluding the larger firms. For this purpose the pursuer's earnings were taken to be 67.6% of the average profits per member, continuing the pre-arrest relationship. This produced a total net loss after correction of £766,000.

[163] For future loss, Ms Rawlin carried out three calculations based on each of her five scenarios, assuming (1) that the pursuer continued to be employed until age 65 with his current salary and benefits of around £240,000; (2) that he continued to be so employed but with residual annual earnings of £120,000; or (3) that he was made redundant and had no earnings. As I understand it, Calculation 2 was intended to provide a midpoint, in line with possible residual earnings identified by another expert witness previously instructed on behalf of the pursuer. The total future loss produced by the various permutations ranged from £357,000 (Scenario A; no redundancy) at the lower end to £1,986,000 (Scenario B2; redundancy) at the upper end.

Experts' comments on one another's methodology

[164] In their joint note Ms Longworth and Ms Rawlin provided additional reasons for preferring certain aspects of their calculation to those of their opposite number. These included the following:

- Ms Longworth's Basis 1 and Ms Rawlin's Scenarios C1 and C2: Whereas Ms Longworth assumed that the pursuer would have earned a salary equivalent to the average earnings achieved across the comparator group, Ms Rawlin assumed in Scenario C1 that the pursuer would earn 59.5% of the average. Ms Longworth preferred her basis because the pursuer's bonuses appeared to have been on an upward trajectory prior to the incident, with the relationship to the comparators having increased from 35.2% in 2011 to 76.5% in 2015. Ms Rawlin noted that the bonuses received by Mr Grier during the pre-arrest period appeared to be related to lock-in arrangements put in place following Duff & Phelps' acquisition of MCR and, therefore, were not necessarily indicative of expected ongoing bonuses. She considered it appropriate to adopt a longer basis period to account for the impact of the lock-in and retention and, therefore adopted the average relationship percentage from 2011 to 2015. In Ms Rawlin's Scenario C2 she assumed that the pursuer would earn 67.6% of the average for the direct comparator firms, the percentages again being derived from a comparison over the period 2011 to 2015. Ms Longworth made the same comments as for Scenario C1 regarding the use of an average of 67.6% when the relationship increased from 58.8% in 2011 to 80.5% in 2015. She noted that Ms Rawlin considered there to be a stronger correlation between the comparators and the pursuer than the direct

comparators, suggesting Scenario C1 may be more reliable, possibly because the direct comparator sample was smaller. Ms Rawlin noted that the direct comparator group of firms had experienced more significant growth in earnings during the post-arrest period, which she considered to be reflective of the variability and growth in earnings of more direct comparators. Whilst lower than for the full comparator group, the correlation to the direct comparator group was still high at 93%.

- Ms Longworth's Basis 2: Ms Longworth had applied inflationary increases of 3% per annum for the period after 2016. Ms Rawlin did not consider it appropriate to apply an inflationary increase to the base salary, and consequently pension benefits, as Mr Duffy's base salary had not increased since 2013. Ms Longworth considered it unreasonable to assume that, but for negative impact of the events on the firm's profitability, a senior employee's base salary would not increase between 2013 and 2021.
- Ms Rawlin's Scenario A: Ms Rawlin assumed no loss of salary and benefits on the basis that they were reflective of the pursuer's market value when he joined Duff & Phelps, at which time he received a £60,000 (40%) pay increase. Ms Longworth noted that the pursuer's bonuses showed an upward trend from £68,000 to £203,000, so that by using an average rather than the later bonus a calculation on this basis was understated. Ms Rawlin reiterated the point that the pursuer's bonuses appeared to be, in the round, related to "lock-in" arrangements.
- Ms Rawlin's Scenarios B1 and B2: Ms Longworth noted that Mr Duffy had already achieved a salary of £400,000 by 2013. She noted further that a bonus

of 67% was in line with the Duff & Phelps normal income model and was therefore more realistic than one of 30%. Ms Rawlin noted that Mr Duffy was a registered insolvency practitioner and appeared to have joined Duff & Phelps on an annual salary of £400,000 having been an equity partner in MCR. This differed from the pursuer who, upon joining Duff & Phelps, had received a 40% pay increase from £150,000 to £210,000 which Ms Rawlin would expect to be representative of his market value at that time.

Decision

[165] Quantification of the pursuer's lost earnings is not a question with a single correct answer. The fact that the two expert witnesses have, between them, produced seven different possible methods of calculation demonstrates that this is a matter of judgement to be exercised having regard to the whole circumstances of the case. Having considered all of the alternative methods proposed, I conclude that the most appropriate would be Ms Rawlin's Scenario C2. My reasons for preferring this alternative are as follows.

[166] It is agreed that the pursuer's role within MCR and subsequently Duff & Phelps was a bespoke one. It is apparent from the evidence that his value to his employers lay in his performing a "front of house" role, attracting business to the firm and creating and maintaining business relationships with clients and others such as the client's other advisers and HMRC. As such his value is not, in my view, comparable with that of an insolvency practitioner such as Mr Duffy whose qualifications would suit him to a more technical role. It is also more likely that an employee whose value lay in his ability to create and maintain business relationships would be remunerated in a performance-related manner, ie with an emphasis on bonuses rather than base salary. I also regard the pursuer's base salary as too

far removed from that of Mr Duffy for the latter to be regarded as a reliable comparator, whether immediately or after incremental increases. I therefore reject Ms Longworth's Basis 2 and Ms Rawlin's Scenarios B1 and B2.

[167] I consider that a comparison with average earnings in an appropriate comparator group is the most reliable means of estimating the pursuer's lost earnings. Although the individual employees within this group will be a mix of practitioners with different skills and specialties, it seems to me that in the absence of availability of comparators with more or less the same attributes as the pursuer, an average derived from of this group is the most helpful comparison. It takes account not only of bonuses but also of base salary increases. I regard that as a strength rather than a weakness of this comparison. Although the pursuer had no contractual entitlement to annual base salary increases, I am not prepared to assume that he would not have received any increases between 2015 and 2021 if, as I presume for present purposes, he was proving his worth to Duff & Phelps. I therefore reject Ms Rawlin's Scenario A, which assumed no base salary increase.

[168] The choice among the remaining options (Ms Longworth's Basis 1 and Ms Rawlin's Scenarios C1 and C2) is concerned with (i) whether the comparison should be done on the basis of the whole average earnings of the comparator group or only on the proportion thereof achieved by the pursuer in the pre-arrest period; and (ii) whether the comparison should be with the whole comparator group or only those within directly comparable firms. As to the first of these, I consider that Ms Rawlin's approach is preferable. If the pursuer was earning only around 60% of the average during the pre-arrest period, I see no reason to assume that in 2015 he would have moved to earning 100% of the average. I also consider that adopting an average of the percentage relationships is appropriate because I am not satisfied that the amounts of bonuses received by the pursuer in 2013, 2014 and 2015

represented a sustainable progression justifying use of the last amount alone instead of the average. As to the second, I consider that restricting the comparison to the employees of those firms most closely comparable to Duff & Phelps is appropriate as being likely to increase the proportion of individuals within the group whose skills and expertise are most similar to those of the pursuer.

[169] In their submissions senior counsel for the Chief Constable and the Lord Advocate invited me to discount Scenario C2 because the calculation used pre-arrest earnings of the pursuer that included the bonuses paid in 2013, 2014 and 2015, which were non-recurring lock-in bonuses not directly referable to work won. I accept that that is so, but I do not regard it as a reason for excluding them from the computation. The comparison being made is simply between all of the earnings of the pursuer in the relevant years and the average of all of the earnings of the employees in the comparator groups. No enquiry is being made into how those earnings have been calculated, and in my view it would be distortive and unfair to exclude particular elements of the pursuer's earnings without any information as to whether parallel exclusions ought to be made in calculating the averages. I am satisfied that this scenario, without any discounting, provides a fair and reasonable basis for estimating the pursuer's lost earnings between 2015 and 2021. The figure produced by Ms Rawlin's calculation for net loss of past earnings, after deduction of tax and NIC and after correction, would be £766,000, to which interest would fall to be added.

[170] Turning to loss of future earnings, I would continue to adopt Ms Rawlin's Scenario C2. The principal issue here is what assumption ought to be made regarding the pursuer's actual future earnings, and particular whether he is likely to be made redundant following the conclusion of these proceedings.

[171] The pursuer's evidence was that he was uncertain how Duff & Phelps would feel about continuing to employ him after these proceedings had ended. They had been very supportive of himself and his colleagues who were also prosecuted, but he could not expect that to continue indefinitely. He was currently being paid at a rate that was excessive for what he was doing. Attempts had been made to find him a suitable back office role within the business but these had not been successful. He had now been out of client-facing work for some years and had lost his value to the firm in that regard.

[172] My assessment of quantum of loss proceeds, obviously, on the hypothesis that the pursuer has been successful on the merits, ie that the court has held that he was maliciously prosecuted. I have not so held, although I have made a finding that there was no objective reasonable and probable cause for either the detention and charging of the pursuer or his subsequent prosecution. It is difficult to gauge what effect, if any, a finding of liability and an award of damages would have had upon the attitude of the pursuer's employers to his continued employment. His business reputation would not have been restored as if the events that began with the BBC allegations had never occurred. In any event his long absence from client-facing work would have rendered it unlikely that he could resume such a role. It would be unrealistic to expect his employers to continue to remunerate him for doing nothing or at least nothing that would justify the salary that he was being paid.

[173] On the other hand there was no clear evidence that the pursuer's employment was likely to be terminated at the close of these proceedings. The pursuer emphasised that he missed working, and I find no reason to assume that efforts to find him a role within the firm would not continue or, alternatively, that he would, assisted by the court's findings, have succeeded in obtaining alternative employment. I conclude that I should regard the prospect of redundancy as a risk rather than a likelihood and adopt the midpoint approach

proposed by Ms Rawlin. That approach could alternatively be treated as a finding of likelihood of the pursuer remaining in employment but at a much lower level of remuneration than he would have achieved if the events since 2012 had not occurred. The figure produced in Ms Rawlin's Scenario C2 for future loss with residual earnings of £120,000, after correction, would be £998,000.

[174] It was submitted on behalf of the pursuer that his loss of future earnings should be increased to take account of the increased work likely to be generated during the next few years by insolvencies caused by the Covid-19 pandemic. Ms Longworth's view was that as Government support for businesses wound down, there was likely to be a significant increase in work in the UK restructuring market, with some of the additional revenue being shared with employees via increased bonus pool allocations. Ms Rawlin agreed in principle that there was likely to be an increase in restructuring work in coming years, but regarded the timing and extent of increase in work to be too uncertain to factor into her calculations. In my opinion there are too many uncertainties to take the potential impact of Covid on businesses into account. Events since the proof have further demonstrated the unpredictability of the economic effect of Covid, and the timing of that effect. I would have regarded this aspect of the claim as impossible to quantify and would have made no adjustment for it.

[175] A further claim was made by the pursuer for a lump sum of £500,000 to represent lost earnings from post-retirement consultancy work. There was no evidence that the pursuer would have been likely to continue to work beyond age 65 and I would not have made any award in this regard.

Solatium

[176] On behalf of the pursuer, reference was made to case law demonstrating that even short periods of detention without reasonable and probable cause led to awards of damages. As regards the scale of the award in the present case, a comparison could be drawn with actions of defamation involving reputational damage, hurt feelings and harassment from journalists and members of the public. Reference was made to *Clinton and Barry* v *News Group Papers Ltd*, 18 December 1998 (unreported) in which an award in respect of unfounded allegations of sexual impropriety between a priest and a teacher was made with a value adjusted for inflation of £218,000. In *Rees* v *Commissioner of Police for the Metropolis* (at [2019] EWHC 2339), two of the claimants were awarded damages, including aggravated and exemplary damages, amounting to £155,000. In the present case an appropriate award would be £200,000 with 75% thereof attributable to the past.

[177] On behalf of both the Chief Constable and the Lord Advocate it was submitted that the court should adopt the approach in *Thompson* v *Commissioner of Police of the Metropolis* [1998] QB 498, which concerned two cases in which damages were awarded for false imprisonment and malicious prosecution. In one case the plaintiff was awarded £10,000 compensatory and aggravated damages and £25,000 exemplary damages; in the other the plaintiff received £20,000 compensatory and aggravated damages and £15,000 exemplary damages. *Thompson* had been applied in Scotland in *Shehadeh* v *Secretary of State for the Home Department* 2014 SLT 199. The sums awarded to the plaintiffs in *Rees* by way of basic awards for distress (£27,000) were consistent with *Thompson*. It was doubtful whether awards in defamation cases were truly analogous. High awards of damages for defamation were likely to include unquantifiable amounts of economic loss caused by damage to reputation, which would duplicate an award for loss of earnings.

[178] I agree with the defenders' submission that *Thompson* (adjusted for inflation) provides an appropriate starting point, although of course no award is made under Scots law for aggravated damages or exemplary damages. In that case Lord Woolf MR, delivering the judgment of the Court of Appeal, provided the following guidance at 515-6:

> "In a straightforward case of wrongful arrest and imprisonment the starting point is likely to be about £500 for the first hour during which the plaintiff has been deprived of his or her liberty. After the first hour an additional sum is to be awarded, but that sum should be on a reducing scale so as to keep the damages proportionate with those payable in personal injury cases and because the plaintiff is entitled to have a higher rate of compensation for the initial shock of being arrested. As a guideline we consider, for example, that a plaintiff who has been wrongly kept in custody for 24 hours should for this alone normally be regarded as entitled to an award of about £3,000. For subsequent days the daily rate will be on a progressively reducing scale…"
> …
>
> "…In the case of malicious prosecution the figure should start at about £2,000 and for prosecution continuing for as long as two years, the case being taken to the Crown Court, an award of about £10,000 could be appropriate. If a malicious prosecution results in a conviction which is only set aside on an appeal this will justify a larger award to reflect the longer period during which the plaintiff has been in peril and has been caused distress."

In the present case, having regard to the period during which the pursuer was imprisoned and the length of time during which he was under threat of criminal proceedings, I would have acceded to the suggestion by senior counsel for the Lord Advocate that a total sum of £30,000 would be appropriate of which, had it been necessary to do so, I would have allocated £7,500 to the pursuer's imprisonment and the balance of £22,500 to his prosecution from service of the petition until final disposal of the Crown appeal.

Criminal defence expenses

[179] The pursuer's claim for reimbursement of the expenses of his criminal defence was maintained only in the action against the Lord Advocate. A statement by Mr Gregory and

an accompanying spreadsheet were produced on the last day of the proof. These showed that expenses amounting to £935,859 had been incurred. This sum would in principle be recoverable as an element of the pursuer's damages claim. There is, however, a question as to whether they will ultimately be borne by the pursuer himself. According to Mr Gregory's statement, Duff & Phelps accepted an obligation to meet defence costs reasonably incurred by the pursuer. There was no evidence as to whether or in what circumstances the pursuer would be obliged to reimburse Duff & Phelps. Shortly before issuing this opinion I was informed that no agreement had been reached between the pursuer and the Lord Advocate as to whether this sum was recoverable in the event of success on the merits. Had I held that damages were payable to the pursuer, I would have allowed him an opportunity to make a supplementary submission with a view to clarifying the matter and, in absence of agreement between the parties, permitting a decision to be made by the court.

Disposal

[180] In the action against the Chief Constable, I shall sustain the defender's third plea in law and grant decree of absolvitor.

[181] In the action against the Lord Advocate, I shall sustain the defender's third plea in law and grant decree of absolvitor.