APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 10
HCA/2021/000423/XC

Lord Justice Clerk
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

CROWN APPEAL UNDER SECTION 74

By

HER MAJESTY'S ADVOCATE

Appellant

against

PAUL COONEY

Respondent

Appellant: Charteris QC, Solicitor General, Ewing QC; Crown Agent
Respondent: Jackson, QC, Henry; Levy & Macrae, Solicitors

9 February 2022

Introduction

[1] This is a Crown appeal against the Sheriff's decision of 2 November 2021 to uphold the respondent's plea that the Lord Advocate, through the Procurator Fiscal Depute at Kilmarnock, having renounced the right to prosecute him by letter dated 21 December 1992, the indictment should be deserted simpliciter. The appellant's principal submission was

that the full-bench decision of *Thom* v *HMA* [1976] JC 48 was wrongly decided, and that a bench of seven judges should be convened to reconsider the decision.

Background

[2] In 2020, the respondent, a former teacher, was indicted at Ayr Sheriff Court on a charge of lewd, indecent and libidinous practices towards a then pupil on various occasions between 1 August 1977 and 2 April 1980, contrary to section 5 of the Sexual Offences (Scotland) Act 1976. A docket on the indictment gave notice of an intention to lead evidence of unlawful sexual intercourse with the complainer when she was aged between 13 and 15 years.

[3] The respondent lodged a plea in bar of trial relying on the letter dated 21 December 1992. Prior to debate on the plea, the parties entered into a Joint Minute agreeing the facts so far as capable of being ascertained. In essence, the complainer made a complaint in 1991 or 1992 to the Education Authority anent events said to have occurred between 1977 and 1980; the matter was reported to the police; it is to be inferred that the report was made by the Education Authority; the respondent was interviewed by police in the later part of 1992; he instructed a solicitor who wrote to the Crown on 18 December 1992; by letter dated 21 December the solicitor was told in December 1992 that no proceedings would be taken against the respondent; on 30 December 1992, the solicitor wrote to the respondent enclosing a copy of the letter date 21 December 1992 from the Procurator Fiscal Depute; consequent upon the letter indicating that there were to be no criminal proceedings, the Education Authority initiated internal disciplinary proceeding against the respondent; the complainer contacted police in September 2016 seeking information on the outcome of any investigation into the report made by her in 1991 or 1992; the police could find no record of the complaint;

enquires with the Social Work Department and Education Authority failed to locate any relevant records; on 30 December 2017 the respondent was detained, interviewed, made no comment and was released without charge; on 8 October 2019 he was arrested, charged with an offence contrary to section 5 of the 1976 Act, and made no reply; on 4 November 2019 he appeared on petition and was admitted to bail; thereafter an indictment was served on him for a first diet on 24 June 2020.

[4] It was agreed that the letter of 21 December 1992 was in the following terms:

> "Dear Sirs,
> Mr Paul Cooney
> I refer to your letter of 18 December 1992. No criminal proceedings are being taken against Mr Cooney in connection with this matter".

[5] It was further agreed that the letter was an intimation to the respondent that no further proceedings were to be taken against him in respect of the acts forming the subject matter of the present indictment, confirming that the matter referred to in the Crown's letter was the same as the subject matter of the present indictment.

[6] No evidence was led. A number of factual assertions were made, in submissions to the sheriff and in submission before this court. Some of these are straightforward. For example, both parties agreed that when interviewed by police in 2016 the respondent was not charged. It may reasonably be assumed that between September 2016 and the respondent's being charged in 2019 there was a process, possibly further investigation, leading to the decision to charge him, but the detail and extent of the investigation is not a matter of agreement. Equally, the nature and extent of the inquiry in 1991 and 1992 is not known. The Solicitor General submitted that the inquiry at that time was not an effective inquiry into the allegations, and highlighted the assertion that the police took no statement from the complainer at the time. She also asserted that the decision to take no further

proceedings in 1992 was made in ignorance of the evidence that would have been available had there been a reasonably competent and diligent police investigation.

[7] With the greatest respect to the Solicitor General the court is not in a position to reach a view about the nature of any investigation in 1991/1992. The absence of police records makes it impossible to know what the inquiry consisted of. Even if one accepts the complainer's recollection that she was not interviewed by police (which perhaps begs the question why she contacted them in 2016), it is a considerable step to conclude from this that there must have been a defective investigation. Both the complainer and at least one witness, according to the Crown, spoke to the Education Authority, who in turn contacted the police. The information which was conveyed by them was sufficient for the police to interview the respondent. A Procurator Fiscal Depute who considers that further inquiry should be made before reaching a decision on whether to proceed in a case may secure that those inquiries are made by the police. We simply cannot know what the available material was upon which the Procurator Fiscal Depute made his decision. The Solicitor General herself recognised that his reasons for writing the letter are simply not known.

Analysis and decision

[8] The Solicitor General essentially made submissions based on three broad propositions:

1. (a) That *Thom* was wrongly decided; the proposition that a statement by the Lord Advocate could constitute a binding renunciation of the right to prosecute was not supported by the Institutional writers and was inconsistent with the general principle that the Lord Advocate's power was not subject to the control of the courts other than on the ground of oppression; (b) Whilst such statement by the Lord Advocate should normally be capable of being relied on, where she proposed otherwise, the matter should not be

determined by means of a plea in bar of trial under an absolute rule as in *Thom*, but as part of a plea of oppression advanced by the putative panel.

2. In any event, *Thom* was no longer good law and should not be followed, having regard to the public interest in the suppression and prosecution of crime and greater recognition of the rights, including Convention rights, of complainers.

3. *Separatim,* in any event, *Thom* could and should have been distinguished on its facts, leading to a different result.

[9] We will address these three issues in turn.

1. (a) That *Thom* was wrongly decided

[10] The Solicitor General noted that *Thom* proceeded on a concession from the then Solicitor General (p 50) that "where the Lord Advocate has publicly relinquished or discharged his right of prosecution in the case of a particular charge against a particular individual - or has made a public announcement which falls to be construed as such a relinquishment or discharge – no prosecution on that charge may competently follow". The Solicitor General submitted that the court did not examine the concession to see whether it was well founded and so the decision had to be approached with caution. We cannot accept that submission. It is clear from the decision in *Thom* that the distinguished and very experienced full bench considered that the concession had properly been made. By contrast, the qualification which had accompanied the concession was rejected by them as an incorrect statement of the law. We are unable to conclude that the concession did not accord with the views on the law of the bench itself.

[11] The written submissions for the Crown developed an argument that the issue of whether the Crown should be held to its renunciation of the right to prosecute had to be addressed under reference to civil notions of personal bar such as might arise in a

contractual situation, including whether the accused had in consequence of the announcement acted to his detriment. This argument was not insisted in during oral submissions, having regard in particular to the case of *Nixon* v *R* 2011 2 SCR 566 to the effect that such arguments completely ignores the public dimensions of the matter, and cannot be sustained (a similar point, that *Thom* did not apply a form of personal bar as that term is understood in the law of contract was noted in the commentary to *HM Advocate* v *Weir* 2005 SCCR 821). That must be correct: should the matter come to be considered in the different context of oppression, any actings of an accused (for example, giving evidence at an FAI, or as may be relevant in the present case, in disciplinary proceedings) in reliance on the renunciation would be a relevant factor in the overall assessment of whether it would be oppressive to allow a prosecution to proceed. However, it has no bearing on the prior issues not only of whether the Lord Advocate can renounce the right to prosecute, but whether a public renunciation can be considered binding on the Lord Advocate.

[12] It was submitted that in *Thom* there was little explanation for the deemed equivalence with desertion *simpliciter*, and that on fuller examination such an analogy would not stand up. Desertion *simpliciter* was a discrete procedural act in the face of the court, made in person, and granted by the court. In these circumstances there could be little room for dubiety and no reason not to hold the Lord Advocate to the desertion. Desertion *simpliciter* should be viewed as being in a class of its own and there was no basis for extending the consequences of such a procedural step to statements made by or on behalf of the Lord Advocate that a prosecution will not be taken. It was maintained that prior to *Thom* the principle of renunciation by statement of the Lord Advocate did not exist, and could not be deduced from Institutional writings.

[13] In our view the comparison made in *Thom* with desertion *simpliciter* was not intended to be a procedural one. Rather, the court was simply noting desertion *simpliciter* as a means by which renunciation by the Lord Advocate of the right to prosecute may be effective. It may be the most common method, especially at the time of Hume, given the limits of methods of communication by which such a renunciation may have been announced, but the important point is the recognition of the fact that the Lord Advocate may renounce the right to prosecute and that a clear and unequivocal renunciation will be binding. All that *Thom* was doing was identifying that a clear and unequivocal public statement not to prosecute an individual for a particular crime had the same effect as desertion *simpliciter*: it was a means of renouncing the right to prosecute.

[14] As to the submission that even when the Lord Advocate makes a clear and unequivocal statement to this effect it was not binding and she should not be held to it, it is important to bear in mind that the making of such a statement or the writing of a letter to similar effect is a deliberate and voluntary decision taken by the Lord Advocate or those with her authority in the full awareness of the consequences. The terms of the Procurator Fiscal Service Book of Regulations 1987, in force at the time of the relevant decision, are as follows:

> "3.02 …In any case the Procurator Fiscal may, if he decides to take no proceedings, give an unqualified intimation of this decision to the accused or the complainer if either specifically request this. Such an intimation to the accused will constitute a bar to any proceedings thereafter (See *Thom* v *HM Advocate* 1976 SLT 232). Where the decision to take no proceedings is based on a lack of sufficient evidence and there is the possibility that further evidence implicating the accused will be submitted to the Procurator Fiscal within a reasonable time no intimation should be made.
>
> 3. 03 When a decision has been intimated that no proceedings are to be taken the Crown will be held to this. Accordingly, care must be taken that no such intimation is given unless it is clearly correct to do so."

[15] This shows that the consequences of making an unequivocal public statement were well understood. It anticipated the existence of further evidence coming to attention, at least within a reasonable time, and posited that no intimation should be made in such circumstances. In any event, the terms of any intimation are entirely a matter for the Crown. Whether to make an intimation is an exercise of prosecutorial discretion. Many Crown counsel will be familiar with the instruction "No pro; no intimation". Furthermore, in cases where, for example, the emergence of another complainer might provide *Moorov* evidence to plug an insufficiency (we hasten to point out that this is not such a case), or where there might be thought to exist another good reason for doing so, it would always have been open to the Crown to qualify any intimation which was made. This in fact is the approach which has been taken in subsequent revisions of the Regulations. The 1998 Regulations read as follows:

> *"3.29 No Proceedings Meantime*
>
> Where the Procurator Fiscal decides that there is insufficient available evidence to support proceedings in respect of a serious allegation and there is a possibility that further evidence implicating the accused will be submitted within a reasonable time, the case should be marked "no proceedings meantime". Similar considerations will operate where the nature of the criminal conduct suggest that the crime is likely to be repeated within a time period which would allow the operation of the *Moorov* doctrine at the later date. Where a Procurator Fiscal considers it necessary or desirable to disclose a decision made in these circumstances, it will be essential to avoid any misunderstanding that the Procurator Fiscal is relinquishing the right to prosecute (see *Thom* v *HM Advocate supra*). It should be made absolutely clear that the decision is an interim decision only. An appropriate indication may be that 'on the basis of information and evidence currently available, criminal proceedings are not contemplated at this time.'"

[16] The current policy is contained in an Operational Instruction No 23 of 2014, stating:

> "All intimation of no action or no further action markings to an accused or their solicitors must contain a standard wording to ensure that it is clear that there is no renunciation of the Crown's right to prosecute."

[17] The standard wording presently is:

> "On the basis of the current available information, I have decided to take no action in this case against you at this time.
>
> You should be aware that there is an obligation on the prosecutor to keep cases under review. This includes cases in which the prosecutor has decided to take no action. I therefore reserve the right to prosecute this case against you at a future date."

[18] The right to make a decision renouncing the intention to prosecute – and the obligation to be held to it – are reciprocal elements stemming from the absolute discretion of the Lord Advocate to decide whether or not to prosecute. The notion that the Lord Advocate should be held to a clear and unequivocal statement that she will not prosecute a named individual for a particular criminal offence is a corollary of the absolute power of decision making in this area which vests in the Lord Advocate, and which prevents the court from making inquiry into, or interfering with, the exercise of her discretion on such matters.

[19] The powers of the Lord Advocate were summarised by Lord President Clyde in *Hester* v *McDonald* 1961 SC 370 at p 377 (the case has since been overturned on the central question of whether the Lord Advocate enjoyed immunity from suit for malicious prosecution, but the statement of the law regarding the role of the Lord Advocate in our system remains valid):

> "To appreciate its significance, it is necessary, first of all, to consider the position of the Lord Advocate in this system. Under our constitution, the Lord Advocate has a universal and exclusive title to prosecute on indictment (Macdonald, Criminal Law, p. 212). As Baron Hume says (Crimes, vol. ii, p. 155): 'By custom, the process by indictment is the exclusive privilege of the Lord Advocate, or public prosecutor, who alone is possessed of that notorious and public character, which entitles him summarily, and of his own authority, to state himself to the Court as accuser, and call on the Judges for trial of his charge, without any previous licence obtained.' In our system, the Lord Advocate alone possesses the function, in indictable offences, of deciding whether he will prosecute or whether he will withdraw a prosecution, and there is no appeal to any Court against his decision on these matters. No Court or magistrate can compel or direct or recommend to him what he should do. These are

> matters exclusively for him and exclusively within his province—Alison's Criminal Law, vol. ii, p. 87."

[20] In *McBain* v *Crichton* 1961 JC 25, Lord Clyde noted (p29), in relation to the role of the Lord Advocate :

> "In this country he is the recognised prosecutor in the public interest. It is for him, in the exercise of his responsible office, to decide whether he will prosecute in the public interest and at the public expense, and under our constitutional practice this decision is a matter for him, and for him alone. No one can compel him to give his reasons, nor order him to concur in a private prosecution. The basic principle of our system of criminal administration in Scotland is to submit the question of whether there is to be a public prosecution to the impartial and skilled investigation of the Lord Advocate and his department, and the decision whether or not to prosecute is exclusively within his discretion …. It is utterly inconsistent with such a system that the Courts should examine, as it was suggested it would be proper or competent for us to do, the reasons which have affected the Lord Advocate in deciding how to exercise his discretion, and it would be still more absurd for this Court to proceed to review their soundness. Any *dicta* indicating that such a course is open to any Court are, in my view, quite unsound."

[21] Lord Guthrie, at p 31, observed that:

> "The Court is not here to review the Lord Advocate's exercise of his discretion in declining to prosecute the exposure for sale and selling of the book mentioned in the bill. That would be to confuse the functions of a Court of law and of the Minister of the Crown charged with the duty of the prosecution of crime. This Court has not the information, nor the means of obtaining the necessary information, to test the Lord Advocate's reasons for declining to prosecute, and in many cases it would be in the highest degree undesirable that his reasons should be disclosed."

[22] The fact that the virtually absolute power of the Lord Advocate in respect of prosecutions in our system disables the court from examining the exercise of her prosecutorial discretion is a significant part of the rationale for holding the Lord Advocate to public statements of this kind, since the ability of the court to inquire into the exercise of her discretion, in the event of a change of heart is extremely limited. If she were able to renege on a decision of the kind in question, subject only to consideration of issues of whether to allow the prosecution to proceed would constitute oppression, examination of that issue,

given the customary, and indeed constitutional, reticence of the courts to examine the substantive exercise of the Lord Advocate 's discretion, would be significantly one-sided.

[23] The law as expressed in *Thom* is in our view entirely consistent with the observations of the Institutional writers. As we have noted above, the analogy with desertion *simpliciter* was not made on the basis of the fine procedural comparisons suggested by the Solicitor General. Hume makes the comparison with desertion *pro loco et tempore* at the hands of the Lord Advocate, on the basis (Crimes, mii, 277) that when the prosecutor seeks desertion on these terms, "he qualifies his motion, and acquaints the panel that he passes from his process for the time and occasion only, and reserves his right to insist anew, at some convenient season." The suggestion that in such circumstances the right is reserved, implies that in other circumstances it may be ceded. Desertion *simpliciter,* which carries no such qualification, can be viewed only as a "thorough relinquishment or discharge of his right to prosecution". Another analogy comes to mind, namely the requirement that the prosecutor be present for the calling of a case. Although the Lord Advocate has the privilege of being represented by her deputes, the prosecutor must nevertheless be in court for the calling of the case. Otherwise the instance will fall (see *Walker* v *Emslie* (1899) 3 Adam 102). If the prosecutor should appear and offer a reasonable explanation excusing the absence at the calling of the case, it would be in the discretion of the court to allow the case to proceed, for then, as Hume puts it (Crimes, ii, 266/267) "it be presumable that he had no purpose of abandoning the process". The inference is clear: the absence of the prosecutor gives rise to the presumption that he is abandoning the process. This is again consistent with the Lord Advocate both having the power to do so, and being held to it, when the purpose appears evident.

1 (b) The matter should not be determined under an absolute rule as in *Thom*, but as part of a plea of oppression advanced by the putative panel.

[24] The submission of the Solicitor General was that "as a general rule" assurances of the kind contained in the letter of 21 December 1992 should indeed be relied upon, and she stated that the Crown would not want to depart from such a proposition "save in extreme circumstances". The difficulty lies in establishing when and in what circumstances such a departure should be possible, and how the court could assess the matter without doing serious damage to the traditional approach that, consistent with the great authority vested in her, the court will not second guess discretionary decisions of the Lord Advocate. As the court noted in *Crichton* v *McBain*, it is not the function of the court to review the Lord Advocate's exercise of her discretion. A number of serious difficulties would be bound to arise if the court were to assume such a reviewing function. What would constitute "extreme circumstances"? What is to be the threshold for allowing a prosecution to proceed in the face of a clear renunciation? The mere assertion by the Crown that an error had been made would not suffice: for the court to determine whether the threshold of "extreme circumstances" justifying a departure from the Crown's publicly stated position, had been reached it would be necessary to examine whether those circumstances existed, which would necessarily, in a case such as the present, involve inquiry into the original decision-making process, as well as what had occurred since. The present case is said to qualify as one where the Crown should not be bound but there seems nothing unusual or odd about its circumstances. A decision was knowingly made in the case (it is not for example a situation where no decision had even been made; see *Weir* v *HMA* 2005 SCCR 821). There was a decision. It applied to this accused. It applied – as agreed in the joint minute – to the charge against him on the current indictment. The Crown do not wish to be held to that

decision because they claim that re-examination of the circumstances in 2016 suggest that there is a sufficiency of evidence, and that this would have been disclosed by a competent investigation at the time. What is being suggested is that the decision was a mistaken one - in other words that it was an exercise of discretion which should not have been made.

[25] In such a case is the court to examine the decision-making process to determine whether an error was made? Or whether the decision might on one view of matters have been considered a reasonable exercise of discretion? What is to be the test? What standard or degree of "error" would be needed for the court to intervene? In connection with questions such as this the Solicitor General submitted that the approach should be that the making and intimation of a decision not to prosecute should only be one factor and that the question should be a straightforward one: whether to allow the prosecution to proceed would, in the circumstances be oppressive. But this would surely require – at least in some cases – examination of the kind of matter which the court has repeatedly declined to examine regarding discretionary decisions of the Lord Advocate. This is something which was considered in another context in *Stewart* v *Payne* 2017 JC 155. Paragraph 95 is particularly relevant in relation to the constitutional arrangements under which the role of prosecutor is given to the Lord Advocate, and the need not to confuse the functions of the court with those of the Lord Advocate, and the difficulties inherent in any approach which may require examination of the Lord Advocate 's exercise of her prosecutorial discretion.

[26] How would matters proceed where the issue related to the discovery of new evidence? In cases where new evidence may be considered in an appeal, or in connection with double jeopardy, there are elaborate statutory rules governing the circumstances in, and conditions upon, which such evidence may be admitted. Is the court to try to adapt these to cover the situation, without the benefit of statutory guidance? Does the strength of

the Crown case, with and without the "new" evidence have to be assessed? Must there be an explanation why the evidence was not known about at the time of the decision? Or whether it could have been discovered? Surely there are policy considerations here, and the scope for unintended consequences of a high degree, which go substantially beyond the extent to which it would be appropriate for the court to engage in policy-driven decision-making.

[27] The test to be met for the establishing of oppression is a high one, and it seems to us clear that if the Solicitor General's submission were to be accepted the whole concept of oppression, as currently understood, and the test applied for its establishment, would require to be re-examined. One might well ask, where the Crown seeks to be discharged from the consequences of a deliberate decision made in the knowledge of its consequences, why the burden should fall on an accused person – who may have passed many years on the assumption that the Lord Advocate would be held to her word- to prove oppression, rather than requiring the Crown to justify the change of mind and the fairness of proceeding. There are many public interest issues here, pulling in different directions, which indicate that this is not an apt matter for reform by judicial development of the law.

2. In any event, *Thom* was no longer good law and should not be followed.

[28] The Solicitor General dealt with this under four headings: (i) ECHR rights, (ii) the public interest and the rights of complainers; (iii) modern developments and (iv) the approach of other jurisdictions. These points tended to merge into one another, and we do not seek to deal with them individually.

[29] The Solicitor General argued that the duty under Articles 3 and 8 to ensure effective investigation and prosecution of crimes involved a requirement that the rules devised therefor be properly applied in practice. The duty was owed to individuals and defects in

an individual case at operational rather than systemic level could constitute a breach. In the present case the effect of the operation of the absolute rule in *Thom* deprived the complainer of an effective prosecution. That there were civil remedies available was not sufficient: the Convention required a criminal prosecution.

[30] From the authorities referred to (principally *MC* v *Bulgaria* (2005) 40 EHRR 20; *O'Keeffe* v *Ireland* (2014) 59 EHRR 15; and *Commissioner of Police for the Metropolis* v *DSD* 2019 AC 196) we consider that the following propositions may be drawn:

- Article 3 ECHR may give rise to a positive obligation to conduct an official investigation. A failure properly to investigate allegations may constitute a violation of the complainer's rights under Articles 3 and 8;
- States have a positive obligation inherent in Articles 3 and 8 to enact provisions which effectively punish crimes and to apply them in practice through effective investigation and prosecution;
- In order to be an effective deterrent, laws which prohibit conduct constituting a breach of Article 3 must be rigorously enforced and complaints of such conduct must be properly investigated. Enquiries should, in principle, be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. That investigation should be conducted independently, promptly and with reasonable expedition, allowing effective participation by the victim;
- The objective is to ensure the detection and punishment of crime, so the existence of a civil remedy will not prevent a relevant breach being established, in which case compensation may be conferred as part of an award of just satisfaction;
- A breach may be established through systemic or operational defects, but in respect of the latter it will be necessary to establish serious failures which were egregious

and significant going beyond simple errors or isolated omissions.

[31] It has not been suggested that there is any systemic deficiency. There is in place a system of investigation and public prosecution of crime in Scotland, which at a general systemic level is compliant with Articles 3 and 8 ECHR. The process for investigation of crime incorporates all of the aspects envisaged in *O'Keeffe*. It is not the fact that following *Thom* the Crown may be held to a clear and unequivocal renunciation of the right to prosecute which is the problem, if problem there be, but the Crown decision to issue the letter in the first place, knowing the consequences thereof. *Thom* does not require the Crown to issue such letters, nor does it prevent the Crown from attaching suitable qualifications to any such letters. Rather, the argument is that any potential contravention of the complainer's Article 3 rights arises by way of human error in the operation of the system. However, as we have noted above whether what occurred in this case merits that description is open to question. On the question whether operational deficiencies may constitute a relevant breach "only conspicuous or substantial errors in investigation would qualify" (*DSD* Lord Kerr, paras 29, 53, 72; Lord Neuberger para 98). It is not possible on the information available to us to reach a properly reasoned view that there have been failures which meet the test for operational deficiencies to constitute a breach of Convention rights.

[32] In any event, had we concluded otherwise, it does not follow that an isolated instance such as this should require the law to be restated and a larger court convened to reconsider *Thom*. The Lord Advocate may not proceed with a prosecution but that does not necessarily apply to the complainer (*X* v *Sweeney* 1982 JC 70*)* and if she were able to establish that the circumstances as a matter of fact amounted to a breach of her Convention rights she may be entitled to seek compensation (*DSD* Lord Kerr, para 63). There may no doubt be other civil remedies open to her.

[33] The public interest has always been relevant to the Lord Advocate's discretion in such matters, and that is no doubt why the prosecutorial rules are written as they are, advocating a certain degree of caution. The public interest in the investigation and suppression of crime has not changed since *Thom* or indeed long before, and was in fact one of the strongest factors in the historical development of the role of the Lord Advocate as the sole prosecutor in the public interest in our system.

[34] As to modern developments, whilst the rights of complainers (and others) within our system has been the subject of significant development over recent years, these rights do not extend to allowing a challenge to be made to the decision of the Lord Advocate on whether or not to prosecute. A review of a decision may be requested, but the review is carried out by the Lord Advocate, and her decision cannot be the subject of challenge in or by the courts. No such request may be made for decisions made prior to 1 July 2015.

[35] As the sheriff noted in her report (para 17), it is undoubtedly true that there have been changes, not to say improvements, in techniques of investigation and detection, of attitudes towards certain offences, and the development of *Moorov*, since *Thom*. However, it is not suggested that these have any relevance to the circumstances of this case. In any event, that investigation techniques improve over time is trite; as is the possibility that new evidence may emerge. The proper way to guard against such an eventuality in appropriate cases lies in the hands of the Crown. As we have noted above, and as the sheriff recorded, it was open to the Crown to qualify any decision not to prosecute with the addition of a simple caveat –"at this time" or "on present information" – to preserve a position. It chose not to do so. That other systems deal with the same issue in a different way is not a reason for the court to consider changing the law. Regard must be had to the context in which the law

operates, and in this case the particular and special role of the Lord Advocate as prosecutor in the public interest.

[36] For all these reasons we are driven to reject the submission that *Thom* is no longer good law and must be reconsidered.

3. *Separatim*, in any event, *Thom* could and should have been distinguished on its facts, leading to a different result.

[37] As we have observed, *Thom* is not based on notions of oppression, but on the concept of renunciation of the right to prosecute. In *Weir* v *HMA* (para 14) it was recognised that oppression was a different argument, which might be advanced on an *esto* basis (although the court reserved opinion on whether it might have succeeded in that case). Another distinguished bench in *X* v *Sweeney* confirmed the decision in *Thom*, and did so under reference to Hume. For the reasons already given, we do not consider that *Thom* can be said to have been wrongly decided.

[38] However, it would not do to overstate the effect of *Thom*. It applies only to public statements which are, or which fall to be construed as, a clear and unequivocal renunciation of the right to prosecute the individual concerned on the relevant charge. The key questions are whether the statement is a clear renunciation; whether the individual who is the beneficiary of the renunciation is properly identified; and whether the nature of the charge to which the renunciation relates can be suitably identified. The approach should not be akin to construction of a conveyancing document, but all these factors should be capable of being reliably discerned from the circumstances of the case. To enable the court to determine whether there has been a statement which is, or falls to be construed as, a clear renunciation of the right, it is entitled to consider all circumstances of the case which might bear on that issue (see for example, *Weir* para 12; and *Stewart* v *HMA* 1908 JC 84). *Stewart*

was a very clear example of the court doing this – of construing the statements or letters in their proper context. The judge approached the matter by asking the correct question, namely whether there was such a clear and unequivocal renunciation relating to the accused and the offending as should be binding on the Lord Advocate. For the reasons given in the opinion, which relate not only to the letter which included the renunciation, but the correspondence of which it was part, the court was satisfied that the three matters we have identified were sufficiently apparent.

[39] The Solicitor General sought to advance her argument under reference to the case of *Waddell* v *HMA* 1976 SLT (Notes) 61 where the court concluded that there having been no charge advanced against the individual in question there could be no question of renunciation. The circumstances of the case were somewhat unusual. At the time of the making of the statement another individual was in custody for the murder in question, having been convicted and had his conviction upheld on appeal. There is no full report of the decision which is supplied only in the Notes section of the SLT reports. It is apparent from p61 that the judge addressed the correct question, namely "whether the Lord Advocate or others on his behalf had unequivocally renounced the right to prosecute Waddell" for the murder in question. The issue of whether someone has been charged may be relevant to that determination. Clearly, where the person has appeared on petition, say, or otherwise been charged with an offence, which becomes the subject of a renunciation, it may be easier to identify whether a clear renunciation has been made, than when no specific charge has been made against someone. However, the presentation of a charge at any stage is not a prerequisite, simply one factor in determination of the primary question. Whether an individual who is the subject of the renunciation has been adequately identified, and whether the nature of the crime for which prosecution has been renounced is sufficiently

clear will be factors in addressing that issue. *Stewart* is an example where examination of the circumstances suggested that those questions could be answered affirmatively, having regard to the nature of the correspondence, even though no charges had been preferred.

[40] In the present case all three questions may be answered with ease in favour of the respondent and there is no basis for considering that the sheriff erred in declining to distinguish *Thom* on the facts.

[41] For all those reasons we shall affirm the decision of the court of first instance and refuse the appeal