OUTER HOUSE, COURT OF SESSION

[2018] CSOH 20

A765/04

OPINION OF LORD TURNBULL

In the cause

THOMAS SHERIDAN

Pursuer

against

NEWS GROUP NEWSPAPERS LIMITED

Defender

Pursuer: Dangerfield (sol adv); Archer Coyle Solicitors
Defender: Dunlop QC et Campbell; Ledingham Chalmers LLP
Minuter: Hamilton; Gillespie Macandrew LLP

8 March 2018

Introduction

[1] On 14 November 2004, the defenders published an article in the News of the World Sunday Newspaper ("the News of the World") in which various allegations were made about the pursuer's private life, including an allegation that he had conducted an affair with a woman by the name of Fiona McGuire. The pursuer raised an action of defamation and the civil trial which ensued concluded on 4 August 2006, when the jury pronounced a verdict in his favour assessing damages at £200,000. A little over 11 years later, on 30 August 2017, the pursuer enrolled a motion in terms of Rule of Court 37.10 seeking to have the verdict applied. Allied to that motion was an application for interest to be included

in the decree at the rate of 8% per annum from 14 November 2004, or such later date as might seem proper, and a motion that the pursuer be awarded the expenses of the action, save as already awarded.

Background

[2] These motions comprise the concluding chapter in a remarkable litigation, in which a then Member of the Scottish Parliament, sought to sue what was at one time said to be the highest selling English language newspaper in the world. A publication which, it was said in evidence before me, "prided itself in exposing hypocrisy". In order to weigh the competing arguments in their proper context, and given the time which has passed, it will be useful to recap some of the history of the case and the events associated with it. It all began with the article published by the defenders on 14 November 2004.

[3] The summons for defamation was signeted on 23 November 2004. The civil jury trial began on 4 July 2006 and lasted for five weeks. Throughout the course of the trial the jurors were exposed to an extraordinary array of witnesses, including; Members of the Scottish Parliament, journalists, politicians and authors, all of many hues and descriptions, investigators, news editors, party activists and others who had simply been caught up in the whirlwind of ever increasing animosity and contempt which each of the parties held for the other. Bitter exchanges were swapped across the courtroom between the pursuer and many of his former colleagues. Some were accused of lying about admissions they testified to hearing the pursuer make at a political meeting. These included the witness Alan McCombes, who earlier in the proceedings had been sent to prison for refusing to comply with a court order requiring him to release to the defenders minutes of a Scottish Socialist Party Meeting which undermined the pursuer. The case captured the interest of the public over the weeks of its

progress with the public benches being full each day, reports appearing daily in all forms of news media and photographs of the main characters appearing daily as they made their way to and from the court.

[4] On 4 August 2006, the trial concluded with the pursuer being awarded the largest sum for defamation ever pronounced in Scotland. That evening, film of the pursuer and his wife emerging triumphantly from the Court of Session to address a crowd of his supporters in Parliament Square was broadcast on the national news, and the story appeared as front page news on most of the following day's newspapers. From that high point for the pursuer matters soon began to take a turn for the worse.

[5] On 11 August 2006, the defenders enrolled a motion for a new trial. Within a few weeks the defenders were in discussion with George McNeilage, a close friend of the pursuer for many years. Mr McNeilage sold to the defenders a tape recording which he claimed to have taken surreptitiously in 2004, in which, it was said, the pursuer could be heard making a number of admissions which contradicted evidence he gave at the jury trial. Around the same time, the police commenced a criminal investigation into allegations that the pursuer and his wife had given perjured evidence during the civil jury trial.

[6] In late 2010, both the pursuer and his wife went to trial in the High Court at Glasgow on charges alleging that they had committed perjury in the course of giving evidence at the civil jury trial in 2006. A number of those who had given evidence in the Court of Session proceedings found themselves giving evidence again about the same subject matter. One of those witnesses was KT.

[7] Having dispensed with his legal representatives on the eve of the High Court trial, as he did in the early stages of his civil jury trial, the pursuer conducted his own defence and gave evidence on his own behalf. The charges against his wife were withdrawn but he was

convicted. The terms of the charges of which he was convicted were that he had lied to the civil jury when he denied:

- that at the SSP executive committee meeting on 9 November 2004, he had made admissions about having visited Cupid's Club in Manchester on two occasions, one in 1996 and one in 2002, and having visited the Club with AK
- that at the said meeting, Mr McCombes and Mr Baldassara stated that the pursuer had admitted to them that it was true that he had attended a sex club in Manchester
- that at said meeting, he did not deny having visited a swingers club in Manchester
- that he visited Cupid's Club on 26 September 2002 in the company of others including AK and KT
- that he had a sexual relationship with KT between 1 January 2000 and 31 December 2005, including staying overnight with her at an address in Dundee.

[8] On 26 January 2011, he was sentenced to 3 years' imprisonment. The pursuer was refused leave to appeal his conviction and failed in a subsequent application to the Scottish Criminal Cases Review Commission in which he asked them to refer his case back to the Court of Appeal.

[9] In the period between the verdict in the civil jury trial and the pursuer's High Court trial, the News of the World and certain of its employees had also come to the attention of the police. In January 2007, Glen Mulcaire, an independent investigator who had undertaken work for the News of the World, and the paper's royal editor Clive Goodman, were both convicted of illegally intercepting phone messages from Clarence House.

Mulcaire was sentenced to six months' imprisonment and Goodman to four months. The defenders' parent company, News International, and others, issued assurances that no one else had been involved in phone hacking.

[10] In the aftermath of these convictions, the News of the World editor at the time, Andy Coulson, resigned. By the time of the pursuer's High Court trial in 2010, he was employed as Director of Communications for the then Prime Minister David Cameron. Mr Coulson was called as a defence witness by the pursuer who sought to question him about phone hacking by the defenders generally and also in association with his defamation case. Mr Coulson denied knowledge of any such activities.

[11] On the same day as the pursuer was sentenced to imprisonment in the High Court, the Metropolitan Police announced that it would begin a new investigation into phone hacking. Over the next few months, a number of employees of the News of the World were arrested and interviewed. A number of civil actions were raised claiming damages for breach of privacy as a consequence of phone hacking. Some of these were settled but it was insisted that others would be contested. By July 2011, it was being suggested that the telephone of the murdered teenager Milly Dowler had been hacked in the period after her disappearance. As the storm of discontent increased around the News of the World it was announced, on 7 July 2011, that it would close and that its 168 year history in print would come to an end, with its last edition being published on 10 July 2011.

[12] The demise of the News of the World did not signal the end of the trouble for all of those associated with it. On 28 October 2013, Mr Coulson, Rebekah Brooks, the paper's former editor and others, including Mr Mulcaire and Mr Goodman, were all tried at the Old Bailey in London on charges arising out of the phone hacking scandal. At the conclusion of the trial in June 2014, Mr Coulson was found guilty of a charge of conspiracy

to intercept voicemails and was sentenced to 18 months in prison. After his release from this sentence, Mr Coulson appeared for trial in the High Court at Glasgow on a charge that he had committed perjury in the evidence he gave at the trial of the pursuer and his wife in that same court in 2010. He was acquitted.

The history of the present action post-verdict

[13] The defenders enrolled for a new trial within the period provided for by Rule of Court 39.1. The relevant history thereafter is as follows:

- on 15 August 2006, the case was appointed to the Summar Roll for a hearing
- on 7 November 2006, and 13 February 2007, the time for lodging the appendix was prorogated on the defenders unopposed motion
- on 24 April 2007, the defenders' motion to discharge the Summar Roll hearing then set for 4 December 2007 was opposed by the pursuer and refused
- on 25 September 2007, having heard counsel for the defenders, the pursuer personally and counsel representing the Lord Advocate's office, the case was sisted and the Summar Roll hearing discharged
- on 14 February 2012, having heard counsel for both the pursuer and the defenders, the defenders motion to recall the sist was refused
- on 17 September 2015, on the unopposed motion of the defenders, the sist was recalled
- on 18 November 2015, the court was informed that counsel for the pursuer was no longer acting and the court continued the case until 18 December 2015 to enable him to instruct new counsel. The case was appointed to the Summar Roll for a hearing on 10 May 2016

- on 12 May 2016, the court made avizandum.

[14] The defenders' motion for a new trial was refused by the Inner House in the decision of the court given by Lady Paton on 19 August 2016 ((2016) CSIH 67). In the final hearing before the Inner House the defenders sought to set aside the verdict of the jury on three grounds:

- it was essential to the justice of the cause for the verdict to be quashed as unsafe since it would be contrary to the justice of the cause to allow the verdict to stand when the pursuer had been convicted of perjured evidence given in the civil jury trial
- the verdict was contrary to the evidence
- *res novitoer veniens ad notitiam*; namely the fact of the perjury conviction and the new evidence available from Mr McNeilage and from another woman who had claimed to have had a long-term extramarital affair with the pursuer.

[15] In support of the original verdict the pursuer's submissions were that:

- he denied lying in the course of the civil jury trial
- it was frequently overlooked that the original article was now known to be wholly untrue, the woman concerned had now provided a statement to the police to that effect
- the McNeilage tape and the story from the new woman were untrue and shabby products of cheque-book journalism, adding nothing new to the case
- the defenders had acted illegally and in a manner which was an abuse of process and in ways which constituted an attempt to pervert the course of justice.

[16] In giving its decision, the court noted that the pursuer had presented his case at the civil jury trial on the basis that his honesty and his marital fidelity were key issues.

However, the court also observed that the jury may well have disbelieved large parts of his evidence, and yet been satisfied that the issue should be answered in the way it was (paragraph [61]). In paragraph [72] the court stated that it was:

> "… open to the jury to conclude that the pursuer had lied to them in the civil jury trial about several matters (for example, about his relationship with KT, and about what he said at the SSP executive meeting on 9 November 2004, where his evidence had to be set against that of an impressive number of his former friends and colleagues) and yet to decide, on the basis of their assessment of all the evidence, that the unproved claim relating to Fiona McGuire was so torrid, lurid and salacious that the 5-page article about Fiona McGuire on 14 November 2004 (and further articles and headlines concerning Fiona McGuire) still did materially injure the pursuer's reputation, in that the allegations in those articles tended to lower the pursuer in the estimation of even fairly liberal-minded members of society generally."

Having arrived at that conclusion the court's view, as expressed at paragraph [74], was as follows:

> "It seems to us therefore that the jury's affirmative answer to the issue was likely to have been reached by a route which did not necessarily turn on the pursuer being awarded a badge of total credibility, total reliability, nor, indeed, total fidelity."

It was in this context that the court then considered the grounds upon which the defenders sought a new trial and concluded that none of those grounds was made out.

[17] The interlocutor and motion sheets in the case show that immediately thereafter an application for permission to appeal to the United Kingdom Supreme Court was intimated by Minute and Answer procedure. That application was refused on 3 November 2016. In circumstances which were not touched upon at the hearing before me, there was then a significant period of apparent inactivity. In April 2017, a motion to apply the verdict and to award interest and expenses was enrolled. This motion was opposed in relation to interest and expenses and did not call in court. It was dropped by e-mail from the pursuer's agents in August 2017. It was not until 21 August 2017, a full year after the Inner House decision had been advised, that a motion for expenses in that process was properly enrolled.

[18] By interlocutor of 22 September 2017, the defenders were found liable to the pursuer in the expenses of and in connection with the application for a new jury trial in the Inner House, all on a party and party basis, and in respect of those parts of the proceedings where the pursuer was a party litigant, the court directed that expenses were to be assessed in terms of the Act of Sederunt (Expenses of Party Litigants) 1976. The pursuer's former agents were sisted into the action as agent-disburser and *quoad ultra* the case was remitted to me to proceed as accords.

Pursuers submissions

[19] Mr Dangerfield explained to me that the defenders paid the pursuer the principal sum of £200,000 on 30 May 2017. In these circumstances the motion to apply the jury's verdict in terms of Rule of Court 37.10 was in the nature of a formality.

[20] He drew my attention to the second conclusion in the pursuer's summons, which was for the expenses of the action. He relied on the terms of Rule of Court 7.7 which provides that where interest is included in, or payable under, a decree, it shall be at the rate of 8% a year unless otherwise stated. He submitted that the pursuer was entitled to an award of interest on the principal sum at that rate for the period from publication (14 November 2004) until 4 August 2006, the date of the jury's verdict. This amounted to a sum, rounded down to the nearest pound, of £27,473. In addition, he submitted that the pursuer was entitled to interest at the same rate for the period from the date of the verdict to 30 May 2017. This amounted to a sum, again rounded down to the nearest pound, of £173,159. The total sought by way of interest was therefore the sum of £200,632. He relied upon the decisions in the cases of *Baigent* v *British Broadcasting Corporation* 2001 SC 281, *Tait* v *Campbell* 2004 SLT 187, *Gilbert* v *Yorston* 1997 SLT 879 and *RAH* v *MH* [2013] CSIH 82.

[21] In relation to his motion for expenses, it was said that the pursuer had been wholly successful in his action. The normal rule that expenses follow success should apply. The defenders had used the civil trial procedure from the outset for the improper purpose of attempting to pervert the course of justice. They obtained evidence by criminal means, including phone tapping, and sought to use that evidence to further their case. They concealed their criminal behaviour and the criminal provenance of their evidence from the court. In light of the defenders' conduct it was submitted that the circumstances were sufficiently exceptional to warrant an award of expenses on the scale of solicitor and client, client paying, which failing the scale of solicitor and client, third party paying.

[22] In support of the pursuer's motions, Mr Dangerfield relied upon various documentary productions lodged. Putting it shortly, these were all referred to in order to show that the defenders had acted improperly, and, as was asserted, illegally, in various different ways in connection with the preparation for and conduct of the civil jury trial and subsequent procedure. Certain of these documents had only been recovered as a result of the later police enquiries into the conduct of the News of the World and had not been available to the pursuer at the time of his High Court trial.

[23] The documents included copies of e-mails bearing to have been sent from Mr Bob Bird, who was the editor of the Scottish edition of the News of the World. On the motion of senior counsel for the defenders, he had been permitted to sit in court throughout the civil jury trial on the basis that he was the nearest that counsel had to a client. Those e-mails appeared to vouch regular and open requests being made by Mr Bird to others within the organisation to engage in enquiries in relation to telephone numbers associated with Mr Sheridan. All of this, it was said, involved improper invasions of privacy and worse. The documentation relied upon included material recovered from Mr Mulcaire,

which appeared to vouch that he been instructed to hack into the pursuer's phone. Mr Dangerfield sought to demonstrate that improper use of private information had been resorted to by the defenders in preparation for the civil jury trial which then enabled them to identify individuals whom they thought would be of value to them and who were subsequently led as witnesses. Reference was then made to the testimony given at the civil trial by certain of the defenders' employees as to how they had identified these witnesses. This evidence, it was said, was given falsely in order to disguise the improper conduct which had earlier been engaged in.

[24] The documentation which Mr Dangerfield perhaps saw as the most damning of the defenders' conduct was that which concerned Fiona McGuire. Attention was drawn to an undated memorandum, apparently from Mr Bird, to the Managing Editor of the News of the World, in which he enclosed what he described as "two hefty Sheridan related bills". One, in the sum of £9,889.44, was described in this fashion:

> "But the other relates to an emergency operation to get Fiona McGuire out of the country when it was stated in court that Mr Sheridan might be re-calling her to the witness box. Andy knew about the urgency and secrecy needed re this operation and that she would be going abroad somewhere. Tom likewise. Both agreed it had to be done by someone who had no connections to the paper. But we had no idea how much it was going to cost us. We were somewhat desperate at the time."

Mr Dangerfield asserted that the two other individuals mentioned in the body of the memorandum were also senior figures within the News of the World. He stated who he claimed they were and what positions they held. This, he asserted, was evidence of an attempt on the part of the defenders to pervert the course of justice during the currency of the civil jury trial. In light of what he submitted were the obvious inferences to be drawn from the documentation in totality, Mr Dangerfield characterised those of the defenders' employees involved as criminals.

[25] A further important aspect of the payment made to spirit Ms McGuire out of the country (she had been taken to Dubai and accommodated in a hotel) also fell to be considered. In the course of the pursuer's preparation for his defence to the indictment which he faced in the High Court, an order had been made by the court, on the pursuer's application, requiring the defenders to hand over documentation relating to the payments which they had made in connection with his civil jury trial. As I understood it, the documentation provided in compliance with the order included a list of payments made in which reference to the cost of sending Fiona McGuire abroad had been deleted. This only came to the attention of the pursuer when a further copy of the same document, but without any redactions on it, was recovered from the News of the World's premises in connection with later police enquiries and was made available to him during his subsequent attempts to have his conviction reviewed.

[26] Mr Dangerfield drew my attention to what had been said by the Inner House at paragraph [95] of the decision in relation to the submissions presented to that court on this material:

> "Had we been in a position to treat the pursuer's allegations as established fact, we consider that the picture thus painted would have been indicative not only of wilful contempt on the defenders' part in relation to a specific order of the court in the criminal process, but also of such a disregard for proper journalistic conduct and for certain requirements of the criminal law that we would have had to give serious thought to the question whether the defenders should be allowed to proceed further."

He submitted that counsel for the defenders ought now to be in a position to explain their conduct, or acknowledge that what were allegations before the Inner House should now be treated as established fact.

Defenders submissions

[27] On behalf of the defenders, Mr Dunlop QC submitted that the question of whether, and to what extent, any award for interest ought to be made was determined by the common law governing interest on damages, as amended by the Interest on Damages (Scotland) Act 1958 ("the 1958 Act"). That Act had itself been amended by the Damages (Scotland) Act 1971. The relevant provisions of the 1958 Act for the purposes of this submission were sections 1(1) and 1(1A) as they had come to be after the 1971 amendments. The present case was one in which damages were awarded in respect of defamation and was therefore governed by section 1(1). An action for defamation was not an action seeking damages for personal injuries. He referred to *Mack* v *Glasgow City Council* 2006 SC 543. The effect of that categorisation was that the court had a discretion to award interest on damages from a date prior to the date of the final decree. This was to be contrasted with the circumstances of a case in which damages were awarded for solatium in respect of personal injuries. Such a case was governed by section 1(1A) with the effect that the court required to exercise its power to award interest on those damages in the manner set out in that subsection.

[28] Mr Dunlop submitted that a proper understanding of the common law, as amended by the 1958 Act, meant that interest in the present case would only run from the point at which the jury's verdict was applied. The normal rule was that interest did not run during the period between the date of the jury's decision and the application of the verdict. Although the court had a discretion to make an award to date from an earlier point, that would not normally arise unless there had been undue delay on the part of the defenders, or other such obstructive conduct. The pursuer's motion to apply the verdict had not been delayed because of any fault on the part of the defenders. It was as a result of the pursuer's

own trial and conviction for perjury and of him resisting recall of the sist in February 2012. There had been no unlawful withholding of sums due by the defender. There were no exceptional circumstances justifying departure from the normal rule. Since the principal sum had already been paid there was no room for any award of interest. In any event it was submitted that the rate of interest sought was excessive.

[29] In the alternative, and on the basis that section 1(1A) of the 1958 Act applied, Mr Dunlop submitted that the court still had a discretion as to whether or not to make an award of interest, and as to when any such award should date from, if there were reasons special to the case which warranted that course. He submitted that such reasons existed by virtue of the pursuer's conduct in committing perjury during the course of the litigation.

[30] For an explanation of the common law position prior to the statutory amendment Mr Dunlop referred me to *Roger* v *J & P Cochrane & Company and Another* 1910 SC 1, *MacRae* v *Reed and Mallik Ltd* 1961 SC 68 and *Wilson* v *Dunbar Bank PLC* 2008 SC 457. For an understanding of the position after the introduction of the 1958 Act he referred me to *Smith* v *Middleton* 1972 SC 30 and again to *Wilson* v *Dunbar Bank*. Insofar as certain of the cases relied upon by the pursuer appeared to suggest different results in individual cases, Mr Dunlop submitted that the issue of how the law governing the award of interest should properly be applied had not been raised in any of those cases. In particular, the common law rule as amended had not been identified and applied or considered.

[31] In relation to expenses, Mr Dunlop submitted that it was a matter which fell entirely within the discretion of the court, taking into account all the circumstances of the case. He referred me to *Shepherd* v *Elliot (*1896) 23R 695. He acknowledged the import of the various documents recovered from the defenders upon which Mr Dangerfield had relied. He pointed out that those named within the documentation, and those about whom assertions

had been made, were no longer employed by the defenders. He was not in a position to make submissions or admissions on their behalf. However, he submitted that the court should simply treat the documents for what they were and was content that for present purposes any obvious inferences should be drawn.

[32] Mr Dunlop acknowledged that valid criticisms had been made of the behaviour of those concerned with the News of the World but submitted that the pursuer's own conduct required to be weighed in the balance. He observed that the pursuer embarked upon an action of defamation which had as its primary purpose vindication of his reputation. Rather than emerge with his reputation cleared, he emerged as a convicted perjurer, albeit £200,000 the better off. That, he submitted, was an unusual state of affairs for someone conducting litigation of this sort. The reality was that each side was as bad as the other. He submitted that a fair and proportionate exercise of my discretion would result in a finding of no expenses due to or by either party. This was particularly so since the pursuer had conducted much of the proceedings himself. In any event, he submitted that there was no basis for an award of expenses being made on any scale other than party and party.

Reply for the pursuer

[33] In light of the detailed analysis of the legal position concerning the award of interest which had been undertaken by Mr Dunlop, I afforded Mr Dangerfield an opportunity to respond on this issue. He invited me to follow the course which had been taken in *Tait* v *Campbell* and had no submission to make on the application of the cases referred to by senior counsel for the defenders.

Discussion

[34] Mr Dangerfield's submissions on behalf of the pursuer were notable for the absence of any acknowledgement of the fact that Mr Sheridan had committed perjury in giving evidence in the course of the action in which he was successful. There was no recognition of the fact that false accusations had been put by Mr Sheridan to various witnesses, far less was there any acknowledgement of the impact which such conduct might have had. The bulk of the time occupied by his submissions was taken up with an attack on the manner in which the News of the World, and those working for it, had conducted themselves, both generally in their work as journalists and in the conduct of the present litigation. These submissions were presented as though the pursuer could occupy a position of moral and legal righteousness. No amount of effort on the court's part to persuade Mr Dangerfield that an exercise of discretion would require the pursuer's own criminality to be weighed in the balance had the effect of tempering these submissions. Indeed, the irony of the two bitter protagonists to this litigation being bound together by the single common characteristic of criminality appeared to pass unnoticed.

[35] I accept, as is obvious, and as has been so comprehensively demonstrated by the events which have unfolded over the years since the jury trial concluded, that some of those associated with the News of the World conducted themselves, on many occasions, in ways which were entirely unacceptable. Some even engaged in criminality. In preparation for the civil jury trial it seems clear that the defenders engaged in phone hacking and other unwarranted invasions of privacy. Whether those more junior members of staff who gave evidence about tracking down witnesses were aware of the methods which lay behind their instructions I cannot say.

[36] For the defenders to have paid to have Fiona McGuire spirited away to Dubai in order to thwart a motion to have her recalled was utterly reprehensible. Mr Bird, in particular, conducted himself in a manner which might have warranted criminal proceedings had the arrangement been successful. He abused the trust of the court in allowing him to remain in the courtroom throughout the proceedings. As it happens of course, no motion to recall this witness was in fact made and the money was wasted.

[37] I am only concerned with the present action and had no involvement with the subsequent criminal trial. Conduct associated with that case can only carry limited weight in connection with the decisions in respect of the motions before me. Nevertheless, the documentation shown to me suggests that there was a deliberate decision made to defy the court order pronounced by concealing information about the expenses associated with Ms McGuire's trip to Dubai. That, of course, is of particular concern. I understand that Mr Bird was interviewed by police officers at one stage and may even have been charged but I have no information as to the focus of those enquiries. I do not know whether the response to the court order has been the subject of a criminal enquiry or not.

[38] As set against all of that, the pursuer, a serving and elected Member of the Scottish Parliament at the time, committed blatant and repeated perjury in the conduct of his own case. Some might think that those who represent their constituents in Parliament are expected to conduct themselves with a degree of public propriety which sets them apart from the worst of the conduct of the tabloid newspapers. When asked how he suggested the pursuer's conduct should be weighed in the balance, as against the behaviour of the defenders which he founded upon, Mr Dangerfield submitted that it should be seen as "many levels below". This was consistent with the theme of denial which permeated all that was said. As if the matter remained for final determination, I was told that Mr Sheridan had

"answered" the fact of his conviction. This transpired to mean that, having been refused leave to appeal, and having had his application to the Scottish Criminal Cases Review Commission rejected, he was pursuing a Judicial Review of that decision. For a time, Mr Dangerfield seemed to be submitting that I should not take any account of the conviction since Mr Sheridan continued to deny his guilt. I made it plain that this was an unacceptable submission.

[39] Since the conduct of the defenders was at the heart of so much of what was relied upon in the pursuer's submissions, it has become necessary to revisit the distasteful matter of the manner in which he conducted himself. I cannot adjudicate upon his motions, based as they are to such an extent on criticisms of the defenders, without taking account of his own conduct. I am entitled to do so in any event as a matter of law. Both questions of interest and expenses have discretionary elements to them. The jury's verdict was arrived at by considering the conduct of the parties, but by reference solely to the questions in the issues. The jury had no duty or right to consider the question of expenses (or interest). As was said in *Shepherd* v *Elliot* at page 697:

> "There is no incompatibility between the function of the jury in answering the issue, and the function of the Court in examining the same material for the decision of the separate question of expenses."

[40] Before considering the legal issues which arise it will be necessary then to set the conduct of the parties in context. For this purpose I am prepared to accept that most of the allegations made on behalf of the pursuer against the News of the World and its employees are established. What then of the pursuer? He stands convicted of the crime of perjury. It is necessary to take note of what that crime comprises. MacDonald on the *Criminal Law of Scotland*, 5th Edition at page 164, explains that the crime of perjury is the judicial affirmation of falsehood upon oath. The author explains that the ingredients of the crime are that:

- the falsehood must be explicit and irreconcilable with the truth
- there must be an explicit denial of what is true or an explicit assertion of what is false
- it must be proved that the perjurer swore to certain things knowing them to be false and knowing what was the truth
- the statement must be made wilfully and corruptly.

This then is the measure of the conduct engaged in by the pursuer. How should such a crime be viewed? The nature of the crime is described in Allison's *Principles of the Criminal Law of Scotland* Volume I page 465 in the following way:

> "Perjury, or the judicial affirmation of falsehood upon oath, is justly regarded as a transgression of the most heinous nature, both as implying a wilful disregard of the sanction of an oath, and as tending directly to undermine the security on which all judicial proceedings and the most important contracts of life are founded."

[41] I am as well placed as any, and perhaps better placed than those who have come to be involved with the litigation in its latter stages, to form a view as to the culpability associated with the pursuer's criminal conduct. To see the pursuer accuse members of his own political party, with whom he had such a long and close relationship, of themselves lying in the evidence which they gave was a most unsavoury sight. Those accused of lying in court included other elected Members of the Scottish Parliament.

[42] A further aspect of the case which came to occupy prominence in the positions which the respective parties took was the matter of the pursuer's visit to Cupid's Club in Manchester in the company of other males and the two women, AK and KT. This was described as a "swingers" club in which adults engaged in sexual activity in front of the other attendees and in which visitors were able to engage in casual sexual activity with others.

[43] By the time of giving evidence KT was 31 years old. She had a degree from Robert Gordon University in Aberdeen and worked for NHS Tayside with people who had learning disabilities. She gave evidence that she met Mr Sheridan through an interest in the Scottish Socialist Party when she was aged around 25. She commenced a relationship with him during the course of which they had sexual intercourse on a number of occasions over the next few years. She was persuaded by him to visit the club in Manchester with him and the others. She also explained that on one occasion the pursuer stayed overnight with her at the flat in Dundee which she shared with her friend from university, RA. Her friend's boyfriend, RB, was also present. KT gave her evidence in a most articulate, impressive and straightforward manner and it was perfectly obvious that she was telling the truth in all that she said. She was accused of lying in her evidence and of doing so at the behest of others from the Scottish Socialist Party who were trying to undermine the pursuer politically.

[44] Unsurprisingly, KT was embarrassed at having to give evidence about aspects of her personal and sexual life conducted when she was in her mid-20s. When re-examined by senior counsel for the defenders and asked whether she was lying, she became visibly upset. She gave an explanation recorded in the transcript of that day's evidence as follows:

> "A. No, I am certainly not. It is embarrassing enough to have that all over the papers, and to have made it up. I wouldn't do such a thing. This case has cost me quite a lot of grief lately.
>
> Q. Can you explain why?
>
> A. Because colleagues, and---
>
> MR JONES: I have no wish to upset you, Miss (T)
>
> LORD TURNBULL: Do you want to take a moment or two? We usually have a break about this sort of time in the afternoon anyway. I take it you have a little more, Mr Jones?
>
> MR JONES: Not very much, but it may be suitable?

> A. No, it is okay. Because all my colleagues, my clients, my friends, my new boyfriend and his family, have read all this about me and it is very embarrassing, and, yes, I did do all these things, but I have changed a lot the past years and they are embarrassing about what happened. And I would never have made such a thing up. To go through all this pain and cause pain to those who are nearest to me.
>
> Q. Take some water. And you realise, Miss (T), that it is being suggested that you have suffered what you just described because you have a political strategy to undermine Mr Sheridan politically?
>
> A. No, I have absolutely no wish to destroy him or anybody else within the SSP. To be quite frank, I couldn't care previously who was leader or who was not leader or who had what post, but now I would certainly not be a member of anything that he is associated with."

The two immediately following witnesses were RA, a 25 year-old occupational therapist, and her partner RB, a 46 year-old journalist with a local newspaper. Each spoke straightforwardly to the occasion described by KT when the pursuer was introduced to them at the flat in Dundee and then stayed overnight with her. Again, it was perfectly obvious that these were two upstanding, straightforward and honest witnesses. Again, each was accused of giving false evidence simply to support KT. In my opinion, this was a disgraceful episode.

[45] The pursuer chose to bring his action of defamation in the full knowledge of all that lay in his personal life. He made decisions as to how to advance his case in light of the averments which the defenders made concerning his private life in their defences and being aware of what the various witnesses were likely to say. He could have admitted his affair with KT and admitted attending at Cupid's Club with her, and the others, and still have challenged the truthfulness of the published article concerning Fiona McGuire. Had he done so he could have admitted the exchanges which took place at the SSP executive committee meeting and avoided casting doubt on the honesty and integrity of the other politicians and Members of Parliament who testified.

[46] Instead, he made the decision that he would falsely present his honesty and marital fidelity as the cornerstones of his case. In order to do this he made the decision to publicly, and in the full glare of the nation's media, accuse others of lying and of engaging together in a form of conspiracy to undermine him. In this effort to advance his own interests he cared nothing for the upset, ridicule and standing of those innocent individuals, some of whom had cared fondly for him and had supported him over many years, who appeared to pose an impediment to him achieving his own purpose. This is not a description of insignificant conduct. In the manner in which the parties respectively conducted themselves in the course of this litigation, which is all that I am concerned with, there is force in Mr Dunlop's observation that they were: "each as bad as the other".

[47] With that context in place I will consider first the question of interest and then the question of expenses.

Interest

[48] The pursuer seeks interest from the date of publication of the offending article until the date of the jury's verdict. He also seeks an award of interest from the date of the verdict until 30 May 2017, the date on which payment was made. He claims to be entitled to these awards based upon the provisions of section 1 of the 1958 Act, as amended, and upon the premise that he should be treated no differently from a pursuer who was successful in obtaining an award before a judge sitting alone in the Court of Session. He seeks to draw support from the opinion of Lady Paton in the case of *Tait* v *Campbell*.

[49] In my opinion, the position is not so straightforward. The common law rule was that interest was not payable on damages until the date of the decree, since it was only then that the damages became liquid. The decree from the date of which interest normally ran was

the final decree: that is to say, in a case where an appeal was taken to the Inner House or the House of Lords, the date on which the judgement of the appellate court was applied. Whilst the appellate courts always had a discretion to award interest from a date earlier than that of the judgement in an appeal, it was not the normal practice for this discretion to be exercised because the party who was unsuccessful in the court of first instance had a right to appeal and the delay caused by the appeal was lawful and was not generally regarded by the Court as unreasonable - see the opinion of the court given by Lord Reed in *Wilson* v *Dunbar Bank PLC* at paragraph 39. The normal practice might be departed from if the defender had caused unreasonable delay, if there had been a frivolous defence or an unjustified appeal, or other obstructive procedure designed to hold up payment - see the opinion of Lord Reed at paragraph 31. Furthermore, the procedure in a jury trial is different from the procedure in a proof. In a jury trial it is necessary for a motion to be enrolled to apply the verdict. It is only at that stage that decree is passed - see for example the opinion of Lord Strachan at page 84 in the case of *Macrae* v *Reed & Mallik Ltd* and Rule of Court 37.10.

[50] The common law was altered by the 1958 Act. The effect of section 1 of that Act was to introduce a discretionary power (or clarify the existence of it) to enable the court to treat a sum awarded as damages (or part of it) as having been wrongfully withheld from the date of citation (or some later date, prior to the date of the decree), and on that basis to include in its interlocutor an award of interest on that sum - see *MacRae* v *Reed and Mallik Ltd* and Lord Reed's observations at paragraph 44 in *Wilson*. Section 1 was in turn amended by the Interest on Damages (Scotland) Act 1971, which introduced the present subsection (1A). The effect of that amendment is that, in the absence of special reasons why no interest should be given, the court is directed to exercise the power described in subsection (1) in the case of all

awards of damages in respect of personal injuries - see the opinion of Lord Emslie in *Smith* v *Middleton* at page 39.

[51] In the present case, the date of final decree, from which interest should run as a matter of law, is the date on which the verdict is applied. In light of the history of the appeal as set out above, it cannot be said that the defender has caused any unreasonable delay or that there has been wrongful withholding of the debt by the defenders in exercising their right of appeal. The grounds raised were anything but frivolous.

[52] The defenders are not responsible for the time taken to resolve the appeal process and payment of the principal sum. The explanation for that lies in the pursuer's prosecution, arising out of his own conduct, and his subsequent efforts to challenge his conviction. Leave to appeal the conviction was refused on 2 August 2011. He successfully opposed the defenders motion for recall of the sist which was heard in February 2012, I assume on the ground that he was actively seeking to have his conviction reviewed on the basis of new information which the court was prepared to take notice of. As I understand it though, his application to the Scottish Criminal Cases Review Commission was not in fact presented until more than two years later, in June 2014. In September 2015, with that application still outstanding, the defenders again enrolled for the sist to be recalled, on this occasion without opposition.

[53] However, I have a discretion, if acting under section 1(1) of the 1958 Act, to make an award of interest and order that it should run from an appropriate date prior to decree. If acting under section 1(1A), I am bound to do so unless satisfied that there are reasons special to the case why no interest should be given. The decision as to which of the two subsections to act under depends upon whether the damages awarded were in respect of "personal injuries sustained by the pursuer".

[54] Section 3(2) of the 1958 Act, as amended, provides that "personal injuries" includes any disease and any impairment of a person's physical or mental condition, but says nothing about any damages for loss of reputation or hurt to feelings. Section 10(1) of the Damages (Scotland) Act 1976 (the 1976 Act"), as enacted, adopted the same language. Section 13(1) of the Administration of Justice Act 1982 ("the 1982 Act"), as enacted, repeated that language. However, both Acts were amended by the Damages (Scotland) Act 1993. Both section 10(1) and section 13(1) were amended in the same way, by adding at the end of what was described as the "definition of personal injuries" the words: "and injury resulting from defamation or any other verbal injury or other injury to reputation".

[55] As I would understand it, it was on the basis of this definition of "personal injuries" as it had come to appear in each Act, that Lord Cameron of Lochbroom concluded that an action for defamation was an action of damages for personal injuries, in a broad sense, although not one which fell within the ambit of chapter 43 of the Rules of Court - see *Tudhope* v *Finlay Park t/a Park Hutchison, Solicitors* 2004 SLT 783. Matters have not stood still though, as both the 1976 Act and the 1982 Act were again amended by the Damages (Scotland) Act 2011 ("the 2011 Act"). The 1976 Act was deleted in whole, a new definition was provided for by section 14(1) of the 2011 Act and section 13(1) of the 1982 Act was amended so as to reflect the same language. Each section now reads as follows:

> "'personal injuries' means –
>
> (a) any disease, and
> (b) any impairment of a person's physical or mental condition."

The effect of the implementation of the 2011 Act is to return the definition of "personal injuries" to almost precisely ("means" rather than "includes" is now the phrase) the definition given in the 1976 Act as enacted and to delete the reference to injury resulting

from defamation. However, section 17 of the 2011 Act provides that nothing in the Act affects proceedings commenced before 7 July 2011. It therefore seems to me that, whatever the position was prior to 1993, and whatever the position is now, actions for damages arising as a consequence of defamation which were raised between 1993 and mid 2011 should be treated as actions involving personal injuries, at least for the purposes of the Interest on Damages (Scotland) Act. I must therefore treat the present action as one in which damages have been awarded in respect of personal injuries sustained by the pursuer and proceed to consider the question of interest as directed by section 1(1A) of the 1958 Act.

[56] In *Tait* v *Campbell* Lady Paton was dealing with an action of damages for injuries sustained in a road traffic accident, and therefore one which fell to be governed by section 1(1A) of the 1958 Act. The case proceeded to a jury trial which concluded on 7 June 2001. Although an award was made in the pursuer's favour, an application was made on her behalf for a new trial which was unsuccessful. On 14 March 2003, the pursuer moved to apply the jury verdict. Lady Paton chose to make an award of interest on the sum awarded by the jury to date from a period of one week after the date on which the verdict was returned, being the date by which the motion to apply would have been granted if enrolled immediately. In doing so she stated at paragraph [28]:

> "But in the exercise of my discretion, I have concluded that only in quite exceptional circumstances should a pursuer suffer a lower award of interest as a result of the passage of time arising from the exercise of what is an undoubted right to seek a new trial. I do not consider that the circumstances in the present case are so exceptional."

Whilst no reference to the terms of section 1(1A) of the 1958 Act appears in the case report, her Ladyship's conclusion closely mirrors the approach set out in that subsection. There were no unusual features or "reasons special to the case" why interest ought not to be applied from a date earlier than that of decree (being the application of the verdict). There is

though no expression of principle in the decision which would be of assistance to me in the present case. It is simply an example of a case in which a judge came to a discretionary decision in a particular manner.

[57] The present case could not be more different in its circumstances. Not only does it concern an award which was, by three times, the highest award ever made in Scotland for defamation, but it was awarded to a pursuer who was subsequently found to have committed perjury of such a serious sort as to warrant a sentence of 3 years' imprisonment. The period of time which has elapsed has been explained by the time taken up with the preparation for his criminal trial, his unsuccessful attempts to challenge that verdict and the hearing of the application for a new civil trial in the Inner House. There can be few other civil cases heard in modern times which have attracted such notoriety. I know of no other case in which a litigant, who sought to vindicate his reputation through an action for defamation, emerged as a criminal convicted of perjury and at the same time secured an award of a very substantial sum of money. To include within the award of damages in the verdict a further £200,632, or a further £173,159, would be a step which many would find difficult to comprehend, not least those who suffered injury to their standing and feelings as a consequence of the pursuer's conduct towards them in court and went uncompensated.

[58] The circumstances associated with this case which I have outlined are, to my mind, self-evidently exceptional. They seem to me to be the sort of circumstances which can be thought of appropriately as being reasons special to the case such as to entitle me to exercise my discretion in favour of declining to make an award of interest to run from any date prior to decree. That is the step which I shall take. Since the principal sum was paid prior to the enrolment of the motion to apply the verdict, I shall make no order for interest.

Expenses

[59] Whether, and to what extent, an award of expenses ought to be made is pre-eminently a matter for the exercise of my discretion. In applying my mind to this question I have again taken account of the conduct of both parties to the action, all as described above. As I have said, the pursuer could have brought the action and pursued his claim arising out of the lies told about him in the November 14 article without resorting to lying himself and falsely attributing that conduct to others. However, I recognise that he had a right to challenge that false article and that he succeeded in doing so. Whilst I felt that there was a strong case for making no award of expenses due to or by either party, in the end, I decided that such a decision would be a step too far. I am therefore prepared to make an award of expenses in the pursuer's favour.

[60] Mr Dangerfield moved me to make an award at higher than the normal level of party and party. He submitted that I should do so as a sanction, or punishment on the defenders, since they had conducted themselves unreasonably in the case knowing that they were engaged in a conspiracy to pervert the course of justice which had begun by December 2004 and which continued through the entirety of the cause. He submitted I should conclude that the defenders had used the civil trial procedure from the outset for the improper purpose of attempting to pervert the course of justice. The foundation for this submission was the conduct of the defenders to which he had referred and the content of the statement given by Fiona McGuire to police officers on 9 August 2011, which he also took me through.

[61] As I have said, I am prepared to proceed on the basis that the defenders did engage in phone tapping and in other invasions of privacy in preparation for and during the presentation of the present case. I have also referred to other aspects of their conduct. I am not prepared to conclude on the basis of the untested statement of Fiona McGuire that the

defenders knew prior to publication, or thereafter, that the terms of the 14 November 2004 article were false. Neither the content of her police statement nor the conduct of the defenders relied upon, even if taken in conjunction, would entitle me to conclude that the defenders had used the civil trial procedure from the outset for the improper purpose of attempting to pervert the course of justice. I am not therefore prepared to give effect to Mr Dangerfield's submission.

[62] There is no other basis upon which the court could or should engage in a punitive exercise against the defenders in relation to expenses on the motion of this pursuer. That would be to risk giving the impression that the court thought less of his misconduct than it did that of the defenders. Each led false evidence about certain important things and each led truthful evidence about certain important things. Beyond that broad observation, the only other comment I would make is that I did not consider that Mr Dangerfield's assessment of the pursuer's conduct as "many levels below" that of the defenders was accurate.

Decision

[63] I will accede to the unopposed motion to apply the verdict of the jury. For the reasons given above, I will refuse to include any sum of interest on the damages awarded. I will find the defenders liable to the pursuer in the expenses of and in connection with the proceedings in the Outer House, except in so far as already dealt with, all on a party and party basis. I will also direct that in respect of those parts of the proceedings in the Outer House where the pursuer was a party litigant that expenses are to be assessed by the Auditor of Court in terms of the Act of Sederunt (Expenses of Party Litigants) 1976.

[64] I will arrange for the case to call at a By Order hearing so that any outstanding issues from the perspective of the agent-disburser can be considered.