OUTER HOUSE, COURT OF SESSION

[2019] CSOH 38

A413/16

OPINION OF LORD BRODIE

In the cause

DAVID JOHN WHITEHOUSE and ANOTHER

Pursuers

against

THE RIGHT HONOURABLE JAMES WOLFFE QC, LORD ADVOCATE

Defender

Pursuers: Adam McKinlay; A & W M Urquhart
Defender: Douglas Ross QC; SGLD

9 May 2019

Introduction

[1] This is an unusual action. The pursuers, who are husband and wife, sue the Lord Advocate for damages on the basis that, on 4 December 2015, he made an *ex parte* application to a judge of the Court of Session in terms of section 121(2) of the Proceeds of Crime Act 2002 by presenting a petition, the operative averments of which were false, with the result that the judge made a restraint order in terms of section 120 of the Act. While the pursuers do not say in terms that the defender knew that the averments in his petition were false, they do have pleadings from which it could be inferred that the averments in the petition were, at the very least, made recklessly. The pursuers offer to prove that the

averments in the petition "were entirely unsupported by evidence" and that "[in] material respects, the defender had evidence which actively undermined the factual position set out in the petition". Remarkable as these averments may be thought to be, equally remarkable is the fact that the defender effectively admits them. The restraint order was recalled by another judge on 17 December 2015 with that judge noting that the defender's failure to aver the full factual position amounted to "a clear and very serious breach of the duty of disclosure and candour" in relation to reasonable cause to believe that the first pursuer had benefited from criminal conduct (see section 119(2)(b) of the Act) and fear of dissipation of assets (see *Jennings* v *Crown Prosecution Service* [2006] 1 WLR 182). He awarded expenses against the defender on an agent and client basis. At answer 8 of the Record in the present action the defender admits that his actions "in applying for and securing a restraint order against the pursuers on 4 December, 2015 were wrongful in the respect of a failure to discharge the duty of disclosure and candour as found by the Judge when recalling the order."

[2] The background to the defender's application for a restraint order and accordingly this action, is the insolvency of Rangers Football Club plc ("the club"), the history of which the courts have become familiar with. The first pursuer is an insolvency practitioner. On 14 February 2012 he was appointed joint administrator of the club along with his colleague Paul Clark. On 14 June 2012, following creditors' rejection of a proposal for a voluntary arrangement the business and assets of the club were sold. On 31 October 2012 joint liquidators were appointed and the first pursuer and Mr Clark vacated office. On 14 November 2014 the first pursuer was arrested and charged with offences related to the acquisition of the club in 2011, prior to its administration. On 1 September 2015 he was arrested again and charged with offences relating to the administration period. On

15 September 2015 he was indicted in the High Court, together with six co-accused. At a preliminary hearing on 5 February 2016 it was argued on his behalf that all seven of the charges against him were irrelevant. The Advocate depute, without offering a response, conceded the position in relation to five of the charges and withdrew them. On 22 February 2016 the Court determined that the remaining two charges were irrelevant and dismissed them. In a separate action for damages, based on very extensive pleadings, the first pursuer sues, *inter alia*, the present defender, for a variety of sorts of allegedly wrongful conduct associated with the criminal proceedings against him. The pleadings in that action were the subject of Procedural Roll discussion before Lord Malcolm. Lord Malcolm's opinion as to the appropriate disposal of the pleas argued before him has been published as *Whitehouse* v *Gormley and Others* [2018] CSOH 93. A reclaiming motion against Lord Malcolm's decision has been marked but has not yet been determined.

[3] Proof in the present action has been allowed and a diet fixed for 18 June 2019 and subsequent days. Given the defender's admission of wrongful conduct one might suppose that the scope of that proof would be limited to quantification of damages. That is not quite the case. The first pursuer sues for £130,000 and the second pursuer sues for £50,000. The first pursuer alleges specific direct patrimonial loss by reason of the loss of a particular investment opportunity. Otherwise the pursuers rely on very general averments of having had difficulty in their financial affairs, and having suffered loss of reputation, anxiety and distress. The first pursuer acknowledges that he cannot be compensated for the same loss in both this and the other action in which he is suing the defender. The extent to which these averments can support a substantial award of damages will be a matter for determination at the proof fixed for 18 June 2019 but it may be that something will turn on the nature of the wrong that the defender is found to have committed. The defender's admission of

(uncharacterised) wrongful conduct does not extend to an admission of the pursuers' averments that they have suffered loss, injury and damage as a result of the defender's infringement of their rights under article 8 of the European Convention on Human Rights. That issue therefore remains live and with it the question of what, in the circumstances of the case, is necessary to afford the pursuers "just satisfaction" in terms of section 8(3) of the Human Rights Act 1998 and the jurisprudence of the Strasbourg court under article 41 of the Convention.

Recovery of documents

[4] As I would understand it, it is because of what I have described as the live issue that the pursuers sought and obtained an order for recovery of documents from the defender in terms of calls 1 and 2 of the specification, number 12 of process, lodged on 31 January 2019. The calls are in the following terms:

> "1. All documents held by or on behalf of the Lord Advocate, his deputes, procurators fiscal, or any member of staff of the Crown Office and Procurator Fiscal Service (collectively "the Crown") as at 4 December 2015 containing entries which showed or tended to show that:
>
> a) The first pursuer was an "active participant in the scheme, which resulted in the obtaining of over £28million from third parties";
> b) The first pursuer had "claimed fees of over £3.1million" for the administration;
> c) The first pursuer had "six months prior to the administration" entered into negotiations with an American financial services firm, Duff & Phelps, to acquire his business, a partnership known as MCR;
> d) There was "reasonable cause to believe that [the first pursuer] had benefitted from his criminal conduct"; and
> e) It was necessary that a restraint order be granted.
>
> including witness statements, reports, memoranda, emails and other documents; in order that excerpts may be taken therefrom at the sight of the Commissioner of all such entries.

> 2. All minutes, notes, records, reports, memoranda, emails and other documents containing entries showing or tending to show the basis upon which the Crown determined that an application for a restraint order against the pursuers should be made, in order that excerpts may be taken therefrom at the sight of the Commissioner of all such entries."

[5] The defender has obtempered that order subject to certain documents being produced within a sealed confidential envelope. It is the defender's position that these documents are inadmissible in evidence and exempt from disclosure to the pursuers by virtue of legal advice privilege ("LAP").

Motion

[6] The action called before me on the motion roll on 9 April 2019 on the pursuers' motion to open up the confidential envelope, number 16 of process, and to allow its contents to be disclosed to the pursuers. Mr McKinlay appeared on behalf of the pursuers. Mr Ross QC appeared on behalf of the defender. In the light of their submissions it appeared that my task was two-fold. First, to determine whether it was open to the Lord Advocate to claim LAP and second, in the light of how I had determined that first matter, whether any of the contents of the envelope should be disclosed to the pursuers with a view to their being made available as evidence in the forthcoming proof. The first matter is one of general principle as to which I was advised there was no authority. The second is one of applying the relevant principle to the particular contents of the envelope, regard being had to their apparent provenance and purpose.

Submissions

The pursuers

[7] Mr McKinlay began by indicating that he did not anticipate that there would be any difference between him and Mr Ross as to what was meant by LAP. It existed where: (1) there was a client, whose right it was to assert or waive the privilege; (2) advice had been given by a lawyer in the capacity of a lawyer; and (3) privilege has not been waived. If legal privilege is found to exist, there is no second stage in the form of a public interest exemption or balancing exercise; the privilege makes the associated evidence inadmissible and irrecoverable by commission and diligence. The leading cases were *Three Rivers District Council and others* v *Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 ("*Three Rivers No 6*"), *R (Prudential plc and another)* v *Special Commissioner of Income Tax* [2013] 2 AC 185 and (particularly in relation to waiver) *Scottish Lion Insurance* v *Goodrich Corp* 2011 SC 534. The applicable law was discussed in Walker and Walker *The Law of Evidence in Scotland* (4th edit) at paragraph 10.2 and in MacSporran and Young *Commission and Diligence* (1995) at paragraphs 5.1 to 5.21 (Mr Ross was to add a reference to Davidson *Evidence* (2007) at para 13.18 *et seq*).

[8] Mr McKinlay accepted that the privilege can attach to an in-house lawyer (a salaried lawyer employed to provide legal services exclusively to his (non-lawyer) employer) but he was unaware of any authority specific to communications internal to Crown Office.
Mr McKinlay did not know what was in the confidential envelope but he understood that it might be a printout of an email chain which included messages from or to an Advocate depute and from or to officials of the Crown Office and Procurator Fiscal Service ("COPFS"). The question therefore was whether LAP could attach to communications between an Advocate depute acting in the name of the Lord Advocate and COPFS officials.

Mr McKinlay observed that when the order for recovery had been applied for no assertion of privilege had been made (notwithstanding the quite specific terms of call 2) but he did not seek to make anything of that.

[9] Mr McKinlay turned to the three elements required for the privilege to exist, as applied to the circumstances of the present case. Who, he asked rhetorically, was the client here? An Advocate depute was effectively one and the same person as the Lord Advocate. Is it suggested that the defender was advising himself? Advice must be given "in the capacity of a lawyer". It was not easy to see this as having happened here. The COPFS was not a creature of statute. It fulfilled a public legal function. Traditionally it is the Advocates depute who give instructions to COPFS officials. Crown Office does not operate on an adversarial basis. When applying for a restraint order those acting for the Lord Advocate have a duty to provide all relevant information. Mr McKinlay suggested that the defender has waived any claim to privilege that he might have, given the extensive recovery of documents (albeit in some instances redacted) which there had been in this case. This was the first time the defender had claimed LAP. There was the oddity that if privilege attaches it attaches to material which is at the very heart of the case; that being the proposition, which had been put to the judge who recalled the restraint order, that there had at the material time been simply no evidence of a risk of dissipation of proceeds of crime and no evidence that the pursuers had benefited from the first pursuer's involvement with the club.

[10] It was for the defender, submitted Mr McKinlay, to explain why he should be able to claim LAP separate from public interest immunity. If he could not do so (and it was submitted that he could not) then the material in the confidential envelope should be disclosed.

The defender

[11] Mr Ross moved me to hold that the defender could claim LAP and, accordingly, as privilege was asserted in respect of the contents of the confidential envelope, the court should open the envelope and, on confirming that the contents were *ex facie* privileged, refuse disclosure of them. Mr Ross accepted that there was little difference between him and Mr McKinlay as to what was the applicable law and in particular what were the three pre-conditions for the existence of LAP. Turning to these pre-conditions, while readily acknowledging that the position of the Advocates depute and Crown Office were *sui generis*, he explained that here the client was the defender. Although holding a commission as an Advocate depute the specialist counsel who appeared in court on behalf of the defender in proceedings in connection with the proceeds of crime was not acting in the more typical role of prosecutor. The reality was that COPFS officials advised and instructed the specialist Advocate depute in relation to restraint proceedings. Mr Ross accepted that to attract LAP the relevant advice must be given in the capacity of a lawyer. It would be apparent on examination of the material in the confidential envelope that the exchanges between COPFS officials and the Advocate depute came within the description of the officials acting as lawyers. As to waiver, Mr McKinlay had not said that there had actually been waiver. Much of the recovery had related to the other action (the "main action") where a liberal approach had been taken to disclosure. An unusual feature of recovery in the main action was that the first pursuer had in fact already seen much of the material with recovery under commission and diligence being resorted to in order that he could use it in evidence. The present proceedings were separate from the main action. What was in question here was material of a different character to that which had been previously recovered. The defender was not asserting legal privilege in relation to all communications between/among COPFS

officials. A distinction fell to be made between, on the one hand, exchanges among COPFS officials or with the Advocate depute for court, which do attract privilege and, on the other, general discussions between procurators fiscal and the police or COPFS officials which do not. The relevant points of difference were the people involved and whether the communications related directly to appearances in court.

[12] As to Mr McKinlay's "oddity" point, Mr Ross adopted what Mr McKinlay had said about there being no second stage or balancing exercise to be carried out after it had been determined that legal privilege applied. It might be an odd outcome but then so what?

[13] The underlying policy of the rule that communication between client and lawyer was privileged from being compelled as evidence lay in the general interest that parties should be able to communicate candidly with their legal advisers without being concerned that the communication may be made known to their opponents: Davidson paragraph 13.18. That consideration applied to the situation of the defender in the context of proceedings in respect of the proceeds of crime. It was of significance that the present action concerned civil proceedings. In the event of attempts to recover documentation of communications within Crown Office and between Advocates depute and COPFS officials or between COPFS officials or Advocates depute and the police in relation to actual or possible criminal proceedings, it is likely that they would be opposed on the ground of public interest immunity. However, not all material is withheld. For example, the modern practice is to disclose police statements but it is not practice to disclose the products of internal Crown Office communications.

Decision

Legal advice privilege: the principle

[14] In *Narden Services Ltd v Inverness Retail and Business Park Ltd* 2008 SC 335 at 338, Lord Johnston, giving the opinion of the Court identified:

> "… (in broad terms) a right of absolute privilege in respect to communications emanating between a solicitor and a client relating to advice and also in respect of any documents, including those coming from accountants, which were prepared in the contemplation of litigation."

Lord Johnston described this right as legal professional privilege ("LPP"). Notwithstanding that description, the right is that of the client, not the lawyer. Its function is to prevent evidence of communications being compellable in court or documents relating to such communications being recoverable by commission and diligence. As Lord Reed explains in his opinion in *R (Prudential plc and another)* v *Special Commissioner of Income Tax* at paragraphs 103 to 108 LPP has been established as a principle of Scots law since at least the late seventeenth century, albeit that the term by reference to which it formerly was discussed was "confidentiality". Lord Reed quotes Lord Wood in *McCowan* v *Wright* (1852) 15D 229 at 237 for a statement of the principle:

> "The rule by which the communications between clients and their legal advisers are protected from discovery, is one of great value and importance, and, within its legitimate limits, ought to be strictly observed. According to the law of Scotland, such communications are privileged although they may not relate to any suit depending or contemplated, or apprehended..."

Lord Rodger was to the same effect in *Three Rivers No 6 (supra)* at paragraph 50 when he adopted the formulation that LAP attaches to:

> "…all communications made in confidence between solicitors and their clients for the purpose of giving or obtaining legal advice even at a stage when litigation is not in contemplation. It does not matter whether the communication is directly between the client and his legal adviser or is made through an intermediate agent of either."

In his opinion in *Three Rivers No 6* Lord Scott of Foscote quotes a number of judicial statements of the policy underlying and justifying LAP. At paragraph 34 he distils them as follows:

> "… the dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else (see also paras 15.8 to 15.10 of *Zuckerman's Civil Procedure* (2003) where the author refers to the rationale underlying legal advice privilege as 'the rule of law rationale'). I, for my part, subscribe to this idea. It justifies, in my opinion, the retention of legal advice privilege in our law, notwithstanding that as a result cases may sometimes have to be decided in ignorance of relevant probative material."

As can be seen from the above quotations from *Narden Services* and *McCowan* v *Wright* there are two aspects to LPP: first, as it relates to preparation for litigation (litigation privilege ("LP"))and, second, as it relates to more general legal advice (legal advice privilege ("LAP")). In *Three Rivers No 6* at paragraph 65 Lord Carswell explained that the:

> "… privilege is commonly classified in modern usage under the two sub-headings of legal advice privilege and litigation privilege ... The former covers communications passing between lawyer and client for the purpose of seeking and furnishing legal advice, whether or not in the context of litigation. The latter, which is available when legal proceedings are in existence or contemplated, embraces a wider class of communication, such as those passing between the legal adviser and potential witnesses."

However, when noticing the distinction between LP, on the one hand, and LAP, on the other, one must also notice Lord Carswell's characterisation of them as sub-headings of one concept. He puts the matter succinctly at para 105 of his speech:

> "legal professional privilege is a single integrated privilege, who sub-heads are legal advice privilege and litigation privilege, and ... it is litigation privilege which is restricted to proceedings in a court of law."

[15] In *Prudential* Lord Reed explains that the law in this area has developed separately in Scotland from in England, although the two systems have developed in the same direction. He notes that there are "a number of differences in the case law in relation to particular aspects of the law, but the general principle, its fundamental importance, and the considerations of public policy which underlie it, are common to both systems". Actual and potential differences in detail as between Scots and English law on the subject have been noted elsewhere (eg Commission Consultative des Barreaux de la Communauté Européene, *The Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community*, a Report by DAO Edward QC (1976) and the comment on the Edward Report in the opinion of Advocate General Warner in *AM&S Europe Ltd* v *Commission of the European Communities* (155/79) [1983] QB 878, [1982] 2 CMLR 264). Davidson notices a number of points of difference and at para 10.2.4 Walker and Walker goes the distance of stating that: "the Scottish and English rules of confidentially and legal privilege are not the same in many respects."

[16] However, whatever scope there may be for divergence as between the law of Scotland and the law of England on what, post *Narden Services*, may in both jurisdictions be described as LPP, parties in the present case did not encourage me to pursue it. Rather, their respective submissions proceeded on the implicit assumption that there were no material differences between the two systems, at least in relation to what I was being asked to consider. I was referred to two English decisions as the relevant leading cases and reminded that the policy considerations and the modern framing of LPP in terms of a human right and, in particular, as an aspect of the protection conferred by article 8 of the European Convention on Human Rights, applied equally north and south of the border. For present

purposes I shall therefore adopt what I have taken to be parties' assumption that, in relation to LPP, Scots law and English law are the same.

[17] While not forgetting Lord Carswell's analysis of LPP as a single integrated privilege, I understood the application before me to be concerned with LAP as opposed to LP. Counsel were agreed that the salient features of the circumstances in which LAP applies are summarised in paras 24 to 27 of Lord Scott's speech in *Three Rivers No 6*. They disagreed as to whether they were to be found in the present case. Before addressing that question it is convenient first to set out the relevant passage from Lord Scott's speech:

> "24. First, legal advice privilege arises out of a relationship of confidence between lawyer and client. Unless the communication or document for which privilege is sought is a confidential one, there can be no question of legal advice privilege arising. The confidential character of the communication or document is not by itself enough to enable privilege to be claimed but is an essential requirement.
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> 25. Second, if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the person, the client, entitled to it and it can be overridden by statute ... but it is otherwise absolute. There is no balancing exercise that has to be carried out... in this country legal professional privilege, if it is attracted by a particular communication between lawyer and client or attaches to a particular document, cannot be set aside on the ground that some other higher public interest requires that to be done.
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> 26. Third, legal advice privilege gives the person entitled to it the right to decline to disclose or to allow to be disclosed the confidential communication or document in question. There has been some debate as to whether this right is a procedural right or a substantive right. In my respectful opinion the debate is sterile. Legal advice privilege is both. It may be used in legal proceedings to justify the refusal to answer certain questions or to produce for inspection certain documents. Its characterisation as procedural or substantive neither adds to nor detracts from its features.
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> 27. Fourth, legal advice privilege has an undoubted relationship with litigation privilege. Legal advice is frequently sought or given in connection with current or contemplated litigation. But it may equally well be sought or given in circumstances and for purposes that have nothing to do with litigation. If it is sought or given in connection with litigation, then the advice would fall into both of the two categories. But it is long settled that a connection with litigation is not a necessary condition for privilege to be attracted... On the other hand it has been held that litigation privilege can extend to communications between a lawyer or the lawyer's client and a third

> party or to any document brought into existence for the dominant purpose of being used in litigation."

The points focused on in argument

[18] Looking to Lord Scott's summary, for LAP to exist there must be a client and there must be a lawyer acting as such. By "acting as such" I mean being engaged in the processes necessary for the giving of legal advice in confidence and in fact providing such advice. It is for the client to assert the right which it is open to him to waive. These were the points focused on by counsel in their submissions: (1) a client, whose right it was to assert or waive the privilege; (2) advice given by a lawyer in the capacity of a lawyer; and (3) absence of waiver. There was a fourth point: what Mr McKinlay described as the oddity that LAP was being asserted in relation to communications which appeared to go to the very heart of the case. I will consider each of these points in turn. In doing so I recognise that there is a degree of overlap among them, particularly between points (1) and (2).

A client

[19] The client, submitted Mr Ross, was the Lord Advocate. The current Lord Advocate, as defender in the action and haver of the material in the sealed envelope, was asserting the privilege which was originally that of his predecessor in office, the Lord Advocate in 2015. Mr McKinlay gently ridiculed the notion of a Scottish Law Officer being a client for legal advice. I will come to that, but it is not suggested that the Lord Advocate in 2015 was personally involved in the communications under consideration. As Mr Ross explained, it was one of his Advocates depute. That puts in question the status of the particular Advocate depute.

[20] Following the hearing, the solicitor acting for the defender sent a letter dated 16 April 2019 addressed to the Principal Clerk of Session for my consideration. With the permission of those acting for the pursuer I read that letter. Its object was to affirm the proposition that, when acting as such, an Advocate depute was effectively the same person as the Lord Advocate. The letter reproduced the following passage from the present Lord Advocate's Royal Warrant (italics added by the writer of the letter):

> "…We have made, constituted and ordained like as We by these Presents make, constitute and ordain the said Walter James Wolffe during Our Pleasure Lord Advocate giving and granting unto him said Office with all the liberties, fees, pensions, duties and emoluments whatsoever pertaining and belonging to the same *and such like power to the said Walter James Wolffe and his deputies for whom he shall be answerable, to use and exercise the aforesaid office of the Lord Advocate …*"

The letter continues by explaining that the words in italics reflect the privilege which the Lord Advocate has of naming deputes through which his powers may be exercised: Hume *Commentaries*, ii 132; Alison, *Practice* p86. It is on that basis that the Lord Advocate grants commissions to advocates depute to exercise the functions and powers attaching to his office. The letter goes on to confirm that the Lord Advocate takes the view that an Advocate depute, whether appointed full time or *ad hoc*, when acting within the scope of his or her commission, exercises functions and powers which attach to the office of Lord Advocate.

[21] I had understood Mr McKinlay to concede that an Advocate depute could be taken to be one and the same person as the defender. The Lord Advocate's Warrant and the Advocate depute's commission provide the basis for why this is so. They also by-pass an issue which has exercised the English courts since the decision of the Court of Appeal in *Three Rivers District Council* v *The Governor and Company of the Bank of England (No 5)* [2003] QB 1556 ("*Three Rivers No* 5") (see *Director of Serious Fraud Office v Eurasian Natural Resources Corpn Ltd (Law Society intervening)* [2019] 1 WLR 791) and that is where the client is a large

organisation, and in particular a corporate organisation, who are the officers or employees who are authorised to seek and to provide confidential information for the purpose of receiving legal advice and to receive that legal advice? The Lord Advocate is neither an organisation nor a corporate body but he is an officer of state at the head of a substantial office. Some of the duties of that office will be carried out by the Lord Advocate personally and some by his Advocates depute but other duties will be performed by COPFS officials. Given the decision in *Three Rivers No 5*, as confirmed in *Eurasian Natural Resources*, questions may arise as to the authority of COPFS officials to act for the Lord Advocate in the capacity of "client" but I accept that such questions do not arise with an Advocate depute. For most purposes and certainly for present purposes, he or she can be regarded as if he or she were the Lord Advocate, as Mr McKinlay accepted. If the Lord Advocate can be a "client" with the benefit of LAP, then it does not matter that he is not the personal recipient of the legal advice; he can be represented by his depute.

[22] I would accept that from some perspectives the Lord Advocate is an unlikely candidate for client status with the protection of LAP. For one, he is a qualified lawyer. He is more readily seen as someone who gives legal advice than as someone who receives it. Mr McKinlay raised, as a slightly ridiculous possibility, the prospect of the Lord Advocate advising himself.

[23] I would further accept that there are other respects in which the Lord Advocate, as represented by the Advocate depute, does not fit the paradigm of the private citizen requiring the assurance that he can candidly disclose his affairs to his legal adviser without any risk of either the citizen or the legal adviser being compelled to reveal what information was disclosed and what advice was given, which may be said to be the original justification of LAP. That paradigm assumes that the client has confidential information to disclose.

That would seem to be unlikely in the case of the Lord Advocate or his depute. The expectation is that it will be the COPFS officials, having instructed investigation by the police, who will have the information and that it will be the Advocate depute who will advise or act or give instructions on the basis of that information. Neither does the justification of LAP in terms of human rights fit very well when the claim is made by the Lord Advocate. I rather doubt whether the office of Lord Advocate has any human rights, but even if that is too sweeping a dismissal of the possibility, it is difficult to suggest that the Lord Advocate requires protection from potentially oppressive state action.

[24] While that may be, given the variety of legal and natural persons who have been held to be "clients" for the purpose of LAP, I do not consider that the defender can be denied an equivalent status, at least in the circumstances of the present case. As appears from the case-law, LAP has been successfully asserted by the Customs and Excise (*Alfred Crompton Amusements Machines Ltd* v *Customs and Excise Commissioners* 1972 2 QB 102), the Bank of England (*Three Rivers No 6*) *(supra)*, the Coroners Department of the Home Office (*AB* v *Ministry of Justice* [2014] EWHC 1847) and the Director of Public Prosecutions (*Auten* v *Rayner (No 2)* [1960] 1 QB 669). That the Lord Advocate and his depute are lawyers does not, of itself, mean that they cannot claim LAP. A lawyer may be a client for legal advice and have the protection of privilege: *B* v *Auckland District Law Society* [2003] 2 AC 736. That is so even when effectively he is advising himself: *Somatra Ltd* v *Sinclair Roche & Temperley* [2000] 1 WLR 2453 at paragraph 44 (one partner of a solicitor's firm acting as legal adviser to his partners in dispute with a client).

[25] Mr Ross described the position of the Lord Advocate and COPFS as "*sui generis*". Accepting that to be so, at least in a purely Scottish context, it appears to me that it is possible to exaggerate its significance for present purposes. The Lord Advocate has a

number of roles and a variety of duties. These include being head of the prosecution service and being a member of the Scottish Executive: Scotland Act 1998 sections 29(2)(e) and 44(1)(c). He is a Scottish Law Officer and, in that capacity, gives advice and appears in court. These are the hallmark activities of a lawyer, the appearance being of the Lord Advocate acting as counsel, with the government as his client. However, as I took Mr Ross to emphasise at another point in his submissions, that is not the capacity in which the Lord Advocate is sued in the present action. In that it is averred that he misused his powers under section 121 of the 2002 Act the relevant capacity is that of the person having title to prosecute on indictment and therefore the "prosecutor" where that expression is used in the 2002 Act. He was therefore not acting on anyone else's behalf and thus, as the person in whose name the application was brought, he may be said to fill a client-like role in which he may be represented by an Advocate depute (albeit that the Advocate depute too is a qualified lawyer). This is reinforced when one considers the reality that the Advocate depute like any other lawyer, even a specialist working within his own speciality, will benefit from and may very well require, the advice of legally qualified COPFS officials. If "client" is thought to be an odd word to use of the defender then it can be substituted with "recipient of legal advice". There is no reason why the Lord Advocate or his depute should not be a recipient of legal advice. Where that is so and where the other conditions for the privilege apply, I see no reason why the Lord Advocate should not be able to assert LAP.

Advice given by a lawyer acting in the capacity of a lawyer

[26] Before one can be the recipient of legal advice which attracts LAP, the advice must be legal and it must be given by a lawyer acting in the capacity of a lawyer. That was

Mr McKinlay's submission and I accept it. As Lord Rodger put it in *Three Rivers No 6* at paragraph 58:

> "In relation to legal advice privilege what matters today remains the same as what mattered in the past: whether the lawyers are being asked qua lawyers to provide legal advice."

It is the circumstance of a client seeking and then being provided with legal advice on the client's affairs from a lawyer which gives rise to the relationship of confidence between lawyer and client and the confidential character of their communications which Lord Scott identifies as an essential requirement if LAP is to apply (*Three Rivers No 6* at para 24). Thus, for LAP to apply, just as there must be a "client", so must there be a "lawyer" acting "qua lawyer". What is the position in the present case?

[27] Mr Ross submitted that in their exchanges with an Advocate depute, legally qualified COPFS officials were the lawyers acting in that capacity. Mr McKinlay conceded that, as a matter of generality, LAP can extend to in-house lawyers. He questioned, however, whether it could extend to COPFS officials. Crown Office does not act on an adversarial basis. The Crown is subject to an obligation to make full disclosure.

[28] The object of the Edward Report of 1976 was to state the law as it related to legal privilege in the then member states of the European Community. At paragraph 32 it says this about the position in the United Kingdom:

> "Privilege attaches to <u>communications</u>, rather than to the information communicated, the person to or by whom it was communicated, or the method (oral or documentary) of communication. In a disputed case, therefore, the law will look at the relationship which existed between the parties concerned at the time when the communication was made. For this reason, the same principles of law apply to solicitors, barristers and advocates in private practice, salaried lawyers employed by government departments, salaried lawyers employed by commercial companies ('juristes d'entreprise'), foreign lawyers and their assistants and 'stagiaires'. The question in each case is whether the communication was made to or by a lawyer in his professional capacity as a legal adviser or advocate."

Thus, according to the Report, privilege attached to "salaried lawyers employed by government departments". That had been affirmed by the Court of Appeal in *Alfred Crompton Amusements Machines Ltd* v *Customs and Excise Commissioners (supra)* 1972 2 QB 102, Denning MR at 129, Karminski LJ at 136 and Orr LJ at 138 (there was a subsequent appeal to the House of Lords but there the proposition was not challenged). What was in issue in *Alfred Crompton* was whether privilege attached to communications between the commissioners and their own legal department. At first instance Forbes J considered that "[by] no stretch of the imagination can the commissioners in this case be regarded as the lay clients of their own legal branch". Lord Denning, with whom the other members of the Court of Appeal agreed, thought otherwise:

> "Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, ...by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason Forbes J thought they were in a different position from other legal advisers who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges."

[29] It is true that Lord Denning's view of the position of in-house lawyers (at least in the commercial sector) is not universal in the member states of the European Union and it has not been adopted as EU law: In *AM&S Europe Ltd* v *Commission* , affirmed in *Akzo Nobel* v *Commission of the European Communities* (Case C-550/07) [2010] 5 CMLR 19, [2011] 2 AC 338, on the basis that in-house counsel are insufficiently independent of their employers to justify LAP in relation to communications between the two. Whether the Court of Justice of the European Union would apply that reasoning to government lawyers may be open to

question (see Stefanelli *Expanding Azko Nobel: in-house, governmental lawyers, and independence*, ICLQ 2013, 62(2), 485) but it is Lord Denning's view: that full-time salaried lawyers, including government lawyers, are required to, and do, uphold the same standards of honour and etiquette as other members of the profession which is the one taken in Scotland. I would expect legally qualified COPFS officials to be admitted solicitors and members of the Law Society of Scotland and therefore subject to all the associated professional duties. In that they are no different from any other practitioner.

[30] Perhaps paradoxically, it was not because COPFS officials have low standards that Mr McKinlay would deny them the status of lawyers acting in that capacity but it is because they have high standards in the sense that their role is to act in the public interest and not simply in an adversarial manner; they have a duty of candour and they are subject to particular statutory obligations in relation to disclosure.

[31] I do not share Mr McKinlay's doubts as to whether a legally qualified COPFS official can be a lawyer acting in the capacity of a lawyer for the purposes of LAP. He or she has the same professional and ethical obligations in respect of the administration of justice as any other Scottish lawyer. It was these obligations that the European Court of Justice saw as the counterparts of and therefore the justification of legal privilege: *AM&S Europe Ltd* at paragraph 24. These include an obligation to exercise independent judgement and to advise and to act in accordance with that judgement. It is true that a COPFS solicitor has a duty of candour, both to the court and in his or her dealings with other lawyers, but so does every other member of the profession. When acting as a prosecutor he or she will be under obligation to comply with the disclosure requirements contained in part 6 of the Criminal Justice and Licensing (Scotland) Act 2010 and the Code of Practice issued under section 164.

These requirements may override LAP, as specific statutory provisions always can, but that possibility does not mean that LAP may not be asserted when it is applicable.

Waiver

[32] Mr McKinlay did not develop his argument on waiver beyond indicating that the defender had already provided extensive material without having previously taken any point on LAP. Mr McKinlay did not accept Mr Ross's description of the defender's approach to disclosure as liberal. There had, Mr McKinlay explained, been multiple hearings relating to recovery of documents. That is not suggestive of the defender having waived his rights but what I would see as more critical is that it was for the pursuers to demonstrate by reference to details that the defender had waived such right as he had to object to the recovery of all or any documents on the basis of LAP. With all respect to Mr McKinlay he did not begin to do that. He did not found on the fact that the defender had not asserted LAP at the stage of the application for commission and diligence in respect of call 2 in the specification of documents. That there has already been extensive recovery of documents, whether on a voluntary basis or by order of the court, is neither here nor there. Where it is suggested that there had been waiver of an entitlement to object to further recovery something specific is required in support. Here there was nothing.

Privilege covering the issue at the heart of the dispute

[33] Towards the end of his initial submissions Mr McKinlay observed that it would be odd if LAP were to attach to material which was at the very heart of the dispute. I took it that what he had in mind was a document or a number of documents which demonstrated or from which it could be inferred that, at the relevant time, someone whose knowledge

could be imputed to the defender knew that there was not a proper factual basis for making the application for a restraint order. My response was to inquire, perhaps somewhat abruptly, "So what?", a question which Mr Ross was to reiterate.

[34] The point as I would see it is this. As a principle LAP may be open to criticism but as Lady Hale observed in paragraph 61 of her speech in *Three Rivers No 6*, it is too well established in the common law for its existence to be doubted. When applicable, as Mr McKinlay correctly explained, it is absolute; it is not subject to qualification or the making of an exception in the public interest. There is no balancing exercise to be carried out. That means that if LAP applies to what would otherwise be relevant evidence and is not waived, then the inevitable result is that the evidence is not compellable. LAP may thus, in the words of Lady Hale, "impede the administration of justice in the individual case" but so be it. The point was made by Lord Rodger at para 54 of his speech in *Three Rivers No* 6 when he quotes Lord Reid in *Duke of Argyll* v *Duchess of Argyll* 1962 SC (HL) 88 at 93:

> "...the effect, and indeed the purpose, of the law of confidentiality is to prevent the court from ascertaining the truth so far as regards those matters which the law holds to be confidential."

Mr McKinlay did not press his submission that it was odd that LAP should prevent recovery of material at the heart of the dispute beyond suggesting that it might weigh in the balance in what was a situation of some novelty. In my opinion it cannot go even that distance. A similar point was taken in *Micosta SA* v *Shetland Islands Council* 1983 SLT 483. It failed.

[35] *Micosta* was an action of damages in respect of alleged abuse of statutory powers on the part of the defenders' harbour master (an allegation with some similarities to what is alleged here). The pursuers were granted commission and diligence in respect of documents in the defenders' hands relating to the cause. The defenders produced letters between themselves and their law agents in a sealed envelope and opposed a motion for the

envelope to be opened up, claiming confidentiality. The pursuers contended that where the subject-matter of the action was an alleged illegal act on the part of the defenders, such communications were recoverable as directly relevant to the intention or state of mind of the defenders at the relevant time. In a reclaiming motion that contention was rejected. Lord President Emslie said this at 485:

> "So far as we can discover from the authorities the only circumstances in which the general rule [that correspondence between a party and his law agent are confidential and not recoverable] will be superseded are where fraud or some other illegal act is alleged against a party and where his law agent has been directly concerned in the carrying out of the very transaction which is the subject-matter of inquiry. In this case it is not suggested that the defenders' solicitors were involved at all in the intimation of the alleged threat by the harbour master and any confidential correspondence as to the defenders' views at the relevant time — for they were quite entitled to seek advice confidentially — clearly falls under the general rule ..."

[36] As I have already indicated, Mr McKinlay did not press his point. He did not invoke the exception to LAP which the Lord President identified in *Micosta*. Had he done so, notwithstanding what he said about the material in question going to the heart of the dispute, I would have considered that the pursuers' averments in this case do not bring it within the *Micosta* exception.

Conclusion in principle on whether the defender can claim LAP

[37] In my opinion there is no reason in principle why the defender cannot assert LAP in relation to communications between an Advocate depute and full-time salaried COPFS officials who are admitted solicitors and deployed in roles which require an application of their legal expertise.

Consideration of the contents of the confidential envelope

[38] I have considered the contents of the sealed envelope, as I was invited to do. Mr Ross had explained during his submissions that what had been placed in the envelope was produced in response to call 2 in the specification of documents: "emails ...showing or tending to show the basis upon which the Crown determined that an application for a restraint order ...should be made."

[39] The sealed envelope contains 12 sheets in the form of a printout of what appear to be eight emails sent over a period of some 21 hours on 16 and 17 December 2015. The senders and recipients are one advocate depute and three COPFS officials who I assume to be admitted solicitors. The immediate context for this exchange of communications was the imminent hearing for recall of the restraint order on 17 December at which the advocate depute was to appear. The style of communication is relatively informal as is to be expected with emails. The content includes summaries of facts, statements relating to the law as it relates to restraint orders and evaluations of the facts in the light of the law. The exchange has the appearance of a review of the defender's position in relation to the forthcoming application for recall of the restraint order.

[40] A feature of the email exchange is that it does not present a picture of the advocate depute as client providing information and the officials as lawyers providing advice which is the basic paradigm of circumstances to which LAP attaches. Rather, information is provided by the officials and the Advocate depute contributes to the discussion of the evaluation of that information in the light of the relevant law. Thus, as has already been touched on, what is revealed by the emails is what one would expect in an exchange between an Advocate depute and COPFS officials. However, that this does not conform to the basic paradigm of a private client disclosing his confidential affairs to his legal adviser,

does not seem to me to matter. What appears from the emails is an obviously private discussion of the application of the law to the available facts in an instant case, among four persons on whom the defender's predecessor in office relied for legal advice. That, in my opinion, gives the discussion and therefore the emails by which the discussion was carried out, a confidential character. The then Lord Advocate, as represented by his depute, was the recipient of legal advice, albeit that the Advocate depute was familiar with the relevant law and contributed to the discussion. I accept that one does not find a formal request for specific legal advice in respect of particular facts followed by the giving of legal advice in response but, to use the expression originally employed by Taylor LJ in *Balabel* v *Air India* [1988] Ch 317 and approved by Lord Scott in paragraph 38 of *Three Rivers No 6*, the communications related to what could "prudently and sensibly be done in the relevant legal context".

Disposal

[41] In my opinion the defender is entitled to assert LAP in respect of the contents of the sealed envelope. It follows that they should not be made available to the pursuers and, subject to any further procedure, may be returned to the defender. In his letter of 16 April 2019 addressed to the Principal Clerk of Session, the solicitor acting for the defender suggested that while the parties were in agreement that there is no necessary additional stage of procedure to be followed consequent on the motion I might deem it appropriate to issue my opinion before taking any action in respect of the sealed envelope in order to allow parties the opportunity to consider whether they would wish to seek leave to reclaim. I am content to do that and will therefore bring the case out by order shortly thereafter to allow parties to make such representations as they wish.

[42] There is an additional reason to issue this opinion before making any order and that is that while I have endeavoured to follow the decision-making process suggested by parties' submissions, I have thought it appropriate to acquaint myself not only with the authorities cited by parties but with some other authorities in the extensive jurisprudence on legal privilege. I do not consider that these additional authorities have distracted me from the path delineated by parties' submissions but, as is apparent from my opinion, I have looked at materials which were not referred to by the parties. I do not invite re-argument of the motion but if either party consider that they have been unfairly prejudiced by my reliance on any authority to which they did not refer I will consider their representations. If either party wishes to take up this opportunity they should, prior to the by-order hearing, lodge a written statement in the form of a note of argument focusing on any concerns that they may have.