OUTER HOUSE, COURT OF SESSION

[2020] CSOH 33

CA86/19

OPINION OF LORD BANNATYNE

In the cause

DAVID HENRY GRIER

Pursuer

against

THE CHIEF CONSTABLE, POLICE SCOTLAND

Defender

Pursuer: Smith QC, MacLeod; Kennedys Scotland
Defender: Duncan QC, Lawrie; Ledingham Chalmers LLP

20 December 2019

Introduction

[1] The pursuer has raised an action against the Chief Constable of Police Scotland. He seeks payment by the defender of £2,000,000 as damages based on allegations of unlawful and malicious conduct of the defender's agents resulting in alleged wrongful detention, arrest and prosecution.

[2] The case called before me in respect of a motion by the pursuer seeking summary decree.

[3] In particular the pursuer moved the court to sustain his first plea in law and to repel the defender's pleas in law other than the fifth plea in law. In practical terms the pursuer

sought decree in respect of the merits of the action reserving only the issue of quantum of damages for proof.

The background circumstances of the present action

[4] At the outset it is necessary to set out the background to and the circumstances of the present action.

[5] The pleadings extend to 119 pages together with a Scott schedule of 64 pages.

[6] The following accordingly requires to be understood as no more than a summary of a detailed and complex picture.

[7] The pursuer is a consultant experienced in business restructuring. In December 2010 and following thereon he was an employee of MCR Business Consulting. In October 2011 MCR was purchased by Duff & Phelps.

[8] In late 2010 CW, a businessman expressed interest in acquiring Rangers Football Club ("the Club"). After various discussions on 14 March 2011 CW engaged the pursuer to assist in negotiations with the Club's lenders, Lloyds Bank. The pursuer became an advisor to CW and continued in this role following the purchase of MCR by Duff & Phelps.

[9] CW through an acquisition vehicle, Wavetower Limited, entered into an agreement for the purchase of a controlling shareholding in the Club and was appointed as a director. The Club struggled to meet its liabilities. On 14 February 2012 it entered administration. Joint administrators were appointed. Later that month the joint administrators met with senior officers from Strathclyde Police and informed them that preliminary investigations suggested that the acquisition of the Club by Wavetower may have involved illegal financial assistance.

[10] Thereafter a number of individuals and their actions were investigated by the defender's officers. Among those investigated was the pursuer. The chief investigating officer

throughout was a Detective Chief Inspector R. He was principally assisted by a Detective Inspector O.

[11] Following upon these investigations on Friday 14 November 2014 the pursuer was arrested at his home in England by officers of Police Scotland. He was transported by a police car to Helen Street Police Office in Glasgow arriving late in the afternoon. Due to the lateness of the hour it was not possible for the pursuer to be taken to court and processed for release on bail. He accordingly had to spend the entire weekend in police custody before appearing on petition at Glasgow Sheriff Court on the following Monday, 17 November 2014 along with others who had also been arrested. A number of requests were made of the duty inspector that he be released, all of which requests were refused.

[12] A petition was served upon the pursuer. The petition served upon him contained allegations that he (with others)

> "did prepare a letter addressed to Liberty Capital, the acquisition vehicle used by CW dated 7 April 2011 providing advice on matters related to the acquisition of the controlling shareholding in the knowledge that the said letter would be produced by CW to Ticketus and used to induce Ticketus to release £18,161,500 to… (an) account controlled by GW". para (i)(vi)

[13] On 15 September 2015 an indictment was served upon the pursuer (and others) requiring his attendance at the High Court in Glasgow on 16 October 2015. A second indictment was served upon the pursuer on 2 December 2015. The final version of the indictment against the pursuer (following radical amendment by the Crown as a result of legal argument at various continued preliminary hearings) alleged inter alia

> "(c) in respect of the Independent Committee of the Rangers Football Club PLC ('Club') knowing that an Independent Committee comprising AJ, DM, MB, JG and JM all c/o Police Service of Scotland, Glasgow and all directors of the Club had been set up by the board of the Club in March 2010 with powers inter alia to recommend acceptance or rejection of any proposed offer to acquire the Club or any of its businesses or assets assessed on the merits of the Club, its shareholders and all other stakeholders in the Club including the supporters,

you CW, GW and David Henry Grier did by yourselves and by the hands of your authorised agents, employees and representatives on various occasions between 3 December, 2010 and 6 May, 2011 both dates inclusive,

(ii) You CW, GW and David Henry Grier did on 24 April, 2011, at a meeting of the Independent Committee at Murray Park, wilfully conceal from the Independent Committee the ticket purchase agreement with Ticketus hereinafter described in paragraph (d) in respect of sales of season tickets for seasons 2011-12, 2012-13 and 2013-14 being assets of the Club normally available for public sales, induce: the Independent Committee to believe that there was no requirement to arrange ring-fenced accounts for season ticket sales for the forthcoming season of 2011-12 knowing that sales of season tickets for seasons 2011-12, 2012-13 and 2013-14 had been agreed with Ticketus aforesaid and this you did to prevent the Independent Committee from discovering same; knowing that the Independent Committee had concerns regarding the source of funding by the acquisition of the Club the ability to provide cash to invest in the Club for players' acquisition, the ability to meet the liabilities of the Club and the ability to provide working capital to fund future operations of the Club, you did repeatedly make false representations and pretences to the Independent Committee to the effect that they would be provided with sufficient evidence of same, knowing that you did not have sufficient evidence of same and had no intention of providing sufficient evidence of same."

[14] The pursuer sought to challenge the allegations contained in the final version of the indictment, and the matter proceeded to a preliminary hearing. The Lord Ordinary considered preliminary pleas based on allegations of relevancy, competency and oppression. Following the hearing of evidence and hearing legal submissions, the Crown sought to amend the indictment by deleting certain words. The Lord Ordinary agreed with the submissions on behalf of the pursuer and around 15 April 2016 he dismissed the charges against the pursuer.

[15] In the course of oral argument at the summary decree motion it was contended on behalf of the pursuer that during the prosecution the charge of fraud which the pursuer faced consisted of an allegation that he conspired with others to mislead the Independent Committee; and then he conspired to prepare a letter of comfort to Ticketus who, as a result, released funds for the purchase of the Club. Given the foregoing contention it is convenient at

this stage in order to understand the detailed argument advanced at the summary decree motion to set out the background as to the funding of the Club by Ticketus and the creation and nature of the Independent Committee.

[16] In respect of the Ticketus funds the Club had operated, for some years, a system whereby a third party (Ticketus) had provided finance in advance of payments received by them for the sale of season tickets. Part of the allegations against the pursuer which subsisted until he was prosecuted related to the question of whether the pursuer was aware that it had been represented to others, being Murray Group, the Independent Committee and Lloyds Bank that funds which were in reality Ticketus advances, were in fact money advanced personally by CW. Such representations would give a misleading impression of the liquidity of CW and a misleading impression of the ultimate liquidity of Rangers.

[17] In respect of the Independent Committee, on 24 April 2011, the pursuer (along with CW and others) attended a meeting of the Independent Committee. The Independent Committee was a public relations creature which had no statutory or other formal status. It comprised notable individuals from the world of football. Its purpose was in order for supporters to feel that they had individuals who would provide their blessing to any deal. However, the Committee could not stop, or influence the transaction in any way whatsoever. There were no "negotiations" with the Committee and nothing that was said at any meeting by anyone could have influenced the outcome materially or otherwise. It was for these reasons that the Lord Ordinary at the preliminary hearing, in the criminal case dismissed the charges against the pursuer.

Summary decrees: the legal framework

[18] The following propositions in respect to the approach to summary decree motions were agreed by parties to set out the legal framework in respect of which the motion before the court required to be considered:

(a) The degree of satisfaction that is the tipping point for the court is less than certainty, but more than probability;

(b) The court can take into account documents other than the pleadings;

(c) While the court at the stage of the summary decree motion should not trespass on what is actually a matter for proof, it is in a quest to see if there is a genuine defence and not merely a relevant defence pled. Accordingly, a defender might state a defence, but if the facts appear to the contrary then the court can grant summary decree. Accordingly, the reverse of *Jamieson* v *Jamieson* [1952] SC (HL) 44, as it were, does not apply.

(d) Summary decree is not limited to those cases where there is no defence stated at all or the stated defence is plainly irrelevant; the court is not barred from pronouncing decree simply because the defender makes unspecific assertions which, if established, would provide a defence where the defender does not offer to prove it.

The submissions on behalf of the pursuer

[19] In the course of his submissions Mr Smith repeatedly referred to Detective Chief Inspector R and it was in respect of this particular officer that nearly all of Mr Smith's criticisms were focused. As I earlier noted he was the senior investigating officer throughout most of the investigations and therefore the police officer in charge of the investigations

surrounding the acquisition of the Club by CW. His deputy in this investigation was Detective Inspector O. In particular Detective Chief Inspector R was the police officer who had prepared a number of reports for the Crown which were referred to by Mr Smith in the course of his submissions.

[20] In summary the core of Mr Smith's submission can be set out in the following propositions:

(a) The pursuer faced a charge of fraud. At all stages, that charge consisted of an allegation that he conspired with others to mislead the Independent Committee (the "IC"); and that he conspired to prepare a letter of comfort to Ticketus who, as a result, released funds for the purchase of the Club.

(b) R represented to the Crown that the pursuer had actively committed each element narrated above.

(c) In fact the pursuer did not do either of them.

(d) R has only recently admitted that in each respect he was in "error".

(e) He offers no explanation as to how that "error" could have occurred.

(f) In the absence of evidence for an allegation being made that leads to prosecution, it is presumed to be malicious.

(g) Until a time after the pursuer was arrested, charged and appeared upon indictment, the Crown did not have available to them the original evidence upon which they could make an independent assessment of the guilt or innocence of the pursuer.

(h) It is presumed that the Crown relied upon the communications from R as being true and accurate. In fact, they were false. R, and hence the defender,

> accordingly are responsible for the wrongs committed by the false reporting to the Crown.

In addition Mr Smith relied on various other aspects of Detective Chief Inspector R's behaviour as supporting his allegation of malice on the part of this officer.

[21] Mr Smith commenced his detailed argument by considering the legal framework of the pursuer's action and started by posing this question: who is the "prosecutor"?

[22] His general position was that a "prosecutor" can be anyone who promotes the prosecution: for example a complainer, or the police or any other private individual if that person is motivated by malice. In support of this submission Mr Smith referred to paragraph 452 of the Stair Encyclopaedia where the following is said:

> "A person who gives information to the police or prosecuting agencies, as a result of which the latter raise criminal proceedings, is not responsible for the conduct of these proceedings and cannot be held liable for loss caused thereby due, for example, to a flaw in the procedure. Such a person can, however, sometimes be held liable for wrongfully procuring a prosecution if the information given is false. The matter has been put thus:
>
> 'When it comes to the knowledge of any one that a crime has been committed, a duty is laid on that person, as a citizen of the country, to state to the authorities what he knows respecting the commission of their crime, and if he states only what he knows and honestly believes he cannot be subjected to an action of damages merely because it turns out that the person whom he has given the information is, after all, not guilty of the crime. It is necessary for anyone raising an action of damages against a person who is given such information to aver that the information was given maliciously and without probable cause.'"

[23] Accordingly Mr Smith submitted that a person providing information to the prosecuting authorities can competently be sued for malicious prosecution if malice and want of probable cause are shown.

[24] Mr Smith then turned to consider in more detail the issues of want of reasonable and probable cause and malice. He did so under reference to an English Court of Appeal decision in *Rees and others* v *Commissioner of Police for the Metropolis* (2018) EWCA Civ 1587. He first

submitted that there is, and can be no material difference between the principles applicable in England and Wales or indeed any other common law jurisdiction than that in Scotland. Procedures may differ but the substance is identical. He asked this question: why would Scotland differ from any other common law jurisdiction?

[25] Mr Smith in his consideration of this case began by setting out what the Court of Appeal by approving what the trial judge had said were the five essential elements of a malicious prosecution claim:

(i) It was a prosecution that caused the plaintiff damage

(ii) The prosecution terminated in his favour

(iii) The defendant instituted or continued the prosecution

(iv) There was a "want of reasonable and probable cause"

(v) The defender acted with "malice"

[26] Accordingly assuming that the defender's officers were the prosecutors in the present case then the only disputed elements were at (iv) and (v).

[27] Mr Smith then turned to consider the meaning of want of reasonable and probable cause and submitted that if there is an absence of evidence to support an allegation then there is by definition a want of reasonable and probable cause. At paragraph 73 in *Rees* McCoombe LJ cited with approval the observations of the trial judge, in adopting observations of Lord Denning in an earlier authority. Lord Denning said:

> "Whereas in truth he is only to be satisfied that there is a proper cause to lay before the court or in the words of Lord Mansfield, 'that there is a probable cause' to bring the (accused) 'to a fair and impartial trial'"

[28] The matter of want of reasonable and probable cause was summarised helpfully by McCoombe LJ in *Rees* in the following manner:

> "75. In my judgment, it is entirely clear that the case presented by DCS Cook to the CPS was not a 'proper' one, nor was it 'fit to be tried'. It included (and strongly relied upon) evidence, on the judge's findings, procured by DCS Cook's own acts which were intended by him to pervert the course of justice. There is no evidence that he gave any thought to the question whether there was a fit or proper case to be laid before the court absent that tainted evidence. In such circumstances, I cannot see that DCS Cook could be found to have honestly believed that there was a 'proper' case to lay before a court. Indeed, as the appellants forcefully pointed out to us, Mr Johnson QC presented no specific argument to us on this aspect of the case, other than (inferentially) by support for the judge's finding that DCS Cook believed that the case (without Eaton) provided 'reasonable and probable cause' – as to which, as I say, there was no evidence whatsoever.
>
> 76. For these reasons, while I cannot disagree with the judge that there may have been objectively sufficient evidence (absent Eaton) to provide reasonable and probable cause to prosecute, I find it impossible to say that, as a prosecutor, DCS Cook believed that he had reasonable and probable cause to lay murder charges against these appellants."

[29] Mr Smith then turned to place the above analysis in the context of the present case and submitted: it is plain that an absence of any evidence to support an allegation, which he contended appeared now to be accepted by the defender, renders it obvious that there can be no "reasonable" cause, in that there is no reason for making the statement, and thus no "probable" cause. His core submission was that in the absence of any explanation for the admitted errors by Detective Chief Inspector R, there is clear want of reasonable and probable cause. In respect to the issue of malice Mr Smith maintained that if there is an absence of reasonable and probable cause, then that establishes that there was malice on the part of the police. He sought to put the matter in this way: if a police officer knows that there is no evidence for an allegation, or it is presumed that he must have known, then he cannot in making the report of the crime have been acting in accordance with his duty. He must have been deliberately acting maliciously, malice being acting for an improper motive. It does not of course require actual evincing of malice and ill will.

[30] Mr Smith then moved to consider certain further authorities which he contended supported the position he was advancing, first in *Quinn* v *Leathern* [1901] AC 495 at 524 Lord Brompton stated the following:

> "Of course, if when he instituted criminal proceedings the prosecutor knew he had no reasonable grounds for the steps he was taking, the definition of malice given by Bayley J in *Bromage* v *Prosser* would distinctly apply, and no further proof of malice would be required…"

[31] In *Bromage and another* v *Prosser* (1825) 4B and C 247 Bayley J stated:

> "The law infers malice from the probable result, viz the injury to the defendant"

and later Bayley J observed:

> "…malice in common acceptation means ill will against a person but in its legal sense it means a wrongful act done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse"

[32] Returning to *Rees* at paragraph 81 Mr Smith accepted that the fair point is made that a desire to bring a criminal to justice is the job of the police. However, it is the desire to bring him to justice that is important, and it is not bringing him to justice if a police officer deliberately withholds evidence, or misrepresents the position. By so doing, he has deprived the prosecution and the fact finder, namely: a jury or a judge of the necessary material to hold a fair and just trial. By syllogism if a police officer is unable to offer an innocent explanation for an error, then it is to be presumed that he acted for improper motive. Even if the officer himself believes in guilt, it is not enough to excuse his behaviour: that is clear from a consideration of the *Rees* case.

[33] Lastly in paragraph 85 of *Rees* reference is made to the observations of Lord Toulson JSC, in *Willers* v *Joyce* [2016] UKSC 43 and in particular paragraph 55. His observations included:

> "As applied to malicious prosecution, it requires the claimant to prove that the defendant deliberately misused the process of the court. The most obvious case is where the claimant can prove that the defendant brought the proceedings in the knowledge that they were without foundation… But the authorities show that there may be other instances of abuse. A person, for example may be indifferent as to whether the allegation is supportable and may bring the proceedings, not for the bona fide purpose of trying that issue, but to secure some extraneous benefit to which he has no colour of a right. The critical feature which has to be provided is that the proceedings instituted by the defendant were not of bona fide use of the court's process. In the *Crawford* case Mr Delessio knew that there was no proper basis for making allegations of fraud against Mr Paterson, but he did so in order to destroy Mr Paterson's business and reputation."

[34] Mr Smith took the following propositions from the above legal analysis:

(a) The person who promotes the prosecution by providing information can indeed be a prosecutor. The police can, if they know that their representations will be relied upon, be taken to be the prosecutors.

(b) If there is an absence of evidence for a statement made, it is taken to be without reasonable and probable cause.

(c) The absence of reasonable or probable cause is, of itself, malicious without further proof.

(d) The misreporting of crucial facts cannot be excused by an honest belief in guilt.

[35] Mr Smith then turned to examine the facts and circumstances of the present case in terms of the above legal framework. He first turned to look at the petition and the indictments which the pursuer had faced. He described the charges contained therein as lengthy and opaque, however, he summarised the charges in the petition as follows:

1. The pursuer conspired with others to pretend to Sir David Murray that CW had sufficient of his own funds to purchase the Club;

2. On 24 April 2011 the pursuer attended a meeting of the Independent Committee and at the meeting he "did pretend" that CW had sufficient of his own funds to effect the purchase;

3. That along with others a letter of 7 April 2011 was prepared and submitted (in some unspecified way) to Ticketus, and by that letter (referred to elsewhere as a letter of comfort) whereby Ticketus were induced to enter into a funding arrangement;

4. That the pursuer sought to pervert the course of justice.

[36] Throughout his submissions Mr Smith referred to the charges at 2 and 3 above as respectively the Independent Committee lie and the letter of comfort lie.

[37] In respect to these two lies he submitted the truth of the matter was that the pursuer did not make any representation to the Independent Committee at all; and although in respect of the comfort lie he was in the course of preparing a letter to assist CW, on receipt, the letter was considered "disappointing" by PAB a witness and GW another accused who suggested certain changes which were adopted in a later email. The final version of the email was sent by PAB to Ticketus at midnight. It was limited to expressing views about the tax liability at the Club and nothing to do with Ticketus funding. Indeed the funds were released by Ticketus several hours before the email was completed. Notwithstanding these obvious points, unless the Crown had a basis for thinking that there was a misrepresentation to the Independent Committee; and there was a letter prepared by the pursuer which induced Ticketus to release the funds, their charge could not stand. There could be nothing left in the indictment or petition.

[38] So in the context of the law on malicious prosecution as developed above Mr Smith posed what he said was the critical question: Did Detective Chief Inspector R tell the Crown

that the pursuer had done these things? Or put another way did he provide the information to the Crown upon which the charges were brought and thus became the prosecutor?

[39] He argued that the first matter in considering these questions is to look at whether there were clear and obvious lines of inquiry regarding each of the Independent Committee and comfort lies that are alleged and to look at the approach of Detective Chief Inspector R to these lines of inquiry.

[40] Thus: in respect of the allegation of misleading the Independent Committee, the obvious source of information that the pursuer misrepresented something to the Independent Committee would be to interview those present at the Independent Committee meeting; and to seek to recover minutes of the meeting if they exist, or other written records of what took place. In fact, it is known that Detective Chief Inspector R and Detective Inspector O did interview Alastair Johnstone, the Chairman of the Independent Committee. Indeed they travelled to Ohio, USA to do so. His statement reveals nothing about any misrepresentation by the pursuer. So either he was not asked, or was asked and replied in the negative. Equally, the minutes of the Independent Committee meeting do not reveal any suggestion that the pursuer represented anything to the Independent Committee regarding the source of funds. Notes by Mr Johnstone were also recovered by Detective Chief Inspector R which again said nothing about any involvement of the pursuer.

[41] In respect of the comfort letter allegations, the obvious line of inquiry would have been to Ticketus. Did they receive a letter of comfort? Who prepared it? And did it induce them to release the funds? It is known that Ticketus officials were not asked any of these questions, and indeed the timing of the release of funds with the finalising of the emails indicates that it would be impossible for them to have induced the release, as the email was completed after the funds were released.

[42] Turning to what was represented by Detective Chief Inspector R in respect of the said two elements of the charge Mr Smith commenced by contending that an examination of the Scott schedule showed that Detective Chief Inspector R's position had changed materially over time. Thus in respect of the Independent Committee lie the initial response by the defender to the allegation that Detective Chief Inspector R had reported to the Crown that the pursuer had misrepresented to the Independent Committee, was in effect "that is not what R said. All he said was that the pursuer had reported to R that he had made certain representations to the Independent Committee." As a matter of fact, the pursuer's witness statement says no such thing, but the defender was trying to take advantage of the clumsy language of Detective Chief Inspector R to seek to create an ambiguity. There was Mr Smith submitted no ambiguity. Thus the defender's position was in short "no he did not say what you allege".

[43] In light of the response set out above the pursuer adjusted the Scott schedule and pointed out that in a different and subsequent report, Detective Chief Inspector R stated in clear and unambiguous terms to the Crown "David Grier in particular presented a version of this document on and around 24 April 2011 to the Rangers Directors and Murray Group personnel". There was no evidence that the pursuer had done so: not from Alastair Johnstone or the minutes of the meeting or anything else. Mr Smith emphasised that the allegation made was of a very particular nature, namely: that the pursuer presented a document which was false. For that there was no evidence. In that the defender in these circumstances could not continue with his position as stated in the Scott schedule shortly before a proof diet which had been fixed in the sheriff court the following change was made to his response in this section of the Scott schedule:

> "As stated in DCI R's supplementary statement, para 20: insofar as my reference in the 19 June 2014 Subject Sheet that 'David Grier in particular presented a version of this document' could be construed as a representation that Mr Grier actually either presented the amended cash flow to the Independent Committee or presented on that document to the Independent Committee, then I accept that as an error."

[44] Mr Smith commented as follows in relation to the above change in position: there is now an admission by Detective Chief Inspector R that what he told the Crown in respect of the Independent Committee lie was an "error"; however, no explanation is offered on behalf of the defender as to how this "error" could have been made. Accordingly, the admission in essence amounts to this: there was no evidence upon which to base the report to the Crown, which formed a charge against the pursuer; the defender's position commenced with what Mr Smith described as obfuscation in the first answer to the schedule.

[45] Mr Smith took from the above that absent of any explanation as to why the position in the Scott schedule was altered after such a length of time that it was a fair assumption that Detective Chief Inspector R had in the course of this litigation been dishonest when the answer to paragraph 1 in the Scott schedule was prepared. If he was dishonest that was indicative of a pre-existing and a continuing malice.

[46] In respect to the comfort lie Mr Smith's general submission was that the defender's response in the Scott schedule to the issues surrounding this was once again an exercise in obfuscation. This matter is dealt with from paragraph 16 of the Scott schedule onwards. He submitted that the simple point the pursuer was seeking confirmation of was that the funds were transferred before the email was completed by the pursuer and sent to CW. Accordingly, that letter could not have induced a practical result by the recipient. Yet, he submitted, that rather simple series of propositions became lost in the midst of what he described as a failure to address the point. He described for example the answer to paragraph 17 of the Scott schedule as incomprehensible.

[47] Moving on in the Scott schedule paragraph 18 sets out the simple proposition, that in the Standard Prosecution Report ("SPR") [this is a document provided by the police to the Crown, setting out information and recommending whether an individual should be prosecuted and if so what is the evidence] Detective Chief Inspector R stated that the funds were released after the letter was received by Ticketus, which is false. That is admitted. Thereafter there follows a very long explanation which Mr Smith submitted added nothing but confusion and irrelevance. Then in paragraph 20 of the Scott schedule it is stated that R reported in the SPR that the funds were released after the letter was sent to Ticketus. That was initially denied, but later admitted. The explanation and the answer to 20, which again came extremely late in the day, appear to accept that the statement in the SPR was an error by Detective Chief Inspector R.

[48] From the foregoing Mr Smith submitted that a similar series of propositions to that which he had propounded in relation to the Independent Committee lie could be made.

(a) Detective Chief Inspector R now admits in his witness statement that what he told the Crown in respect of the letter of comfort being a false pretence which provoked a practical result was an "error".

(b) Neither Detective Chief Inspector R nor the defender offers any explanation as to how the "error" could have been made. Accordingly, once more, Detective Chief Inspector R is admitting in essence that there was no evidence upon which to base the report to the Crown on that matter, which of course formed a charge against the pursuer.

(c) The defender's answers are punctuated by a failure to admit what should have been admitted.

[49] Mr Smith then summarised his position so far as the two lies are concerned in this way: there is an acceptance by the defender that in respect of the only two elements of the charge of fraud against the pursuer, namely: the two lies, it was an "error". However, thereafter no explanation is given as to how these errors could have occurred. Thus as a matter of law, when there is no evidence to support a charge, it is presumed to be maliciously reported.

[50] There was not only the above which clearly supported the pursuer's position that there had been a malicious prosecution there was also what was described as the "Don't tell David" email.

[51] As a preliminary proposition to advancing his argument relative to the significance of this email Mr Smith said this: the pursuer was charged with conspiracy to defraud. At the very least, the start point for bringing home a charge of this kind is that the accused must have known about the intention to mislead. If he was ignorant about the fraud by others he cannot and could not be convicted of the charge of fraud.

[52] In development of his position regarding this email Mr Smith first returned to the Scott schedule and directed the court's attention to paragraph 24 and following where the issue is raised regarding an email chain. Paragraph 25, it is accepted that an email was sent by CW to PAB which stated inter alia: "Don't disclose anything to David other than what is required for him to negotiate with the bank. That is all he's engaged to do." (the "don't tell David email"). In the Scott schedule and from the email chain it can be seen that PAB stated that he had not told the pursuer "anything" (see: section 29 of the Scott schedule).

[53] This email was contained in a cache of emails available to Detective Chief Inspector R and is clearly and obviously inconsistent with the statement of PAB relied upon by Detective Chief Inspector R that the pursuer did in fact know about the actual Ticketus deal.

[54] He went on to develop this argument as follows: the defender admits that that email was sent by CW to PAB. It is admitted that R was aware of it when he prepared the SPR. He so admits inter alia in his supplementary statement at paragraph 41. In recent (July 2019) disclosure the "Don't tell David" email is produced. A handwritten annotation in that document by Detective Chief Inspector R by means of an asterisk which points to its importance. It is denied by the defender that the email is "consistent" with the pursuer being ignorant of the actual Ticketus arrangement. The defender responds to the email as follows: The email is not exculpatory. It is not significant. That it is not expressly mentioned in the SPR is unsurprising. There is a very simple issue raised in the Scott schedule regarding this email. Were the Crown told of its existence and when? Regrettably, the defender fails to provide an explanation of what the position actually is. It is plainly exculpatory and significant.

[55] In paragraph 28 of the Scott schedule, the pursuer states simply that R did not at any time advise the Crown of the existence of this email. That is denied (thus maintaining that he did in fact tell the Crown of its existence). The Scott schedule then refers back to lines 15 and 26 of the Scott schedule, but when one looks to line 15 for a statement that the email was in fact sent to the Crown, one looks in vain. This is, once again, obfuscation.

[56] The defender maintains at 26 that the email was neither "significant" nor "exculpatory". And no doubt, despite suggesting that the email was disclosed to the Crown, it is being suggested that the reason Detective Chief Inspector R did not disclose it was because he considered it to be an irrelevance.

[57] In his first statement in this action [TAB 11A], at paragraph 188 and following, Detective Chief Inspector R discusses the email; and at paragraph 32 of the supplementary statement. His position is solely based upon what he thought was the case, and what the

explanation for the email was. None of it is remotely logical or reasonable. It appears from statements taken from PAB that he was never asked about it. Nor was he asked about PAB's reply referred to above, which is plainly inconsistent with the PAB statement. It is also crystal clear that the email is plainly exculpatory; and even if some charitable view can be taken of the R analysis, it is plainly an email that should have admitted of the interpretation that the pursuer was in fact being kept in the dark about the actual Ticketus deal. He emphasised that evidence does not have to be "exculpatory" for it to be relevant, or for the obligation to exist of disclosure. The Crown was, by the concealment of its existence, deprived of the ability to make an independent and informed judgment of whether the pursuer should be prosecuted. The Crown was also deprived of the ability to disclose to the defence a vital piece of evidence which they would have had the obligation to disclose. Further he emphasised that there was in fact - as now is accepted - no evidence that the pursuer was in fact aware of the actual Ticketus deal and thus nothing to "exculpate" him from. For what it is worth, on the basis of that email, those representing the defendants in the High Court action accepted that it demonstrated ignorance by the pursuer of the actual transaction, and they abandoned their claim for a contribution to damages by Duff & Phelps. It is also a matter of importance to note that the email was not, by definition, something of which the pursuer was aware, yet was contained (according to R's statement} in the CW database (viz the 130,000 or so emails). The defender has consistently failed or refused to hand over that database in this litigation. It is abundantly clear that at least one vital piece of evidence was contained in that database (the "Don't tell David email") and the pursuer continues to wish to interrogate that database to find out if there is anything else that R decided not to advise the Crown that is of importance. It is a matter of admission by the defender (in the notice to admit) that Detective Chief Inspector R interrogated the email database and nothing incriminating was found. That ought

to have been disclosed to the Crown too. In the defences, their note of argument and the Scott schedule, the defender seeks to suggest that certain emails within the cache were incriminatory of the pursuer. In his statement at paragraph 327, Detective Chief Inspector R states that the database "implicated" the pursuer. Yet that denial fails to state what implicated the pursuer. Of the emails produced and referred to by Detective Chief Inspector R, none "implicates" the pursuer and Mr Smith reminded the court that the defender has unreasonably refused to produce the database of emails, despite Detective Chief Inspector R relying upon some of them for his opinion. No valid reason has been given for the failure to produce them.

[58] Mr Smith submitted that the foregoing showed a clear want of reasonable and probable cause. There is no evidence to support the allegations made against the pursuer, that on its own shows there is no reasonable cause. There is no explanation for the errors of Detective Chief Inspector R in his reporting to the Crown. There is no explanation for his failure to report the "Don't tell David" email. Taken together this evidence on its own clearly shows malice on the part of Detective Chief Inspector R. There is nothing put forward on behalf of the defender which supports an honest belief in the position put forward by Detective Chief Inspector R.

[59] Turning to the issue of the causative effect of the foregoing Mr Smith contended that the Crown at least to the stage of the petition were relying on the police reporting. This was shown by the following:

- The petition followed on the prosecution report prepared by the police.
- The summary of evidence attached to the petition was taken from the SPR and not filtered through the mind of the Crown.

- The schedule prepared by Detective Inspector O as to when documentary evidence was uploaded by the Crown, contained dates almost all of which post-dated the date of the petition. If the Crown obtained any primary evidence to allow it to independently consider the matter the defender has not produced that information.
- The harm was done to the pursuer at the stage of the petition and the petition was entirely procured by the actings of Detective Chief Inspector R. At that stage there was a completed wrong and thereafter it caused damage to the pursuer.

[60] The next chapter of the pursuer's submissions related to elements of what was described by Mr Smith as misbehaviour on the part of Detective Chief Inspector R which supported a general presumption of malice.

[61] This chapter divided into a number of discrete submissions. However, the broad thrust of them was this: the actings of Detective Chief Inspector R showed a reckless determination by him to obtain evidence in breach of the requirements of due process.

[62] First it was contended that Detective Chief Inspector R had obtained and executed a search warrant in abuse of state power.

[63] On 6 November 2015 Detective Chief Inspector R had requested and obtained a warrant in Glasgow Sheriff Court. This was a highly unusual course of action in that at the time of the request the pursuer was subject to High Court procedure.

[64] The intention of Detective Chief Inspector R was to search the offices of Holman Fenwick Willan ("HFW") Solicitors in London, who at that time were representing not only Duff & Phelps, but also representing the interests of the pursuer albeit instructing Scottish solicitors to handle the Scottish part of the criminal proceedings.

[65] There was a dispute as to what had been said and done at the time of the obtaining of the warrant in Glasgow Sheriff Court. It was not accepted that this factual dispute could not be determined at the hearing of a summary decree motion and there was no further discussion of this issue.

[66] However, what was relied upon by Mr Smith was what had occurred following the obtaining of the warrant and which it was his position had been orchestrated by Detective Chief Inspector R.

[67] First on 9 December 2015, the warrant was given effect in England by application to the City of London Magistrates' Court for the warrant to be endorsed. A search then took place at HFW's offices, during which a number of items were seized including items which were of clients of HWF entirely unconnected with the Rangers inquiry. No steps were taken to protect the obvious privilege that would arise in respect not only of third party clients, but of the pursuer and others in Duff & Phelps.

[68] Moreover, while the search was underway, HFW instructed counsel in England to have an interim injunction granted against a number of parties including Police Scotland.

[69] On the day of the search Simon Clark of HFW met with Detective Chief Inspector R and indicated that it was his intention to obtain an injunction against him from continuing with his search, seizure and inspection of any documents within and taken from the offices of HFW. He asked for an assurance that the documents would not be viewed, and that they would be kept secure until the matter was determined by the court. Detective Chief Inspector R responded to him that as far as he was concerned the warrant was valid and lawful, and he would give no assurances to Mr Clark. The application for the injunction was heard on the evening of 9 December and on that date the interim injunction was granted. When the injunction was granted HFW sent an email communication to Detective Chief

Inspector R informing him of the terms of the injunction; a notice was given to City of London Police of the injunction. Detective Chief Inspector R was repeatedly asked to confirm that he would comply with the terms of the injunction but did not respond. However at 2.00pm on 10 December 2015 he was personally served with the injunction. The proceedings in England were followed up by proceedings in Scotland where on 11 December 2015 an application was made to the courts in Scotland to suspend the warrant.

[70] Despite having had the injunction personally served upon him Detective Chief Inspector R emailed Simon Clark of HFW on 14 December 2015 asking that he comply with the terms of the warrant by providing him with electronic copies of the material which had been seized. Mr Clark responded pointing out that there was a live High Court injunction in place, and an application was underway in Scotland to suspend the warrant. He accordingly refused to hand over electronic copies.

[71] What followed was this: the warrant was quashed in Scotland. The judicial review proceedings in England concluded by the issuing of a decision by Gross L J and Mitting J in the High Court. In that decision the actions of the police were described as "heavy handed" and an "abuse of power".

[72] It was contended by Mr Smith that Detective Chief Inspector R's actions constituted this abuse. It was submitted that given this abuse of state power it could not be contended that a police officer was acting other than maliciously.

[73] The second matter in this chapter was this: it was maintained that even after the granting of the interim injunction Detective Chief Inspector R had sought to circumvent it by emailing Duff & Phelps insurers Novae in the following terms:

> "It is in relation to your company's relationship with both Duff & Phelps and HFW and a particular line of inquiry I have that I would welcome the opportunity to discuss my enquiries with you to establish if you can assist my investigation. To protect the

> integrity of the criminal investigation I respectfully request that you do not disclose or discuss this matter at this time with either Duff & Phelps or HFW or individuals who represent them."

[74] Mr Smith then referred to the defender's response in their written submissions at paragraph 87 in respect of this particular matter: there he submitted it is maintained that the approach to Novae was made with the knowledge of the Crown and Andrew Gregory, Duff & Phelps solicitor. He submitted that that is evidently untrue. The correspondence indicates that the approach by Detective Chief Inspector R to Novae was secretive and in particular he noted that Novae was thanked for not disclosing the approach to Duff & Phelps as late as 18 December 2015, having had at least one conversation with Novae the notes of which have never been produced. At paragraph 132 of his supplementary statement Detective Chief Inspector R lists the email correspondence he had with Novae. In the list of correspondence, Detective Chief Inspector R fails to disclose that prior to 21 December 2015, he had been in contact in secret with Novae. The suggestion that there was no secret about contacting Novae is simply untrue. The reason he disclosed to Mr Gregory that he had done so was that Novae refused to provide further information unless Mr Gregory approved. In addition Mr Smith referred to the following section of Detective Chief Inspector R's supplementary statement:

> "129 Following the search of HFW premises and the resulting injunction, I contacted both Novae and Duff & Phelps through their respective solicitors in order to try to obtain the materials which had been the subject of the December 2015 warrant and to cut through the difficulties which the police were experiencing in recovering materials."

[75] Mr Smith submitted that the "difficulties" which were referred to in this statement were the injunction which had been obtained. It was clear that he was seeking to circumvent the injunction.

[76] Thus Mr Smith submitted that Detective Chief Inspector R's approach to Novae and the request that this be kept secret was an unacceptable way to proceed. Again it was submitted that this was indicative of malice.

[77] Mr Smith then turned to how Detective Chief Inspector R had behaved in relation to what he described as the schedule 9 document.

[78] He began this section of his submissions by describing the schedule 9 document and its importance: this document was vital to the decision to prosecute the pursuer. The importance was that there were two versions of it: one which showed the source of funds for the share purchase to be CW's own money, via Wavetower, and the other, which was the truth, showing the source of part of the funds to be in essence a debt owed to Ticketus. It is not contentious that it was clear that the alteration to the schedule 9 document was designed to mispresent the funding arrangements, but the pursuer was wholly unaware of the content of schedule 9. He was unaware that it had been altered. But Detective Chief Inspector R engaged in a quest to try to establish, albeit he had no basis for believing it to be so, that the purser knew of the alteration.

[79] Mr Smith argued that throughout the investigation, it is clear from the answers in the Scott schedule that Detective Chief Inspector R had in fact accessed a version of schedule 9 which was recovered during a search of the offices of Duff & Phelps, despite there being an immediate claim to privilege over the file in which schedule 9 was placed, thus ignoring the claim of privilege and this too is indicative of malice. In support of this Mr Smith referred to the Scott schedule from paragraph 135 to 147 and in particular to 146 where the following is said:

> "In the interim report to the Crown dated 5 April 2014, R makes reference to the schedule 9 cash flow document which had been contained in the black file. He does so by stating 'on 28 August 2013 documentary evidence was seized under warrant from

> the premises of Duff & Phelps. Included and identified during initial sift is a one page document … which is a financial forecast spreadsheet which shows Ticketus as the fund through the acquisition. This is the spreadsheet Saffery Champness … prepared and was instructed to remove reference to Ticketus and replace with Wavetower".

In response to that statement made on behalf of the pursuer in the Scott schedule the response is: "Yes" by the defender. Thus there is a clear breach of the asserted privilege.

[80] The next section of the allegations regarding Detective Chief Inspector R's behaviour related to a further claimed breach of privilege. This allegation related to an envelope containing CD type discs containing copies of and emails in respect of which privilege was claimed by Duff & Phelps.

[81] Detective Chief Inspector R's position throughout was that he had only opened these envelopes when they were returned to Duff & Phelps solicitors, namely, Mr Gregory (see: Scott schedule at answer 13).

[82] However, shortly before the initial diet of proof in the Sheriff Court Detective Chief Inspector R gave a wholly different explanation, what he now said was this: he had already opened the envelopes and he was merely conveying that he had reopened them before Mr Gregory. The email correspondence Detective Chief Inspector R had after the event with Mr Gregory makes no mention of this bizarre explanation; and his initial statement in the case said that the envelopes were in a "sealed production bag". The inconsistency between the initial statement and the supplementary statement, after three solicitors provided statements to the court that are contrary to what he was representing, is inexplicable other than by considering that he has sought to mislead the court in this process. Once more that is indicative of malice. Equally, the bizarre explanation now provided amounts to an admission of breach of claimed privilege. That too is indicative of malice.

[83] The next matter referred to by Mr Smith was this: the reporting that the pursuer had misled the Insolvency Practitioners Association ("IPA") and attempted to defeat the ends of justice by lying to Lord Hodge. The critical point in relation to this was that the pursuer is not and had never been an insolvency practitioner. He never had been regulated by the IPA and could not contribute to the report ordered by Lord Hodge.

[84] At a meeting between Detective Chief Inspector R and the IPA, he was advised by them that the pursuer had no connection with them. Despite being advised as above on 3 October 2013, he never the less reported to the Crown subsequently via SPR on 8 August 2014 that the pursuer had attempted to defeat the ends of justice by lying to both the IPA and Lord Hodge. Mr Smith submitted that Detective Chief Inspector R was clearly aware that the pursuer had not committed any offence, and that he had not lied to Lord Hodge. Yet he made what can only be taken to be a false allegation to the Crown. This too is indicative of malice as no explanation has been provided to justify the position.

[85] Another series of actings of Detective Chief Inspector R which it was contended by Mr Smith showed malice related to the circumstances surrounding the pursuer's detention, arrest and first appearance in Glasgow Sheriff Court on petition on which the pursuer was detained (under section 14) at approximately 05.30 on 14 November 2014. [See the pursuer's pleadings.] He was transported by police car to Helen Street Police Station in Glasgow, arriving at approximately 15.30. After interview, he was charged. No discussion took place as to whether a court appearance could be arranged that evening. The pursuer was held in custody until the following Monday and on that date, after appearing, was released on bail.

[86] The pursuer has never been charged with any offence in his life. His representatives were in constant dialogue with the Crown and the police prior to that detention. He owned property in England and is domiciled there. He was employed by Duff & Phelps. There was

no risk that he would abscond. He had been fully cooperative with the investigation at all times. He would, had he been asked, have attended the police station with his solicitor.

[87] The only explanation of these actings proffered on behalf of the defender in his pleadings is that the pursuer was a "flight risk" however no reason is given for this averment. The defender's response to the pursuer's agents being in contact with them is "not known" (see: paragraphs 125 and 126 of the Scott schedule).

[88] In answer 19 a little more is said about the issue of flight risk thus: the defender has maintained in answer 19 on record that the defender received "intelligence" that DW (another accused) had booked a flight to Portugal leaving on Friday 14 November 2014 and in a desire to arrest all accused at once, it is implied that there was a fear that DW might be intending not to return.

[89] It is understood that the "intelligence" was information from UK Border Force TAB 47 to the effect that a flight had been booked by DW. The flight had been booked by DW in September of that year, prior to any suggestion that he might be accused of any offence. He owns and at the material time owned property in Portugal, and regularly travelled there - all of which was easily verifiable. He had a return flight booked for the Sunday evening, again easily verifiable. Detective Chief Inspector R did not ask whether there was a return flight booked, nor did he inquire whether there were any suspicious circumstances of his leaving to go to his home in Portugal. Any responsible decision to arrest DW would have required that such basic investigations took place. Detective Chief Inspector R did not do so, and by that failure acted maliciously. No valid excuse has been provided for the arrest of DW, far less the arrest of the pursuer.

[90] Further when the pursuer arrived at Helen Street, a large number of media personnel were present. Although the defender now seeks to justify having tipped off the press, this

aspect was a direct consequence of the decision to detain the pursuer rather than invite him to attend the police station with his solicitor.

[91] All of the above actings it was contended showed malice on the part of Detective Chief Inspector R.

[92] The final section in this chapter related to alleged inappropriate behaviour on the part of Detective Chief Inspector R towards professional persons. Mr Smith's submission in respect of this was that the conduct of Detective Chief Inspector R in his investigation displayed an arrogant, unprofessional and malicious course of conduct towards potential witnesses and legal representatives. Although there is no admission by him of such conduct, there would appear to be no denial. The court is now is possession of evidence which displays an unacceptable manner of investigation which can only be explained by it being motivated by malice.

[93] The first detailed allegation related to behaviour towards James Clibbon who was a solicitor with HFW. In a Subject Sheet (a Subject Sheet is a report by the Senior Investigating Officer updating the Crown in respect of the police investigation) in January 2016 at paragraph 22 it was represented to the Crown that Mr Clibbon was impeding the progress of the inquiry and should be interviewed under caution. At no time did Mr Clibbon do other than represent his clients' interests.

[94] The second allegation related to behaviour towards Paul Smith a partner with Duff & Phelps. He only had a peripheral involvement in the issue of the purchase of the shares in the Club. He was interviewed by Detective Chief Inspector R in a heavy handed way, during which he threatened him with prosecution. There was no basis for such a threat, and the conduct once more is indicative of malice.

[95] Thirdly there was behaviour in respect of a Mr Philip Duffy who is an insolvency practitioner and chartered accountant. He has provided a statement in the course of the litigation, indicating that upon interview he was inappropriately treated by Detective Chief Inspector R, who engaged in sectarian abuse. Again Mr Smith argued that a professional person was submitted to conduct by Detective Chief Inspector R which was wholly inappropriate.

[96] Mr Smith in conclusion took from the foregoing that a single occasion of over enthusiastic conduct is explicable, however, the pattern of behaviour spoken to by the three professional persons gave a clear indication that there was an overbearing and irrational course of conduct by Detective Chief Inspector R that was an abuse of power and thus the only explanation for it was malice.

[97] In summary it was Mr Smith's position that focusing in a narrow way on the errors and the lack of explanation for these clearly showed malice. When consideration was thereafter widened and Detective Chief Inspector R's behaviour more generally was focused upon once again malice was clearly shown. Thus when these two aspects were taken together malice was clearly shown.

[98] The final chapter of Mr Smith's submissions dealt with the issue of causation.

[99] He commenced his submissions by asserting that the statements and actions of Detective Chief Inspector R are causally connected to the petition being served upon the pursuer.

[100] Mr Smith then proceeded to develop his general argument on causation by first looking at the issue of the division of labour between Crown and the police.

[101] This division he summarised in this way: the police investigate and report; the Crown prosecutes. The division of labour is regulated by the Criminal Justice and Licensing (Scotland) Act 2010 section 117 ("the 2010 Act") which provides:

> "(1) This section applies where in a prosecution-
> (a) an accused appears for the first time on petition, or
> (b) an accused appears for the first time on indictment (not having appeared on petition in relation to the same matter).
>
> (2) As soon as practicable after the appearance, the investigating agency must provide the prosecutor with details of all the information that may be relevant to the case for or against the accused that the agency is aware of that was obtained … in the course of investigating the matter to which the appearance relates.
>
> (3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that information that the prosecutor specifies in the requirement.
>
> (4) In this section, 'investigating agency' means-
> (a) [F1] the Police Service of Scotland,"

[102] What the pursuer takes from the above is that it is recognised by statute that the police carry out investigations; they report to the Crown; the obligation to report all relevant matters to the Crown arises no later than a point in time after appearances on petition; and the obligation is a continuing one. It is therefore clear from the above provision that the Crown can prepare a petition and serve it, based on information provided by the police without having had access to all primary source material.

[103] Mr Smith accepted that the point in time regarding the obligation to produce the material is stated to be no later than a point in time; and theoretically that does not answer the question of whether, in this case, it was in fact provided previously.

[104] Mr Smith then set out the framework which he submitted allowed the court to deduce that the primary information was not provided to the Crown at an earlier stage than the service of the petition.

[105] First the defender fails to state when the primary information was in fact provided to the Crown. If all statements were provided and all material was provided whereby the Crown were able to and did micro manage the investigations to come to their own conclusion, then the defender should say so and list what was provided and when. At no point is that made clear.

[106] The second important feature of this aspect is that what Detective Chief Inspector R is now apparently accepting is that there was no evidence to support the *actus reus* of each of the (main) charges. How could it be disclosed to the Crown that there was no evidence to support that? How could the Crown know that there was no absence of evidence - other than him just saying to the Crown "although I have said that the pursuer did X and Y, in fact there is no evidence to support it".

[107] We also know that Detective Chief Inspector R reported to the Crown in the Subject Sheet and in the SPR that the purser did the things that he was charged with. No other possible source has been suggested by the defender other than the report from him. The court he submitted is therefore faced with a situation where the Senior Investigating Officer ("SIO") reports that the pursuer did X and Y; he is charged with doing X and Y; when the SIO is challenged by the Crown as to what the evidence is for X, the charges are withdrawn; no other possible source of evidence is suggested for the charge being laid against the pursuer. Accordingly, it is a simple deduction of cause and effect. If the defender wishes to suggest that the charges could have been brought absent R's report, then no doubt he can say so - and he does not - and produce the evidence which supports such a proposition. It is clear that the summary of evidence attached to the petition [TAB 8] was prepared by Detective Chief Inspector R. It is difficult to see how any other conclusion can be drawn that the reports by Detective Chief Inspector R caused the pursuer to be charged with the two main offences.

[108] That the duty of disclosure and the continuing duty was breached can be demonstrated by reference to a number of aspects of the case. These can usefully be summarised as resulting in the Crown being deprived of the ability - through that concealment - to make an independent judgment at any time of the ability to bring charges against the pursuer. In particular, Detective Chief Inspector R was in possession of all material indicative of the fact that the funds transfer occurred prior to the email ("letter of comfort") being sent out by the pursuer to CW. He did not disclose that to the Crown. He was in possession of the "don't tell David" email - harvested from the CW "cache", but took a positive decision that as it was not exculpatory, he was not going to tell the Crown. That decision was a breach of the provisions of section 117. It is not up to him or any police officer to make a value judgment on a fact such as that.

[109] The timing of the transfer of funds is important in respect of the allegation that the pursuer induced release of the funds. It is beyond any doubt whatsoever that the funds had been paid over by Ticketus to Clarke Wilmott (who were their solicitors) on 31 March 2011 (some days prior to the alleged "letter of comfort" on 7 April 2011). The purpose of that was to permit Clarke Wilmott to confirm the "show funds" to allow the transaction to proceed.

[110] The timings of the transfers (See the Scott schedule 16 and 16A), and the fact that the "letter of comfort" post-dated the transfers of funds was information available to Detective Chief Inspector R. He knew that to be so, as he had available to him considerable quantities of emails of CW (which is understood from the Scott schedule he interrogated) and to which reference is made by him in his witness statement at paragraph 327. The pursuer considers those emails will establish what is known to be correct in fact: that the transfer pre dated the email prepared by the pursuer on 7 April. Despite repeated calls upon the defender

to produce the 130,000 or so emails, the defender has failed to produce those emails without any proper explanation.

[111] Detective Chief Inspector R also had available information from another source, namely the High Court action in England. The Joint Administrators of the Club, DW and PJC, issued proceedings (in about June 2012) in the High Court (Chancery Division) against Collyer Bristow, alleging a fraudulent means conspiracy by them relating to the purchase of the shares. Central to that claim was the question of the basis upon which the funds were transferred. It was alleged that a fraud had been committed. The Administration was subsequently taken over by BDO, as liquidators, and the High Court action was continued by them. On 19 February 2014, the pleadings in the case were provided to R by James Clibbon. In the pleadings in the High Court action, the precise dates and times of the transfers were outlined with reference to email correspondence. The particulars of claim are produced TAB 55. There would accordingly be no doubt that Detective Chief Inspector R was in possession of information to the effect that the transfer predated the letter of comfort. It is clear from recent disclosure that the exhibits from that case were examined by Detective Chief Inspector R in detail. The exhibits make little sense without also cross referencing them to the particulars of claim.

[112] Despite having all of that information available to him, Detective Chief Inspector R reported to the Crown that the transfer post dated the letter of comfort and the transfer was induced by it being produced to Ticketus. In the statement of O, she confirms that she was aware of the civil pleadings. Although she states that she did not read them, no explanation is given for the failure to consider this obvious line of inquiry. A case, concerning fraud, regarding the transfer of funds was a clear and obvious source of information to affirm or deny the allegations being made against the pursuer.

[113] In conclusion there is a statutory duty upon the police to provide all relevant information to the Crown. The 2010 Act makes clear that there is a division of labour: and it is clear from the 2010 Act that the police are expected to gather evidence and the Crown require that they are provided with a full and accurate package of that information. That obligation on Detective Chief Inspector R was to disclose to the Crown that there was in fact no evidence upon which the charges could be based. In clear breach of the obligation, he deliberately concealed important information which deprived the Crown of the ability to make an independent decision on whether to prosecute the pursuer. For example he concealed from the Crown the "don't tell David email" and failed to tell them about PAB not being asked to explain this important line of inquiry.

[114] Mr Smith submitted that the defender seems to struggle with the simple issue of causation: the only source of information that the pursuer did the things that became the two charges was from the reports prepared by R. The defender does not offer an alternative source - indeed concedes that there is no such source. Absent any other possible source of evidence for the charges, causation is instantly established. In summary, R says the pursuer did X and Y; he is charged with X and Y; there is in fact no evidence from any source that he did X and Y. He was prosecuted because Detective Chief Inspector R said he did X and Y.

[115] In conclusion and for the above reasons Mr Smith maintained that there is no defence to the action, the summary decree motion should be granted and proof should be restricted to quantum of damages.

The reply on behalf of the defender

[116] Mr Duncan's general position was that I should refuse the motion for summary decree. Mr Duncan commenced his detailed response by first setting out some matters of general

background. He referred to how Detective Chief Inspector R communicated and sought guidance from the Crown and said this: Updates were principally provided by way of Subject Sheets and, occasionally, Interim Reports.

[117] He then turned to look at the issue of the progress of the investigation. He submitted that the Interim Report of 4 December 2012 gives a useful overview of progress by the end of the first year of the investigation. In his principal statement, DCI R sets out the passage within the report in which he summarised his then view of where the criminality lay in CW's purchase of the Club. By this stage, the pursuer had been implicated by the BBC in two broadcasts, and the police were also concerned that the pursuer's colleagues had been less than forthcoming in assisting with the early stages of the investigation. However, the police did not consider the pursuer a suspect as at the end of December 2012.

[118] As set out in Answer 10, the police view of the pursuer's role eventually changed. While there were a number of reasons for this, foremost among them appears to have been information provided by another witness - PAB. The evidence from PAB is referred to in the principal statement of DCI R. In short, PAB advised DCI R that the pursuer had been aware of the true source of the purchase funds prior to conclusion of the purchase. This contradicted what the pursuer had told the police previously. The evidence of PAB appeared to be supported by email correspondence. On 5 April 2013, DCI R reported to the Crown that he required to undertake further assessment of the evidence directed at the pursuer. He submitted a further interim report on 23 November 2013. That report referred to emails that DCI R considered contradicted the pursuer's claimed ignorance of the true role of Ticketus prior to CW's purchase of the majority shareholding.

[119] As explained in Answer 10, the investigations continued in late 2013 and into 2014. Analysis of additional emails and other investigations disclosed what appeared to DCI R to be

further evidence pointing towards the pursuer's knowledge pre-purchase of the true role of Ticketus. Further significant reports were made to COPFS on 4 April and on 19 June 2014. Eventually, on 8 August 2014, DCI R drafted and submitted a Standard Prosecution Report ("SPR") to COPFS. Reference is made to Answer 10 and the averments about the content of the SPR.

[120] Following discussions with the Crown, DCI R submitted a further Subject Sheet on 10 October 2014. It set out the executive action the police proposed should be taken in relation to each suspect. The pursuer was subsequently detained on 14 November 2014, and then arrested and charged.

[121] Thereafter Mr Duncan submitted that it was of some significance when considering the position advanced on behalf of the pursuer to have regard to the history of the prosecution. He briefly set out the principal points in the prosecution the beginning and the end point of the prosecution ought not to be in dispute. The pursuer appeared on petition on 17 November 2014. On 15 April 2016 all extant charges were dismissed by your Lordship, which decision was upheld on appeal on 13 May 2016. Between the beginning and the end of the proceedings, and as the pursuer's pleadings explain, two indictments were served. The first was served on 15 September 2015 and the second on 2 December 2015. The latter differed materially from the former and was itself the subject of considerable amendment.

[122] Mr Duncan then turned to detail the core point which he sought to take from the history of the prosecution: the pursuer's pleadings bear to set out two charges which are said to be taken from what he describes as the "final version" of the indictment against him. It is not known what he has in mind by that statement. It appears that he means the version of the indictment which was before your Lordship "[b]y the stage of the hearing of the second tranche of minutes". He goes on to aver: "Those charges against the pursuer were the only

charges which he faced". In response to the defender's challenge to that statement, the pursuer, in his note of argument says this:

> "[t]he pursuer only faced those two charges (sic) [set out in Cond. 22] as is clear from the indictment referred to, and the decisions of Lord Bannatyne at the various hearings. Other charges which featured earlier - such as an attempt to defeat the ends of justice - had no foundation and did not feature in the indictments. The pursuer finds it difficult to comprehend what additional charges the pursuer faced in the light of the content of the indictments if the defender wishes to explain what charges he refers to as multiple, then the pursuer will answer the matter further."

[123] In fact, the pursuer's pleadings refer only to one charge. But the more fundamental point is that it would not be accurate to suggest (a) that in the second indictment the pursuer faced only the charge set out in Cond 22; and (b) that that was the position throughout the prosecution. The correct position is as follows: the pursuer was subject to two charges within the petition. Within charge 1 and charge 5 (the two charges that concerned the pursuer) five elements of criminality or dishonesty are libelled. Charge 1 avers: that the pursuer was part of a fraudulent scheme; that (per para (iv) of the charge) he attended a meeting of the Independent Committee of the board of directors of Rangers (the "IC") at which CW pretended he had sufficient funds to acquire the majority shareholding and to meet working capital requirements; that (per para (vi) of the charge) he and others produced a letter of 7 April 2011 knowing that it would be produced by CW to Ticketus and used to induce release of funds to an account controlled by GW; and that the pursuer had known that CW did not have the necessary funds and that the acquisition was being funded by Ticketus. Charge 5 libelled an attempt to pervert the course of justice based on the pursuer's representation to police that he had not known that Ticketus was funding the transaction.

[124] The first indictment libelled two charges against the pursuer. Once again there were multiple elements to these, and they differed materially from the approach in the petition. Charge 1 libelled (against the pursuer and others) conspiracy to acquire the majority

shareholding by fraud and also actual fraud (and averments of false representations and pretences were directed at all accused).

[125] Paragraph (c) of charge 1 libelled a number of elements in relation to the IC. These included an averment that the IC had been set up with powers to recommend or reject any proposed offer. That was not correct. In Cond 22, the pursuer blames the police for this: he says that the Crown relied upon the police reports. In Cond 23, the pursuer says that the police and the Crown could have had no reasonable belief in the suggestion that the IC had power to recommend or reject the transaction. The pursuer says that the conduct of the police (as investigators) and the Crown (as prosecutors) was therefore wrongful. There are a number of problems with the pursuer's position on this matter. Foremost of these is that the police did not say to the Crown that the IC had the powers which the charge suggested. Indeed, as has been averred for many months in Answer 23, DCI R expressly flagged up within the SPR that the IC had no power to block the transaction. It is not known upon what basis the pursuer continues to blame the police for this error within the first indictment.

[126] Paragraph (c) of charge 1 then sets out a number of detailed elements of the criminal conduct libelled against the pursuer and others in connection with the IC. Under reference to the sub-paragraphs in which they appear, these are: (i) that CW made false representations and pretences to the IC that he was funding the acquisition from personal wealth or via his companies; that the pursuer and others made false pretences about (ii) the source and provenance of the purchase funds and (iii) the source of available working capital; (iv) that the pursuer and others wilfully concealed the Ticketus Purchase Agreement from the IC; (v) that the pursuer and others induced a belief on the part of the IC that there was no requirement to ring-fence season tickets sales; and (vi) that the pursuer and others:

> "did repeatedly make false representations and pretences to the Independent Committee to the effect that they would be provided with sufficient evidence [in relation to the IC's various concerns], knowing that you did not have sufficient evidence of same and had no intention of providing sufficient evidence of same."

[127] Overall, it can be seen that the detail of the charges against the pursuer in relation to the IC were significantly expanded from what was set out within the petition. The pursuer ignores this.

[128] Paragraph (d) (vi) of charge 1 concerned the letter of 7 April 2011. There were five key elements as regards this matter in the first indictment: (a) that the pursuer and others conspired to issue or caused to issue a letter of 7 April 2011 to CW; (b) that the letter was signed by the pursuer; (c) that the pursuer and others were aware that the contents of the letter would be made available or otherwise communicated to Ticketus; (d) that the letter was intended to provide Ticketus with certain comfort and reassurance; and (e) that the nature of that comfort and reassurance was per a quote purportedly taken from the letter. The quote was in the following terms:

> "should Wavetower or any of its nominees or associates become the subsequent owner of the football club following an insolvency process, there is then the ability to recognise and honour the contract for the future sale of season tickets"

[129] Again, it can be seen that the Crown's treatment of the letter of 7 April 2011 is framed quite differently to the approach within the petition. Again, the pursuer ignores this. Charge 1 concluded by setting out the results of the foregoing criminality. Charge 4, which was parasitic of charge 1, libelled a breach by the pursuer and others of section 28 of the Criminal Justice and Licensing (Scotland) Act 2010.

[130] The pursuer faced the charges within the first indictment for a little over two months, and, thus, none of the legal challenges to the prosecution that were argued before your Lordship was brought within the context of the first indictment. The second indictment made

a number of significant changes to the case against the pursuer. First, an aggravation in terms of section 29 of the Criminal Justice and Licensing (Scotland) Act 2010 was added to charge 1. Further, and in addition to the charges libelled within the first indictment, the second indictment libelled a further five charges against the pursuer; charge 3 (a contravention of section 330(1) of the Proceeds of Crime Act 2002); charge 7 (a second fraud charge); charge 8 (a third fraud charge); charge 9 (a fourth fraud charge); and charge 10 (offences under s 993 of the Companies Act 2006).

[131] The circumstances surrounding service of the first and second indictments are discussed by Lord Malcolm in *DW* v *Philip Gormley QPM & Ors* 2018 CSOH 93 at paragraphs [18] and [19], and consideration of that discussion is not unhelpful in emphasising the obvious point that the question of whether to charge (and the basis on which to do so) are all matters for the Crown and not for the police.

[132] The second indictment was itself the subject of significant further amendment. That can be seen from your Lordship's opinions. Amendments made at or about a continued preliminary hearing held on 22 February 2016 are described at paragraph [9] of your Lordship's first opinion as "wholesale and radical". As can be seen from paragraph [18] of your Lordship's second opinion, the Crown appear to have made further amendments to the indictment. Amendments at both stages appear to have included charge 1. Once again, the pursuer engages with none of this.

[133] Further, if the pursuer's claim that he faced only the charge set out in Cond 22 is based on the position as at "the stage" when "the second tranche of minutes" was argued before your Lordship (which it appears to be given the wording included by the pursuer in the pleadings), then this is incorrect. Even by this late stage in the proceedings, the pursuer still

faced one other charge on the indictment, a contravention of section 993(1) & (3) of the Companies Act 2006.

[134] It is thus entirely unclear: how the pursuer is able to say as he appears to do in his pleadings and in his note of argument that the only charges he ever faced were those articulated in Cond 22; and how (as with all previous and other charges) those charges within the second indictment were procured by the police. As against this, it is to be recalled that the position of the police in the current proceedings is: the investigation proceeded under the direction of the Crown at all times; that it was the Crown which had responsibility for analysing whether the circumstances supported the bringing of a criminal case against the pursuer; that it was the Crown which had responsibility for bringing and maintaining the subsequent prosecution; which is to say that it was the Crown that had responsibility for the content of the petition, for each of the indictments and for all amendments thereto. Plentiful support for this position is to be found in the evidence including the statements of DCI R and DI O.

[135] Mr Duncan then moved to consider the law regarding summary decrees and he did not dispute the various propositions set out earlier in this opinion. However, he submitted that in the circumstances of the present case it was important to have regard to the observations of Lord Rodger of Earlsferry in *Henderson* v *3052775 Nova Scotia* 2006 SC (HL) 85 at paragraphs 14, 15 and 18. Mr Duncan argued that the pursuer's motion for summary decree offended against each of the principles set out in these paragraphs. Mr Duncan then turned to examine in detail the specific arguments advanced on behalf of the pursuer based on the errors identified by Mr Smith.

[136] The first chapter of Mr Duncan's submissions dealt with what Mr Smith had described as the Independent Committee lie.

[137] Mr Duncan looked initially at what was the admitted error and what he contended was the explanation for this. The error relied on by the pursuer relates to Detective Chief Inspector R's reporting of the pursuer's role at the Independent Committee meeting on 24 April 2011 within a Subject Sheet dated 19 June 2014 and the SPR.

[138] Within the Subject Sheet dated 19 June 2014 the relevant extract is as follows:

> "… the cash flow part of the document details the agreement CW completed with Ticketus on 9 May 2011. Ticktus name is included in the document as providing an advance of £20,000,000 excluding VAT with a season by season breakdown also included.
>
> This clearly contradicts statements and evidence provided by Duff & Phelps that they were unaware of the Ticketus deal prior to acquisition. David Grier in particular presented a version of this document on and around 24 April 2011 to the Rangers directors and Murray Group Personnel which had Ticketus name removed and replaced with Wavetower."

[139] Within the SPR the relevant passages include:

> "Grier also provided that a financial forecast was provided to the directors at this meeting concerning cash flow. He stated that £20,000,000 is shown on the sheet with Wavetower being the provider of funds."

[140] Mr Duncan then turned to the way that the pursuer's case in respect of the Independent Committee lie had developed in its pleadings and in particular within the Scott schedule and how the response for Detective Chief Inspector R had developed.

[141] In his pleadings, the pursuer argues that:

> "to exaggerate the role played by the pursuer in attending this meeting, the SPR notes that David GRIER in particular presented a version of this document on or around 24th April 2011 to the Rangers Directors and Murray Group personnel which had Ticketus name removed and replaced with Wavetower".

[142] Initially, the argument in the Scott schedule referred solely to the statement in the SPR (see Scott schedule, line 1). Accordingly, Detective Chief Inspector R was asked to consider the wording on page 44 of the SPR. At paragraphs 336 to 338 of his principal statement of 25 January 2019, he provides the following explanation:

> "336. I did not mean either that David Grier provided the cashflow to the directors at the meeting on 24 April 2011 or that he made any presentation at the meeting. What I was referencing was what David Grier had told me in his statement.
>
> 337. I was also relying on the fact that David Grier was present at the meeting when CW stood up and said he was using his money to fund the deal. I believed David Grier knew that was not the case.
>
> 338. I accept that my wording is ambiguous …"

[143] In relation to the statement in the SPR being based on what the pursuer had told Detective Chief Inspector R in his statement Mr Duncan submitted that of relevance are the following extracts taken from the pursuer's typed statement of 24 October 2012.

> "… By this stage [around the beginning of April 2011] MM had already provided me cash flow forecast provided to him by PAB (from Saffery Champness). This indicated that Wavetower (acquisition vehicle used by Liberty Capital Limited) was going to inject £20 million pounds to acquire the Lloyds debt …
> […]
> Prior to the meeting and in preparation I was aware of the following. […] I was also copied into what CW described as the latest cash flow forecast which he had sent to MM. When I opened the attachment I realised this document was the same PDF file that had been sent to me in the beginning of April by MM. It wasn't in my remit to comment on cash flows at the meeting."

[144] On the basis of the foregoing, the defender stated at line 1 of the Scott schedule that:

> "These sentences [in the SPR] do not allege that the purser said these things to the Independent Committee ('IC'). They are a report of what the pursuer is said to have told the police: that a financial forecast was available to the Independent Committee directors; that it showed Wavetower was the provider of £20m of funds. The same sentences appear in the Interim Report of 4 December 2012 at p22. The pursuer was not a suspect at that point."

[145] In a later iteration of the Scott schedule, at line 1A, reference was made by the pursuer to the Subject Sheet of 19 June 2014 which also refers to the Independent Committee meeting of 24 April 2011. In response, Detective Chief Inspector R's supplementary statement of 21 February 2019 provides further clarification about his understanding and reporting of the pursuer's role at the Independent Committee meeting. Specifically, he states, in the relevant part, as follows:

"18. In relation to what Mr Grier said or did at the meeting of the Independent Committee on 24 April 2011, my position is that this is accurately reflected in the Minutes prepared by Mr McNeill. When these Minutes were put to other witnesses for comment, no one said that Mr Grier said or did anything other than what was recorded in the Minutes.

19. I am directed to the following statement included in a Subject Sheet of 19 June 2014:

> 'Ticketus name is included in the document as providing an advance of £20million excluding VAT with a season by season breakdown also included. David GRIER in particular presented a version of this document on and around 24 April 2011 to the Rangers Directors and Murray Group personnel which had Ticketus name removed and replaced with Wavetower.'

20. As I state at paragraph 336 of my previous statement, my position is not that: 'David Grier provided the cashflow to the directors at the meeting on 24 April 2011 or that he made any presentation at the meeting.' More specifically, it was not my position that David Grier actually made any presentation at the meeting of the Independent Committee on the cash flow document which had Ticketus' name removed and replaced with Wavetower. In so far as my reference in the 19 June 2014 Subject Sheet that 'David GRIER in particular presented a version of this document' could be construed as a representation that Mr Grier actually either presented the amended cash flow to the Independent Committee or presented on that document to the Independent Committee, then I accept that is an error. On reflection the correct wording I should have used is that he 'commented on' the cash flow (see statement of David Grier dated 24th October 2012) or that David Grier 'explained' 'their analysis' of the cash flow (as per the minutes of that meeting).

21. In terms of criminality, the significance of this meeting is that Mr Grier was present when CW told the Independent Committee that he was funding the acquisition with his money and Mr Grier knew that this was a lie but kept silent. In my assessment, David Grier was involved with GW and CW in the acquisition process and was part of the inner circle. Again, as evidence of this involvement, I would point to the email summary provided in the appendix to this statement."

[146] Mr Duncan then turned to the question: Can the court draw an inference of lack of probable cause and malice from the foregoing? His answer to that question was no for the following reasons:

- First, Mr Duncan submitted that the language used by Detective Chief Inspector R had to be looked at carefully. He submitted that the passage in the SPR could only be described in one way: it was a garbled statement therefore nothing could be taken from it and in particular it could not be taken from it that there was any malice on the part of Detective Chief Inspector R.
- Secondly, this is not a situation where Detective Chief Inspector R is not offering an explanation for the impugned wording rather, his position is that he sought to convey what the pursuer had told him in his statement. He accepts that on reflection the wording is ambiguous and that he could have used different wording, pegged to the underlying evidence on which he was relying.
- Thirdly, if the suggestion of the pursuer is that Detective Chief Inspector R sought to deliberately "fit up" the pursuer by using these statements, one only needs to notice the language used to notice the problem with that. What did the language within the SPR even mean: "Grier also provided that a financial forecast was provided …"? If this was an intended deception by Detective Chief Inspector R, it was not a very good one. Moreover, if one then faces the history of the use of the phrase it becomes obvious that this was not Detective Chief Inspector R's intention. This can be seen from the fact that it first appeared in a report at a point when the pursuer was not said to be a suspect.
- Fourthly, in the particular context of an exceptionally complex investigation where the police, as they saw it, experienced immense difficulties in ingathering evidence, the court has to be very careful about focusing upon individual sentences within reports and asserting malice and want of probable cause as the

> only possible explanation of the content of these sentences. The events of the Independent Committee meeting of 24 April contradict such a narrow approach. As Detective Chief Inspector R makes clear in the passages to which the court's attention had been drawn his real concern was that at the meeting CW was questioned about the source of the acquisition funds and gave a misleading answer. Standing the evidence available to the police indicating that the pursuer knew CW's answer to be dishonest, Detective Chief Inspector R had probable cause to suspect and report dishonesty on the part of the pursuer.

[147] Broadening out from looking just at the passages in the documents themselves there were Mr Duncan argued other matters which entitled the court to say that Detective Chief Inspector R was not acting maliciously.

[148] In respect of the second part of the Independent Committee lie namely: "David Grier in particular presented a version of this document to the Independent Committee". Mr Duncan referred to two wider matters which he said showed that this error was not the product of malice.

[149] First the error was not repeated in the summary of evidence that had accompanied the petition. That he submitted was strong evidence that the Crown did not seek to rely on the single sentence to put the pursuer on petition.

[150] Secondly the existence of the minutes was drawn to the Crown's attention in the SPR. The minutes are listed as production number 89 at page 111 of the SPR. Thus Detective Chief Inspector R expressly drew the Crown's attention to the key document that would have called into question whether the "in particular presented" comment was indeed intended as an

accurate verbatim account of what occurred. That he argued pointed away from any malicious intent.

[151] Moving on, Mr Duncan submitted that the charge relative to the Independent Committee lie was fundamentally based on the Independent Committee having power to stop any deal. Mr Duncan argued there was no question of the police/Detective Chief Inspector R misleading the Crown in respect of this issue. On the contrary it was the police who had drawn the Crown's attention to the Independent Committee's power, or lack thereof. This pointed directly in the opposite direction from Detective Chief Inspector R being malicious. This was Detective Chief Inspector R pointing out to the Crown, who required to legally analyse the position, of the relevant factors, namely: the legal position regarding the Independent Committee's powers.

[152] Moreover, Mr Duncan noted that the petition contained no averments about the powers of the Independent Committee. However, when the first and second iterations of the indictment are turned to there are averments that the Independent Committee had special powers to deal with certain matters and made reference to special resolutions granting them such. None of these averments were based on anything said by the police.

[153] Mr Duncan contended that when the evidence was looked at as a whole it did not support the pursuer's case that Detective Chief Inspector R was "trying to fit up the pursuer".

[154] Next Mr Duncan asked: could the court conclude at this point that in reporting the matter to the Crown the police had probable cause? He urged the court not to take a narrow view of this issue and concentrate on individual sentences rather it should look at the gravamen of what Detective Chief Inspector R was seeking to report. Detective Chief Inspector R's concern related to the giving of misleading answers and in particular his concern was that at the meeting of the Independent Committee CW had said something which in

Detective Chief Inspector R's assessment was inaccurate and which as Detective Chief Inspector R understood at that time Mr Grier knew that it was incorrect. This was based on what PAB had told him and upon email traffic.

[155] The next question posed by Mr Duncan was this: do the errors go anywhere or put another way can the court say at this point that they caused the prosecution. His answer to this question was no and that answer flowed from this: the Crown's case against Mr Grier was one of wilful concealment and in support of this position he directed the court's attention to *HMA* v *CW, GW and Grier* 2017 JC 249 at paragraph 45. It was his position the court could not hold that these two errors of expression procured a case of wilful concealment.

[156] Further he made this point: there could be no question of the police having procured the prosecution of the pursuer. That is because, regardless of any ambiguity arising from Detective Chief Inspector R's use of words, from both a practical and legal perspective, the Crown was required to undertake its own independent analysis of the evidence. Reiterations of the various charges show that the Crown did so. There is no question of the prosecution having proceeded purely on the basis of the Subject Sheet and the SPR which contained the errors and without any analysis of the underlying evidence by the Crown. There can be no question of the Crown being deprived of the ability to make its own judgment by Detective Chief Inspector R's errors within the SPR and the Subject Sheet. He referred to Detective Chief Inspector R's statement where he said this at paragraph 338:

> "…Insofar that as there was any ambiguity in the SPR, Crown Office has had all the evidence (the witness statements and documents would have been submitted to the Crown after the submission of the SPR), including a copy of the minutes of the Independent Committee meeting held on 24 April 2011 and so it would have been clear from the underlying evidence who said what. In addition the SPR would have been considered against all of the briefings and updates from which the Crown had been provided prior to August 2014."

[157] The next chapter at Mr Duncan's submissions related to the letter of comfort lie.

[158] Detective Chief Inspector R's position in respect of this was as set out in his statement at paragraph 7:

> "I now accept that my conclusion that the Ticketus funds were transferred on receipt of a letter prepared by MCR dated 7 April 2011 was an error."

He further said this at paragraph 220:

> "'…The completion monies (circa £24 million which included £4 million VAT) for the transaction between Ticktus and CW's acquisition of the Club were transferred from Ticketus via Clarke Willmott on 7 April 2011 to Collyer Bristow and held in a separate joint client account set up with Collyer Bristow bankers, C Hoare & Co.
>
> These monies were transferred after Ticketus Investment Committee received the comfort it sought from CW and GW regarding what would happen to their investment should there be an insolvency event.'
>
> And
>
> 'On 7th April 2011 at the request of the accused GW who stated this would allow the deal to progress with Lloyds and MIH, Ticketus (after receiving the letter from MCR via CW) authorised the completion monies circa £24 million to be transferred from their solicitors Clarke Willmott's client account to the Collyer Bristow client account. The monies were held to the order of Clarke Willmott and not the accused GW or CW as no deal had completed.'"

[159] The position of the defender in the Scott schedule is as follows:

> "DCI R accepts that the statement in the SPR that funds were released by Ticketus 'after reviewing the letter from MCR via CW' is an error but believes that comfort was being sought by RB of Ticketus around that time. Reference is made to lines 18 and 18B above. At all times, DCI R acted in good faith." (See answer 20 in the Scott Schedule.)

[160] Mr Duncan's submission was that the foregoing amounted to this: the statements in the SPR, therefore, can be explained as being the product of a simple error on the part of Detective Chief Inspector R, an error which he now accepts. However, in these circumstances, it cannot be said that the pursuer is bound to succeed in demonstrating malice or a lack of probable cause on this point. Nor is there any prospect of the pursuer succeeding in the context of a motion for summary decree in showing that through the foregoing statement the

police procured the prosecution of the pursuer. He again referred to the way in which the Crown had developed the articulation of the charges against the pursuer.

[161] In understanding the explanation for this error Mr Duncan said that it was important to consider the detailed background to the transfer of the Ticketus money. It occurred in four stages: there was the transfer to Ticketus own solicitors Clarke and Willmott. There was then the transfer by Clarke and Willmott to a jointly controlled client account with Collyer Bristow which remained under the control of Ticketus. There was then the release of funds by Ticketus to GW of Collyer Bristow. Finally there was the transfer to Lloyds to pay down the debt.

[162] Mr Duncan submitted that the transfer of the money was not a straightforward matter and what had been said by Detective Chief Inspector R had to be read carefully and in the context of that complex background.

[163] In development of the above Mr Duncan referred to page 32 of the SPR where the following is said:

> "These monies (the £24,000,000) were transferred after Ticketus Investments Committee received the comfort it sought from CW and GW regarding what would happen to their investment should there be an insolvency event. CW and GW met with Grier and C of Duff & Phelps regarding this D&W's London offices. A letter was subsequently agreed between the parties. Contents of this were provided to Ticketus via fund manager the witness RB.
>
> The monies were held subject to an undertaking provided to Clarke Willmott by the accused GW which in effect provided the monies were held to Clarke Willmott's sole order.

[164] Mr Duncan emphasised three points within the said section:

- The use of the phrase "the comfort" rather than "letter of comfort."
- That reference was made to "A letter was <u>subsequently</u> agreed between the parties." (emphasis added)

- "the monies were held to Clarke Willmott's sole order."

[165] The error he submitted at page 43 of the SPR had to be looked at in the context of what was said at page 32 of the SPR.

[166] Mr Duncan argued the court might be entitled to say that none of what was said about the letter of comfort was very clear. That he submitted was the whole point. If Detective Chief Inspector R was attempting to fit up the pursuer it was not a good one and was not very successful. All of that is indicative that there was no malice here.

[167] Once again it was argued by Mr Duncan that it was clear that the skills of Detective Chief Inspector R as a draftsman were not good, however, malice should not be viewed through that lens.

[168] It was his position that the words were not clear and that at a minimum there was room for doubt as to what was meant in the SPR.

[169] Looking beyond the terms of the SPR itself Mr Duncan directed the court's attention to a note prepared by Detective Chief Inspector R for the advocate depute in the case. In this document Detective Chief Inspector R said this:

> "The funds had not been transferred by 7 April they were always in control of Ticketus. The funds were moved on the basis that the tax issues had been addressed. The letter followed the GW RB email exchanges. DW was copied in to all and had knowledge of what was being asked for and given. At times he provided his opinion when asked by C."

[170] The part emphasised in this note by Mr Duncan was that "they (the monies) were always in control of Ticketus." This he submitted showed the complexity of the situation.

[171] Thus he urged the court not to take one sentence and look at it on its own. The court had to look at the entirety of what was said and then place the error within that matrix.

[172] Finally he said this: that in any event when one turns to the charge itself it is not based on what Detective Chief Inspector R had said. The petition contains a charge at page 2(vi) which does not reflect what was said by Detective Chief Inspector R.

[173] The next chapter of Mr Duncan's argument was this: could the court be satisfied that in his reporting of criminality to the Crown Detective Chief Inspector R could not have had suspicions of criminality.

[174] Mr Duncan made two general points on commencing his submissions under this head: first Detective Chief Inspector R's position was that he had a basis and it was important that hindsight should not be applied as the test in relation to that and in relation to these matters it was important to take a broad view and not look at one sentence or two sentences in what were long reports. It was necessary when thinking about probable cause to take a broad view.

[175] The court should take note of the evidence which led him to suspect the pursuer.

[176] He directed the court's attention to Detective Chief Inspector R's statement where in section C he had set out the basis for his reporting of the matter. Mr Duncan submitted that the length of his summary was eloquent of the detail of the examination by Detective Chief Inspector R of this issue and the amount of evidence that there was before him.

[177] Mr Duncan in particular relied on the following:

- At paragraph 5 Detective Chief Inspector R referred to the pursuer having accompanied PAB to the meeting at Dundas and Wilson's office in London and at that time PAB had explained to the pursuer that the money being used to pay the Lloyds debt was being funded by Ticketus.
- At paragraph 8 Detective Chief Inspector R says this:

  > "I do believe that comfort was being sought by RB of Ticketus on that date (see below – in an email of 5 April 2011 RB states 'For our IC to get comfortable on final sign off to release the funds') and at this comfort

> did come in the form of the letter provided as per the last email sent on 7 April 2011 at 2329 hours by PAB to David Grier ('Thanks David very much appreciated. I will forward a copy to RB now. Speak tomorrow.'). Comfort had also been provided by the response GW gave to the 'tax case hurdle/info' email which had been sent by RB."

There is thereafter reference to a number of emails.

- Paragraphs 10-18 of the statement of Detective Chief Inspector R cover what he relied on in showing what the pursuer knew at relevant stages.
- There was reference to an email of 5 April 2011 from PAB to the pursuer which refers to Ticketus as "our third party funder" and Detective Chief Inspector R's position is this: that this email supports the view Ticketus was funding this matter and the pursuer was aware of this.
- At paragraph 13 there is reference to a further email of 6 April 2011 which again refers to investment funds and the importance of: "this area of funding is sensitive and had been asked to keep within the firm."
- It was Mr Duncan's position that again what was said there could be accepted by a court as showing that the pursuer knew what was going on regarding Ticketus.
- It was his position that the same inference could be taken from the email referred to at paragraph 15.
- In respect of paragraph 16 it referred to a further email on 6 April 2011 which was sent to various persons within Duff & Phelps or others. It was Mr Duncan's position that what this email could be construed as saying was this: there was an above the board Ticketus agreement and there was a below the table agreement that was about using the three year deal to pay down the

Lloyds Bank debt and provide funding. This email related to the Ticketus purchase agreement.

- Its relevance was that it was being discussed within Duff & Phelps and Detective Chief Inspector R was entitled to be suspicious that the pursuer and Duff & Phelps knew of this.
- Mr Duncan relied on the terms of paragraphs 17 and 20.
- Turning to paragraph 21, this was an email of 6 April 2011 in which a Paul Smith replied to the pursuer's email with subject heading "tax case hurdle/info". He wrote:

> "Hi David did you make any progress? A load of queries late in the day and I guess difficult to fully answer. Were you aware he was funding the deal in this manner, I thought it was his cash? Fingers crossed for you on the deal."

- It was Mr Duncan's position that the above was of some importance in respect to the pursuer's knowledge as to the funding of the acquisition.
- Mr Duncan also relied on the terms of paragraphs 23 – 26 and paragraphs 29 and 32.
- Mr Duncan then turned to look at emails which post-dated the acquisition which he submitted Detective Chief Inspector R was entitled to think showed that the pursuer knew what was going on. In paragraph 35 Detective Chief Inspector R states:

> "On 11 May 2011, David Grier emailed an attachment to the witness MB with no instructions or comments. The attachment comprised financial forecast, a profit and loss cash flow and balance sheet forecast. It also had other tabs of information relating to the specific years of season tickets sold to Ticketus. It was for the next four years. It showed money coming in from Ticketus and money going out to Lloyds around the £20,000,000 level. The email originated from RB of Ticketus and came to Grier via PAB. RB states that when he first spoke with

> David Grier it was on a conference call between 16 and 19 May 2011 and it was apparent to RB that by 19 May 2011 David Grier was fully aware of the scale and the mechanics of the Ticketus transaction with the Club."

- Mr Duncan also placed particular reliance on paragraph 38 where

  Detective Chief Inspector R states:

> "Also informing my suspicion in relation to Grier is an email exchanged between MB and NB on 1 June 2011 wherein NB wrote: 'Sounds like an interesting job what's the scope? Who else is in on it?' MB reply:
>
> 'All the Partner Group know about it as it is very finely poised – we are not broadcasting involvement to anyone in case guy who has bought it, our client, makes a mess of the whole thing.
>
> We don't want to be associated too heavily. Led by DG (Grier) but DW was on sight as well and PJC closely involved. We're engaged to review short term cash flow and org chart/associated cost and liaise with HMRC on the Club's behalf – although we are unofficially being dragged into other things as the guy who has bought it hasn't got a fucking clue – no plan, no strategy, did very little DD – it is honestly baffling.
>
> He only went ahead and did it as hasn't risked any of his own cash – paid a £1 for shares and funded repayment of bank debt by forward selling three years worth of season ticket revenue. So every man thinks he is a saviour but in fact it's all a big front and Club has as much debt as it had before, just as someone else.
>
> Very long story but if interested and if you have the time… have a look at a website called ……...com or it might be .co.uk Club are under investigation with HMRC for a decade of tax evasion which they claim amounts to circa £50,000,000 – if they win Club will go bust and that's our endgame ultimately…'"

Mr Duncan submitted that in respect to the above that at this stage the court could not be satisfied that Detective Chief Inspector R was not entitled to think that he was lied to by the pursuer about the extent of his knowledge during the deal.

- Mr Duncan also relied on the terms of paragraph 43 where Detective Chief

  Inspector R says this:

> "Also, very significant is neither Grier… disclosed any of the above emails to me when I was taking statements from them. They were obtained from other sources including PAB or, after certain warrants had been executed, from Duff & Phelps and Collyer Bristow."

- Mr Duncan accepted that it was clear that considerable reliance had been placed by Detective Chief Inspector R on the evidence of PAB. His discussion of this starts at paragraph 168 of his statement and goes through to paragraph 175.
- Mr Duncan in respect of this reliance on the evidence of PAB in particular emphasised paragraph 173 of Detective Chief Inspector R's statement which says this:

> "Following this asked PAB who all knew about the full details on the Ticketus deal CW used to acquire the Club. PAB included 'MCR, David Grier and PJC' as those who knew. PAB stated he was aware of the press coverage and the denials being made by them (MCR now Duff & Phelps). It is stated that he asked CW before telling Grier about the deal who stated 'As he's now formally engaged no problem'. He stated that this occurred in a pub after hearing Grier attended a meeting with Lloyds Bank and Murray Group representatives in London. He said Grier had never heard of Ticketus before so he had to tell him how Ticketus worked and that CW was raising funds against the future sale of season tickets. PAB also confirmed to me that he told Grier the funding raised would be used to pay down the Club's debt to Lloyds Bank."

- Mr Duncan submitted that the above was of considerable importance. In the course of his submissions Mr Smith had sought to suggest that no reliance could be placed on the evidence of PAB. It may be that following a proof a court decided that no reliance could be placed on the evidence of PAB. However at this stage the court could not say that no reliance could be placed on the evidence of PAB.
- From paragraph 185 Detective Chief Inspector R sets out in detail his position regarding what he believed given the foregoing were attempts to pervert the

course of justice by the pursuer. Mr Duncan said it was reasonably clear from the terms of this paragraph that the main concern of Detective Chief Inspector R was related to this question of an attempt to pervert the course of justice by the giving of misleading statements concerning knowledge of how CW had acquired the Club using Ticketus. In the last sentence Detective Chief Inspector R said this: "At this time, however, I was unclear of exactly what role C, DW and Grier played in the acquisition and management of the Club."

- From paragraph 309 onwards Detective Chief Inspector R deals with certain transcripts of recordings made by CW.
- In particular at paragraph 309 he refers to a transcript during May of 2012 where David Grier is clearly heard saying: "We probably did know what was going on with Ticketus". He also added words to the effect "There is no email traffic whatsoever… that says we did".
- At paragraph 310 Detective Chief Inspector R says this regarding the above section of the transcript: "I regarded this as highly significant". He goes on to say that CW in the same conversation said this: "We all know you did… so you knew the structures of the deal".

Mr Duncan's position regarding the above parts of the transcript was that the court at the stage of the summary decree motion could not come to a conclusion on the questions which were clearly raised by the content of the transcript.

- In a section dealing with his conclusions at paragraph 430 Detective Chief Inspector R says this:

> "I did not initially suspect that David Grier… were involved in criminality. I was always trying to see the case from their side until there came a point when I could no longer support the view that they

> were not involved. There was a tipping point when the only way in which everything fitted together was that they were involved – they knew prior to acquisition that the Ticketus deal was being used to acquire Rangers by CW. I remain of that view".

- Mr Duncan argued that this conclusion was a major challenge to the pursuer. He submitted that Detective Chief Inspector R had given the pursuer the benefit of the doubt, even after the BBC published certain allegations. Following these allegations Detective Chief Inspector R had reported in December 2012 that he did not regard the pursuer as a suspect.

[178] For all of these reasons Mr Duncan argued strongly that there was a proper basis for Detective Chief Inspector R's suspicion.

[179] Mr Duncan then turned to address the issue: at what point was the delict of malicious prosecution completed? He began by examining the way that Mr Smith had approached this question in the course of his oral submissions. He argued that it appeared from the way that Mr Smith had addressed the court that what was being put forward was that the relevant point was when the petition was served.

[180] Mr Duncan made two short points in response to this:

- It is not the case which the pursuer has put forward in his pleadings and which the defender has been required to answer. The case which the pursuer offers to prove is that the defender's officers drove the case from the stage of the petition to the end of the prosecution.
- The defender's case is that a prosecution is a *unum quid* and cannot be divided in the way the pursuer seeks to put forward.

[181] In development of this second proposition he noted that neither party had been able to put forward any authority which supported the proposition the prosecution could be divided

in this way. Accordingly he submitted regard had to be had to first principles. He accepted that having regard to the Stair Encyclopaedia at paragraph 446 it appears that the essence of an action of malicious prosecution is about its "instigation". However he submitted that the court should be careful about that. Conceptually he submitted it seems more likely that one has to look at a completed prosecution. He submitted that the idea of there being malice at one stage and then no malice was a very odd one. It is not normal for a prosecution to be considered in terms of individual parts of the prosecution.

[182] He submitted that a conceptually more appropriate way to look at the matter was to approach the prosecution as a *unum quid*.

[183] It was his submission that Mr Smith's approach could not be said to be one which was more than of doubtful relevancy. He submitted that there was clearly a major legal question in relation to this matter and he reminded the court that this was not a debate and accordingly this issue had to be left for another day.

[184] Moreover even on the basis of an argument that the appropriate point to consider was the date of the petition, the timeline in respect to the petition would have had to be had regard to. The SPR recommending charges was dated 8 August 2014 and on 10 October 2014 the Crown was told the police were proceeding to executive action. Accordingly the Crown had had notice of what was happening here for some two months. In these circumstances it was not open to the court to say the Crown was unable to make an independent judgment in relation to this matter. He submitted that all of that was enough to give pause for thought regarding whether the pursuer had discharged the onus to prove procurement of the prosecution on the part of the defender.

[185] The next section of Mr Duncan's submissions was to consider the role in prosecution of the Crown.

[186] He began by arguing as regards the role of the Crown, the position of the defender is this:

> "The police are bound to comply with any instructions that the Lord Advocate may from time to time issue to the chief constable. In relation to the investigation of offences the chief constable, and through him his constables, must comply with the instructions of the procurator fiscal. The ultimate responsibility for the investigation of criminal offences lies with the procurator fiscal and not with the police. He is completely independent of the police, who are subordinate to him and subject to his control. […] The police report cases to the procurator fiscal where in their view there is sufficient evidence to justify taking proceedings against a particular accused. The procurator fiscal may, however, instruct police to report to him any case at any time."

Mr Duncan then directed the court's attention to the following in the defender's pleadings:

- answer 6 (pages 19/20) where it is averred that a senior PF was involved in the decision as to how PAB was to be treated;
- answer 7 statements and minutes of meetings were supplied to the Crown;
- answer 9, averred that the police investigation proceeded under the direction of the Crown;
- answer 10, averred that:
  - (1) updates were provided by the police to the Crown during the investigation;
  - (2) requests were made for directions from the Crown;
  - (3) enquiries were directed by the Crown;
- answer 10 was further referred to between pages 47 and 63 including the averment that the then Lord Advocate was "personally involved" in the prosecution that averment being based upon what senior counsel for the Crown had said in the *Whitehouse* case;

- Lastly the court was referred to Answer 11 at page 65, Answer 19 and Answer 20 and in particular the averment that the petition was framed by the Crown.

[187] Following the above detailed review Mr Duncan made five points which he said flowed therefrom.

- All of the above goes to the issue of procurement of the prosecution no matter what stage of the prosecution is looked at. At all stages it was abundantly clear that the police told the Crown what they were relying on. To make out procurement of the prosecution by the police, the court would have to hold that the Crown was unable to ask any questions of the police. An example of this was the Crown unable to ask the police to see the minutes of meetings of the Independent Committee and unable to ask for clarification relative to the letter of comfort.
- Moreover, the above was relevant to malice. The police at all stages were telling the Crown what they were doing. This was a situation which was entirely different to that in the *Rees* case. In that case the police did not tell the prosecution what they were doing.
- The above clearly showed that the Crown had been given ample notice of the difficulties relative to the pursuer regarding the Independent Committee.
- All of the foregoing averments when taken together are evidence that there is an issue to try in relation to want of probable cause. The defence in particular offers to prove at proof police had the instructions of the Crown and the approval from the Crown to proceed, that is relevant to the above question.

- Lastly, the defender places reliance on these averments in respect of two pure legal issues:

    (a) The police at all times were acting in terms of their statutory obligations in obtempering the instructions of the Crown. This is a legal point which the pursuer will have to face.

    (b) The police will say that insofar as they were the hands of the Crown they are entitled to the same immunity from suit as the Crown.

[188] The next section of Mr Duncan's reply dealt with the issue of disclosure of documents.

[189] Under this head he dealt with two specific matters, first the "Don't tell David email".

[190] Mr Duncan commenced by saying that as he understood the pursuer's position the obligation to disclose this document arose under section 117 of the 2010 Act. In passing he noted that this particular obligation was not pled by the pursuer. The first substantive point he made in relation to this was that it was difficult to see how civil liability arose from breach of that provision. He pointed out that it was only engaged after service of the petition and the requirement of disclosure was subject to the condition of "reasonable practicability". It was his position that the issue of reasonable practicability arose very sharply in respect of this document as it was one out of 130,000 documents. He argued it was very difficult to understand how the pursuer can prove how a failure to pull out one document from 130,000 can amount to malice.

[191] Secondly as to whether this email is exculpatory he referred to the Scott schedule at lines 24 – 26 and to Detective Chief Inspector R's statement at paragraphs 191 – 192. Thus although the email indicates that the pursuer was being kept away from the share purchase agreement nothing in it related to the agreement with Ticketus.

[192] Thirdly as to whether the document was provided to the Crown, there were two sources of the email: first the cache of 130,000 emails and Detective Inspector O in her first statement at paragraph 167 and in her second statement at paragraph 67 indicates that the cache was in a disclosure list sent on 5 January 2016 and secondly it was contained in certain discs recovered from Stevenson Harwood in December 2013 and in Detective Inspector O's supplementary statement at paragraphs 41 and 42 these discs were signed off to the Crown on 23 July 2013 and returned on 18 September 2014.

[193] He also pointed out that in terms of Detective Chief Inspector R's supplementary statement at paragraph 41 the email was provided to the defence in February 2014 (Mr Clibbon).

[194] As to disclosure more generally Mr Duncan said this: the defence position is that it is not necessary for them to prove when certain productions were provided to the Crown rather it was enough for the defence to show that the documents were available. It was open to the court to hold at a minimum that interrogation of primary material by the Crown was clearly possible including the "don't tell David memo". Mr Duncan in particular referred to [TAB 16] in the pursuer's bundle and argued that what it shows is not merely the uploading of documents to a Crown database but production of documents to the defence by the prosecution by December 2014 indicating that the Crown by that time had had sufficient time to consider this documentation.

[195] Mr Duncan then moved on to consider the requirements for succeeding at proof in a case of malicious prosecution.

[196] In his note of argument, the pursuer explains that his case is one of malicious prosecution. The pursuer says "that, provided certain averments…and circumstances subsist, a person providing information to the prosecuting authorities can competently be sued for

'malicious prosecution'". He did not take issue with that as a very general statement of the law; the defender does not say that there are no circumstances in which Scots law recognises as relevant actions for malicious prosecution where the wrongdoer is someone other than the actual prosecutor.

[197] But the issue, in the context of a motion for summary decree, is not simply whether the pursuer's averments are sufficiently relevant to go to proof but whether, at that proof, he is bound to succeed. None of the Scottish authorities on which the pursuer relies assists with that question; none of them is concerned with judicial determination of an action of malicious prosecution after proof. The defender is aware of no case of malicious prosecution against police officers proceeding to (far less succeeding at) proof in Scotland. Thus, there is no authority which explains how at proof the court ought to adjudicate upon an action of malicious prosecution in the particular context of the law in Scotland regarding the role of the Crown and police in prosecution of crime in Scotland as he intended to turn later in his submissions. In this situation, Lord Rodger's reminder that a motion for summary decree is not the forum within which to embark upon detailed exegesis of the law is particularly apt.

[198] It was Mr Duncan's position that the pursuer ignored the principles governing the role of the Crown and police in the prosecution of crime in Scotland and rather, relying heavily on English cases, the pursuer identifies what he considers to be the necessary legal ingredients for succeeding in a case of malicious prosecution where the wrongdoer is someone other than the Crown. Among the necessary elements, the pursuer says he requires to demonstrate that the wrongdoer (a) acted maliciously and (b) without probable cause and (c) that he procured the prosecution.

[199] In respect of the third element although in overall support of his case of malicious prosecution the pursuer relies heavily upon the decision of the Court of Appeal in *Rees &*

Ors v *Commissioner of Police for the Metropolis*, he barely mentions it at all in relation to the third element to be considered, which is concerned with causation. That is surprising because the discussion of McCombe LJ at paragraphs [45]-[60] is of particular assistance in understanding the exacting nature of the causation threshold the pursuer would require to meet at proof. The pursuer requires to show that the defender's officers "procured" the prosecution. In practical terms, as emerges from McCombe LJ's discussion, this means that the pursuer requires to demonstrate that, acting maliciously and without probable cause, the police deprived the prosecuting authority of the ability to exercise a proper independent judgment in deciding whether to prosecute the pursuer. This critical plank of the pursuer's case is entirely absent. Not only is this fatal to the motion for summary decree, it leads to the result that the case falls to be dismissed as irrelevant.

[200] Returning in this context to the issue of the investigation and prosecution of serious crime in Scotland the pursuer's position appears to be that the whole of the police investigation into CW's purchase of the majority shareholding was conducted maliciously and without probable cause from beginning to end. It also appears to be the pursuer's position that the defender's officers are responsible for - that they procured - the whole of the prosecution from beginning to end; that they are responsible for its inception and for the absence of any cessation prior to dismissal. This brings into sharp focus two things with which the pursuer's motion for summary decree requires to contend.

[201] The first matter is what he had submitted earlier, namely: to notice the differing roles and responsibilities as between the police and the Crown for investigation and prosecution. Ultimate responsibility for the investigation of crime lies with the Crown and not with the police. Mr Duncan directed the court to the following authorities in support of that proposition: section 12 of the Criminal Procedure (Scotland) Act 1995; section 17(3)(a) of the

Police and Fire Reform (Scotland) Act 2012; *Smith* v *HM Advocate* 1952 JC 66 at pages 71-72; *McBain* v *Crichton* 1961 JC 25, at page 29; *HM Advocate* v *Miller* (in the particular context of investigations post-arrest) 2017 SC 1, at paragraph 12; and to Crown Office Book of Regulations, Chapter 2, paragraphs 2.1, 2.1.2. The investigation and precognition of major fraud cases is the subject of a specific regime in chapter 2.29 of the Book of Regulations. The essence of this regime is the early involvement of the Regional Procurator Fiscal, and possibly a specialist unit in Crown Office, in a case where it becomes clear that the case is likely to be indicted (rather than the subject of summary complaint) in the Sheriff Court or the High Court and, thus, requires precognition.

[202] Overall, the position in relation to investigation can be summarised as follows:

> "The police are bound to comply with any instructions that the Lord Advocate may from time to time issue to the chief constable. In relation to the investigation of offences the chief constable, and through him his constables, must comply with the instructions of the procurator fiscal. The ultimate responsibility for the investigation of criminal offences lies with the procurator fiscal and not with the police. He is completely independent of the police, who are subordinate to him and subject to his control. […] The police report cases to the procurator fiscal where in their view there is sufficient evidence to justify taking proceedings against a particular accused. The procurator fiscal may, however, instruct police to report to him any case at any time."

[203] Turning to responsibility for prosecution, the legal and constitutional position in Scotland is clear. It is for the Crown Office and not for the police to decide whether the results of the investigation justify prosecution. Renton & Brown provides the following useful guidance in understanding the particular matters for which the Crown have responsibility in determining whether to bring proceedings:

> "When considering whether, in any particular case, criminal jurisdiction should be involved, attention ought to be paid by all prosecutors to the following points:
>
> (1) Whether the facts disclosed in the information constitute either a crime according to the common law of Scotland, or a contravention of an Act of Parliament which extends to that country.

(2) Whether there is sufficient evidence in support of these facts to justify the institution of criminal proceedings.
(3) Whether the act or omission charged is of sufficient importance to be made the subject of a criminal prosecution.
(4) Whether there is any reason to suspect that the information is inspired by malice or ill-will on the part of the informant towards the person charged.
(5) Whether there is a sufficient excuse for the conduct of the accused person to warrant the abandonment of proceedings against him.'
(6) Whether the case is more suitable for trial in the civil court, in respect that the facts raise a question of civil right."

[204] Thus, whether or not the police have themselves given consideration to whether the facts disclose a crime known to Scots law and whether there is a sufficiency of evidence, these questions must be considered again by the Crown and it is the Crown's view which prevails. Simply because a case has been investigated and reported to the Crown by the police does not mean that a criminal charge will of necessity follow.

[205] The pursuer's note of argument discloses that the current case proceeds on the basis of a presumption that a different approach was taken in the criminal case against him. The pursuer presumes: that at all times, from beginning to end of the prosecution, the Crown accepted the police assessment of whether there was sufficient evidence to bring and maintain proceedings alleging criminal conduct by the pursuer and others. Thus, the pursuer's approach depends upon a presumption that the task of analysing the law, and of the requirements for libelling particular crimes, was, here, a matter for the police rather than for Crown Office. The pursuer pleads no basis and discloses no evidence in support of this exceptional approach.

[206] As well as being in conflict with invariable and longstanding practice as regards the commencement of serious criminal proceedings in Scotland, the pursuer's presumption ignores the legal reality whereby the content of charges remains under the review of the Crown and may well change as between petition and indictment and possibly beyond. The

present case is particularly apposite as regards that because ongoing review by the Crown resulted in serial changes being made to the charges faced by the pursuer at each key stage of the prosecution process – petition, first indictment, second indictment – and in response to the legal challenges made by the accused during the preliminary hearings. These reviews clearly evidence that the Crown had gone beyond any statements in police reports and had not been deprived of the ability to exercise a proper independent judgment in deciding whether to prosecute. On the contrary, this independent judgment was repeatedly engaged.

[207] The second matter which the pursuer's approach ignores is the different levels of suspicion that are required at the key stages of an investigation and prosecution. The evidential hurdles escalate as the procedure advances. Only at the stage of full committal must there be a sufficiency of evidence in the form of a corroborated case. Mr Duncan then gave a short summary of the tests that apply prior to then.

[208] For the police to detain under section 14 of the Criminal Procedure (Scotland) Act 1995 (which section is no longer in force), all that was required was "reasonable suspicion". At the point of arrest and charge, the test became evidence "sufficient for a charge". It is not entirely clear what that phrase means. But as arrest is the point reached prior to appearance on petition, the threshold cannot be higher than at that later stage. Of the threshold required to place somebody upon petition, the following was said in *Lauchlan* v *HM Advocate* 2010 SCCR 345:

> "[i]t is not a requirement that, in order to place an accused person on petition, there is a strict legal sufficiency of evidence (i.e. two independent corroborated sources) against him. The evidence and its sufficiency will seldom have been considered in any detail at that point. It is from then that time begins to run and not the date of full committal, when, at least if the person is to be remanded in custody, there ought to be a prima facie case against him."

[209] Finally in this chapter Mr Duncan moved to consider the interface among each of the foregoing matters within the current case. He described this section as being in the nature of a conclusion. In advancing his motion for summary decree, the pursuer relies upon cases that are not in point and provide him with no support. In the current case, the police were investigators. Thus, the police are not sued as witnesses for evidence that they gave or intended to give (as in *McKie* v *Strathclyde Joint Police Board* 2004 SLT 982). Nor are they said to have improperly "prompted" witnesses to implicate the pursuer (as in *Rees*). There is no suggestion of suppression, manufacture or manipulation of evidence, and it is not in dispute that (at the very latest) the Crown had the primary evidence at the earliest stages of the prosecution.

[210] Having regard to these considerations, exactly how a case of malicious prosecution could ever be brought home against the police remains an open question, and even in *McKie* - a case that, remarkable to say, looks straightforward compared to the current one - the Lord Ordinary who allowed a Proof Before Answer had doubts about the relevancy of certain key averments. Thus here - and only if one ignores the problems on causation laid bare in the pursuer's note of argument - the best that could ever be said for the pursuer would be the same thing: his case is one of doubtful relevancy. That may be good enough for PBA to be allowed (again ignoring the other difficulties the pursuer has). But it is not a sufficient basis for an order of summary decree.

[211] The next section of Mr Duncan's submissions dealt with further problems he submitted the pursuer had not faced up to in respect of the issue of causation.

[212] First, the pursuer's submission (at para 2.1(g) of his note of argument) that

> "[u]ntil a time after the pursuer was arrested, charged and appeared upon indictment, the Crown did not have available to them the original evidence upon which they could make an independent assessment of the guilt or innocence of the pursuer"

overstates the evidence and is factually wrong. It is presumed that the reference to an indictment is an error and is intended to refer to the pursuer's appearance on petition on 17 November 2014.

[213] Although no citation is provided in support of this statement, its source appears to be based on paragraphs 12 to 15 of Detective Inspector O's supplementary statement. These paragraphs do not clearly state when each witness statement, production and label were first provided to any member of the Crown and on what basis. Further, paragraph 42 of the same statement (and the related production - Production book receipts relating to Production 44/31113/13) establish that primary source materials were being directly considered and referred to by Crown personnel prior to the pursuer being placed on petition. Specifically, Detective Inspector O notes that Production 44/31113/13, which comprised 4 x CDs, seized from Stephenson Harwood LLP was signed out by Sally Clark on 23 July 2014.

[214] Therefore, the pursuer's assertion at paragraph 4.4 of his note of argument that "it is clearly implied by Detective Inspector O that … the primary information was provided after the pursuer appeared on petition" and

> "absent any contrary explanation by the defender, it is to be reasonably assumed that the Crown were not provided with the full information in order to make an informed decision as to whether the pursuer should be prosecuted"

is wrong and based on an incomplete reading of the entirety of Detective Inspector O's statement and the underlying documentary evidence.

[215] Secondly, even if it were true that the Crown did not have physical possession of any productions until sometime after 17 November 2014, this takes the pursuer nowhere. At its height for the pursuer, such an evidential picture might support some measure of reliance by the Crown up to the point at which the pursuer appeared on petition. Whether that would be sufficient, however, to demonstrate procurement in the sense discussed by McCombe LJ

would be (as a minimum) open to some doubt. But more fundamentally, such an evidential position would not assist in demonstrating what measure of reliance and procurement there was after this point.

[216] Thirdly, in all the circumstances the natural inference is that the first and second indictments and all amendments thereto were based upon the Crown's analysis of the "primary information". Nothing pled or produced by the pursuer suggests otherwise. Detective Chief Inspector R states that "the witness statements and documents would have been submitted to the Crown after the submission of the SPR." As earlier submitted, the pursuer makes no suggestion of primary evidence being withheld or of being manufactured or of being manipulated. This is a clear point of distinction between the present case and that of *Rees*. In this situation, there is simply no basis upon which the court could conclude that the pursuer is bound to succeed at proof in demonstrating that the indictments were procured by the police. The position is precisely to the opposite effect he is bound to fail.

[217] Fourthly, any perceived confusion or ambiguity regarding Detective Chief Inspector R's reporting of what the pursuer did at the Independent Committee meeting in the Subject Sheet dated 19 June 2014 and the SPR did not have any effect on the Crown's formulation of any averment comprising the fraud charge at any stage in proceedings. At all stages (from petition to the various indictments), the relevant averments regarding the pursuer and his involvement with the Independent Committee were more broadly framed than any of the statements made by Detective Chief Inspector R in the Subject Sheet or the SPR. The averments in the charge, whether at the stage of petition or indictment, do not expressly state that the pursuer either presented the amended cash flow to the Independent Committee or presented on that document to the Independent Committee. Reference is made to the petition, the first indictment and the second indictment, relevant extracts of which are

provided in Appendices 1 to 3 of the note of argument. Indeed, the pursuer appears to recognise this at sub-paragraphs 5.1(i) and (ii) of his note of argument but fails to explain how these more general averments can be ascribed to the aforementioned statements of Detective Chief Inspector R.

[218] Fifthly, the error in chronology - that the provision of the letter of comfort triggered the release of the funds by Ticketus to the Collyer Bristow account - was included in the petition but was corrected in the first indictment. Reference is made to petition, charge 1(vi) and first indictment, charge 1(d)(vi). The inclusion of a reformulated averment relating to the provision of the letter of comfort in charge 1 in the first indictment shows that the identification of the error did not result in the Crown abandoning any part of the proposed prosecution of the pursuer.

[219] Sixthly, by the second indictment, the prosecution against the pursuer covered seven separate charges in total. Notwithstanding any subsequent amendments made by the Crown to this indictment, it was the Crown's original intention to prosecute the pursuer on all of these charges. In the absence of any argument ascribing these additional charges to the defender's officers as "prosecutors", this fact is fatal to any argument that the defender's officers were responsible for bringing a malicious prosecution against the pursuer.

[220] The final section of Mr Duncan's submissions dealt with the wider points referred to by Mr Smith as supporting the inference of malice on the part of Detective Chief Inspector R.

[221] The first matter he dealt with was the search warrant. The answer to this he submitted was a straightforward one.

[222] Detective Chief Inspector R was at all times acting under the supervision and direction of the Crown. Beyond that Mr Duncan directed my attention to the remarks of the

Lord Justice General in *Holman Fenwick Willan LLP* v *Procurator Fiscal Glasgow* 2017 HCJAC 39 at paragraph 7 when speaking in respect to the actings of the Crown.

> "Although the actions of the Crown were classified by the court as oppressive in a legal sense they were not motivated by bad faith. The procedure adopted was inept, but there was at least some basis for seeking recovery of a limited part of the material covered by the warrant."

[223] Mr Duncan submitted that these observations regarding what was meant by oppression apply equally to the High Court's observations about abuse of state power by the police and the Lord Advocate.

[224] As to whether Detective Chief Inspector R sought to circumvent the terms of the injunction, the core of the pursuer's argument in section 8.2(b) of the note of argument appears to be that, in November 2015 when the HFW Warrant was sought, Detective Chief Inspector R was seeking to prove the provenance of schedule 9 and "knew that the question of the pursuer's knowledge of the contents of that document may be in the hands of the solicitors for Duff & Phelps". Accordingly, on the pursuer's theory, Detective Chief Inspector R was willing to try to circumvent the terms of the injunction, including by making approaches to Novae Insurance which the pursuer argues are "indicative of malice".

[225] A plain reading of the HFW Warrant application establishes that this theory is wrong. By November 2015, Detective Chief Inspector R had determined that schedule 9 did not have the significance he thought it might potentially have had when it was first found in August 2013 during the search of the Shard. Detective Chief Inspector R expressly alerted the Crown to this development in the Subject Sheet seeking the warrant to search HFW's premises. Reference is made to the Subject Sheet dated 6 November 2015, paragraphs 25, 28. The pursuer's theory, therefore, does not even leave the starting blocks.

[226] Further, rather than seeking to keep his approaches to Novae Insurance secret, a complete review of Detective Chief Inspector R's correspondence on this matter reveals that he made these approaches with the knowledge of the Crown and also Andrew Gregory, who was acting for Duff & Phelps.

[227] Detective Chief Inspector R explains the basis for his approaches to Novae Insurance in his statement of 21 February 2019 at paragraphs 129-133. The pursuer's selective approach to presenting Detective Chief Inspector R's evidence means that, while paragraphs 129 and 130 of the statement are included in the note of argument, the following is not:

> "131. Given: (i) Andrew Gregory's assurances that his client, Duff & Phelps, wished to cooperate with the police investigation; and (ii) Duff & Phelps were the client of HFW, I thought that Duff & Phelps would be able to ask HFW to cooperate with the warrant. Unfortunately, this avenue was not as straightforward as I had hoped. The reason it was not straightforward is that, in addition to representing Duff & Phelps, HFW had been instructed to act for Duff & Phelps' insurers, Novae Insurance. HFW took the position that the insurers also had a say in what could be disclosed to the police. It was on this basis that I made contact with Novae. My purpose was to try to seek the same level of cooperation from Novae as I was being assured Duff & Phelps wanted to give."

[228] As is evident from the above, Detective Chief Inspector R was not engaged in any malicious conduct but, rather, was seeking to work pragmatically to resolve the legal professional privilege dispute on the hypothesis that as the client of both HFW and Novae Insurance, Duff &Phelps' stated intention to help the police investigation might remove the basis for any LPP claim being made by these companies.

[229] Turning to the issue of the schedule 9 document and whether it was accessed in breach of legal professional privilege. Mr Duncan first argued that contrary to the pursuer's assertions in section 8.2(c) of the note of argument, the handling of schedule 9 by the police is not "indicative of malice". The defender has consistently argued that the pursuer's characterisation of schedule 9 as part of "the foundation of the charges against the pursuer" is

an overstatement and that the version of the document identified and seized during the search of the Shard on 28 August 2013 was not accessed again until it was released by James Clibbon in May 2014. Reference is made to Answer 13, page 75, Answer 15, page 83 and Scott schedule, lines 151D-151G.

[230] Throughout the investigation, the police clearly recognised the limit of their knowledge regarding the provenance of schedule 9 and how it came to be in the possession of Duff & Phelps. This limit was repeatedly referred to in reports to the Crown, including the SPR, and earmarked for further investigation. Reference is made to: Subject Sheet dated April 2014 (Interim report), page 68; Subject Sheet dated 19 June 2014; SPR dated 8 August 2014, section 4.5. This recognised limit, therefore, meant that schedule 9 played no role in the decision to take executive action.

[231] By November 2015, any perceived significance the document had been thought to possess had been dismissed. By this point, the police had established that the reason why schedule 9 had been placed in the black folder at a chronological point which appeared to indicate knowledge of the Ticketus deal prior to the acquisition was the result of a mistake made by HFW staff when preparing the folder for use in the case being brought by the administrators against Collyer Bristow. Reference is made to Subject Sheet dated 6 November 2015, paragraphs 25, 28.

[232] The claim that the police accessed schedule 9 in breach of a claim of LPP also does not withstand scrutiny. Prior to schedule 9 being released by Mr Clibbon in May 2014, the fact that it had been identified by police during the initial sift conducted on the day of the search was expressly brought to the Crown's attention in reports and meetings. Reference is made to Subject Sheet dated April 2014 (Interim report), page 68 and the supplementary statement of Detective Chief Inspector R dated 21 February 2019, paragraphs 168-174.

[233] Schedule 9's release was also reported to the Crown. The Subject Sheet of 19 June 2014 advised of Mr Clibbon's attendance in Glasgow on 20 May 2014 to separate documents over which LPP had been claimed. It further advised that the "[s]eparated documents where privilege has not been claimed have been assessed for relevance and further enquiry" and that one such document was the "3-page document recovered from a ring binder folder", namely schedule 9. Reference is made to Subject Sheet dated 19th June 2014.

[234] The statements of both Detective Chief Inspector R and Detective Inspector O prepared for these civil proceedings consider in detail the contemporaneous documents which evidence how the material subject to the LPP claim, including schedule 9, were handled. These contemporaneous documents cover: emails; extracts from day books; documents raised by Detective Chief Inspector R and identifying further lines of enquiry; the creation of two new standalone productions on 4 June 2014 by Detective Inspector O, the subject of which was the newly released schedule 9 for use in interviews; and tabs which were used to mark where material subject to a claim of LPP had been extracted from a folder and the corresponding tabs which accompanied the extracted material and formed new productions which were clearly marked as subject to a LPP claim. Taken together, all these documents which Detective Chief Inspector R and Detective Inspector O considered in painstaking detail in their statements demonstrate that schedule 9 was released from any LPP claim in May 2014 and triggered various actions and lines of enquiry to be actively and overtly pursued by the police. These documents and the explanations provided by Detective Chief Inspector R and Detective Inspector O which evidence the careful handling of the LPP material and the steps taken to resolve the LPP claim, including meeting with Mr Clibbon, also belie any allegation that the police were intent on accessing documents regardless of any LPP claim. Reference is made to: statement of Detective Chief Inspector R dated 25 January 2019, section L1; supplementary

statement of Detective Chief Inspector R dated 21 February 2019, section H1; statement of Detective Inspector O dated 25 January 2019, sections G1 and L1; supplementary statement of Detective Inspector O dated 21 February 2019, section J; and all the associated documents referred to in these statements.

[235] Finally, it is to be noted that the police obtained schedule 9 from other sources, including Saffery Champness and PJC. As Detective Chief Inspector R explains:

> "having obtained this document from other sources, I asked those witnesses who I was aware had handled it – how did they receive it, when did they receive it, who did they send it to, why and when? None of these enquiries involved me either showing them the Schedule 9 document which had been seized from the Shard or telling them that I had seen it in the Shard in the black folder. Once the copy of the Schedule 9 document which had been seized from the Shard was released by James Clibbon in May 2014, witnesses were interviewed about that document, as can be seen from their statements (all of which post-date 20 May 2014)."

[236] As to the issue of accessing the CD envelopes Mr Duncan submitted that a fair reading of the pleadings, alongside the Scott schedule and the statements, does not "clearly indicate that the defender maintained that R opened the envelopes only at the time they were returned to Duff & Phelps solicitor, Andrew Gregory". The pursuer's averments in Cond 13, are as follows:

> "When R arrived at the offices in Manchester he handed over a number of hard copy documents, but also handed over the CD discs. The envelopes had been opened and the discs attached to the opened envelopes by elastic band. They were not in sealed (or indeed unsealed) bags. Andrew Gregory, a solicitor acting for Duff & Phelps challenged R and asked for an explanation. R stated, untruthfully, that [Gregory] 'had just seen me open these right here'. That was a lie as he had not opened the envelopes in the presence of Mr Gregory and they had been opened as long previously as at least 3rd March 2016."

[237] The defender answers the above at pages 77 to 78 of the pleadings in the below terms:

> "A meeting was arranged in Manchester at the offices of Duff & Phelps on 6th October 2017. […] DCI R was opening up each production and identifying it by number to enable DI O to mark it off her list of productions, and Mr Gregory and Mr Noble to do the same. DCI R opened envelopes containing CDs and passed the disks (sic) to DI O for her to cross off her list of productions and then pass on to Mr Gregory. When

> Mr Gregory was handed the CDs he asked for an explanation as to why the envelopes had been opened and it was explained to him by DCI R that the envelopes had been opened within the room a matter of seconds previously."

[238] Detective Chief Inspector R's position, as explained in the pleadings and further expanded upon in the Scott schedule and statements, is that he did open the envelopes on 6 October 2017. But the pleadings do not say that that was the first time that any of the envelopes had been opened, and nor does Detective Chief Inspector R say that in his statement. At least some of the envelopes were opened for the first time in December 2015. This was not concealed by the police. Far from it. Individuals advising Duff & Phelps were made aware at the time. In this situation it is impossible to understand why the pursuer thinks a discussion two years later between Detective Chief Inspector R and Mr Gregory – many months after the case against the pursuer had been dismissed – evidences malice at all, far less malice at the time of the investigation, far less in the context of a motion for summary decree.

[239] Finally as regards the IPA and Lord Hodge Mr Duncan said this:

[240] In section 8.2(e) of his note of argument, the pursuer alleges that Detective Chief Inspector R reported to the Crown in August 2014 (the pursuer refers to 14 August but it is assumed that this is an error and the date of the SPR, 8 August 2014, is intended) "that the pursuer had attempted to defeat the ends of justice by lying to both the IPA and to Lord Hodge".

[241] The basis of the pursuer's allegation appears to be the statement at page 19 of the SPR that

> "[t]he report will also show that GRIER, C and DW attempted to pervert the course of justice and intentionally misled Lord Hodge and the Insolvency Practitioners Association."

[242] In the Scott schedule, at line 50, the defender clearly explains that this sentence was preceded by, and requires to be read alongside, the following sentence at page 19 of the SPR.

> "The report will also highlight intentionally misleading witness statements provided to the police by the accused GRIER, C and DW and misleading reports provided by C and DW as joint administrators to both Lord Hodge and the Insolvency Practitioners Association."

[243] The sentence upon which the pursuer relies contains a mistake. That should have been obvious when the pursuer first alleged deliberate and malicious misstatement by Detective Chief Inspector R in relation to this matter. But even if the pleaders had not noticed the sentence a few lines above the one upon which they rely, the defender expressly drew their attention to this at line 50 of the Scott schedule.

[244] Notwithstanding this, the pursuer, in his note of argument, describes the erroneous sentence in the following way:

> "Yet he [DCI R] made what can only be taken to be a false allegation to the Crown. This too is indicative of malice as no explanation has been provided to justify the position."

The defender is unable to identify a basis for any part of that statement. Far from supporting the averments of malice made in the case, it calls them into question.

[245] For all the foregoing reasons Mr Duncan contended that the motion should be refused.

Discussion

[246] At the outset in considering the motion for summary decree I believe it is particularly apposite for the court to remember the observations of Lord Rodger of Earlsferry in *Henderson* v 3052775 *Nova Scotia Ltd* regarding the circumstances in which a summary decree motion is appropriate. He set forth three principles. He firstly says this at paragraph 14.

> "The very description 'summary' decree indicates that the procedure is intended to be used where the matter can be determined in a summary fashion, without there being any need for a prolonged examination of matters of fact or law."

He further observes at paragraph 15:

> "a motion for summary decree is not intended to replace a hearing on the procedure roll which is designed for the disposal of legal questions requiring more detailed and extensive legal debate. A motion for summary decree will be appropriate where the pursuer anticipates being able to satisfy the court, without the need for any prolonged legal debate, that there is no defence to the whole or part of the action because the defender's averments are irrelevant."

Lastly at paragraph 18 he remarks as follow:

> "But all this (a motion for summary decree) takes place within a system where disputed matters of fact are generally resolved by a judge who sees and hears witnesses giving oral evidence at a proof. So where there are actually disputed issues of fact to be resolved, the appropriate person to resolve them is the judge who hears the proof, not a judge who hears a motion for summary decree."

I consider, as submitted by Mr Duncan that the present motion breached each of the above principles. Given the complexity of the case it could not be determined in a summary manner. The pleadings as I have earlier said were very extensive; the issues between the parties both of fact and law were numerous and complex; substantial notes of argument were submitted, which were supplemented by lengthy oral submissions which were further added to by supplementary notes of argument on behalf of both parties submitted after the hearing of the motion; the documentary evidence relied on and in particular the statements of Detective Chief Inspector R were lengthy. This motion is not capable for these reasons of being determined in a summary fashion. The hearing of the motion I believe to a very large extent sought to replace a procedure roll hearing. Much of the legal argument before me was of a type and nature clearly more suited to a procedure roll than the hearing of a summary decree motion. Lastly, although Mr Smith argued strongly to the contrary effect I am in no doubt that there remain factual issues of materiality which require to be resolved by a judge at

a proof and not by a judge hearing a summary decree motion. I consider that there are clearly issues to try in this case. To take but one example: whether Detective Chief Inspector R was acting in good faith and genuinely made errors in reporting are issues which require to be investigated at a proof and are not matters on which I as a judge hearing a summary decree motion could properly make a finding. The underlying position of the pursuer was that I should take the view that no reliance should be placed on the evidence of among others Detective Chief Inspector R. I believe I cannot properly come to such a view at this stage. The above is a brief summary of my views and I would intend to develop the above position as I consider the various detailed arguments advanced before me. However, I consider this case is not an appropriate one to be dealt with by means of a summary decree motion.

[247] Turning to the detailed arguments made I first observe that the core of the pursuer's case of malicious prosecution is what Mr Smith described as the Independent Committee lie and the letter of comfort lie. For convenience I will use the foregoing references when referring to these issues. Mr Smith's position is that these two lies are pivotal to the prosecution brought against the pursuer.

[248] He maintained in his submissions that no explanation for what was now admitted by Detective Chief Inspector R to be errors in respect of these matters is forthcoming. He then went on to submit that such unexplained errors firmly pointed to absence of reasonable cause and malice on the part of Detective Chief Inspector R.

[249] Given the centrality of the above submissions to the case advanced by Mr Smith it is convenient to take as a starting point an examination of them.

[250] I turn first to consider the Independent Committee lie. This relates to two passages in reports prepared by Detective Chief Inspector R regarding the pursuer's role at the Independent Committee meeting.

[251] The first passage is in the SPR and is this:

> "Grier also provided that a financial forecast was provided to the directors at this meeting concerning cash flow. He stated that £20,000,000 is shown on the sheet with Wavetower being the provider of funds."

[252] The first question which arises is this: does Detective Chief Inspector R accept that this is an error and if so is there any explanation offered as to how that error had occurred?

[253] Detective Chief Inspector R begins by saying this in his statement regarding the above passage:

> "336. I did not mean either that David Grier provided the cash flow to the directors at the meeting on 24 April 2011 or that he made any presentation at the meeting. What I was referencing was what David Grier had told me in his statement."

[254] Detective Chief Inspector R then at paragraph 338 accepts that "my wording is ambiguous".

[255] He thus concedes that on one reading of the passage there is an error.

[256] So far as any explanation for that error that as I understand it is first given in paragraph 336 and in essence what he says there is: in the passage he was seeking to reflect the statement which he had obtained from the pursuer.

[257] The pursuer in his statement (TAB 12) of the defender's bundle of productions deals with the Independent Committee meeting from the third last paragraph on page 4 to the fifth last paragraph on page 5.

[258] Having considered what is said by the pursuer in that section of his statement I am persuaded that it cannot be ruled out that a court at proof could accept the above explanation.

[259] First the words "also provided" at the commencement of the passage it appears to me could be accepted by a court at proof as an error of expression and that what was intended to be conveyed was that the pursuer "also stated" in his statement "that a financial forecast was provided…".

[260] I consider that what is set out in the said passage in the SPR could be accepted by a court as reflecting in summary form the broad essentials of what is said by the pursuer in the passage of his statement to which I have above referred. In the statement of the pursuer at page 4 second complete paragraph he refers to a cash flow statement which was provided to him by MM and comments as follows on this document:

> "This indicated that Wavetower (acquisition vehicle used by Liberty Capital Limited) was going to inject £20,000,000 to acquire the Lloyds debt but there was also a working capital shortfall in future months of around £3,000,000".

[261] Later in his statement when he turns to what happened at the meeting the pursuer says this:

> "The first thing said was comment on cash flow. I agreed with the Committee there was a £3,000,000 gap in the cash flow. CW confirmed he had £5,000,000 available from a UK based financial institution which was more than enough to cover the cash flow gap."

[262] It seems to me that it is implicit in the second passage regarding cash flow that the statement being referred to is the same one as was referred to in the first passage. Thus I believe it is a view which a court at proof would be entitled to take that on the basis of the pursuer's statement a financial forecast was provided to the directors at the meeting concerning cash flow and that £20,000,000 is shown in the forecast with Wavetower being the provider of funds.

[263] Thus I am persuaded that it cannot be ruled out that a court could accept the explanation proffered by Detective Chief Inspector R in respect of this error, namely: that what he was intending to do was to reflect the statement provided by the pursuer although he has done this in a somewhat garbled fashion.

[264] There is thus a twofold explanation proffered for the error: (1) there is an error in expression in respect of the words "Grier also provided", and there clearly is such an error

and (2) subject to that error there is a basis for what is said, which is found in the statement of the pursuer.

[265] For the purposes of the summary decree motion the foregoing is sufficient for me to conclude that at the present stage the court is not entitled to find that the said statement resulted from malice on the part of Detective Chief Inspector R. There is a defence on this issue which is put forward which requires investigation at a proof.

[266] Detective Chief Inspector R has not as argued by Mr Smith left it as a "mystery" how this error came about. He has sought to offer an explanation for that error. Whether that explanation is accepted or not is a matter for proof. Accordingly at this point I cannot hold that malice can necessarily be derived from that error.

[267] Mr Smith in his supplementary written submission made a further point regarding the SPR at paragraph 2.7 where he said:

> "Such an interpretation (that the passage reflected the pursuer's statement) would be inconsistent with other statements within the very report. On page 53 there are two significant statements which make clear that what R is attempting to report back is that the pursuer did in fact misrepresent to the Independent Committee:
>
> > 'On 24 April 2011 in Glasgow CW, GW and Grier presented false information concerning the source of CW's funding to the Independent Committee of Rangers directors'
>
> And later on the same page:
>
> > 'This clearly contradicts statements in evidence provided by Duff & Phelps that they were unaware of the Ticketus deal prior to the acquisition. David Grier in particular presented a version of this document on and around 24 April 2011 to the Rangers directors and Murray Group personnel which had Ticketus name removed and replaced with Wavetower.'"

[268] As is pointed out by Mr Duncan in his written response to this argument these passages are not referred to in the pleadings and to date therefore have not been the subject of

any specific comment by Detective Chief Inspector R. However, I note the second passage is a repetition of a passage found in the Subject Sheet to which I will shortly turn.

[269] So far as the first additional passage relied on by Mr Smith this on one interpretation could cast an unfavourable light on the explanation proffered by Detective Chief Inspector R. However, first I think the statement has to be seen in the context of what Detective Chief Inspector R says at paragraph 337 of his statement:

> "I was also relying on the fact that David Grier was present at the meeting when CW stood up and said he was using his money to fund the deal. I believed that David Grier knew that was not the case."

[270] It appears that Detective Chief Inspector R believed at that time that silence on the part of the pursuer relative to the source of the funds where he knew this to be untrue made him criminally liable and therefore his reference to "presentation" by all three at the Independent Committee has to be seen in this context. It is in the context of Detective Chief Inspector R's view in respect of "concealment" that the further comments relied on by Mr Smith have to be viewed namely; that by silence the pursuer was complicit in the presentation. It appears to me that once more there is an issue which requires proof before a decision can be arrived at regarding the parties positions on this matter.

[271] Mr Smith's position was that when these two further sections of the SPR were had regard to Detective Chief Inspector R's position became unsustainable.

[272] Even putting into the equation the further passages upon which Mr Smith relies I am not at this stage prepared to hold that Detective Chief Inspector R's position is unsustainable. He has given an explanation of his position which even adding in the above passages I believe could be accepted by a court having heard all of the evidence. Mr Smith's argument is that the position is crystal clear and the passages can only be represented in a single fashion. That for the reasons I have set out I do not think is correct.

[273] Moreover, I accept the argument of Mr Duncan that what underlies the submission of Mr Smith regarding malice is that there was an attempt by Detective Chief Inspector R to "fit up" the pursuer. In considering whether there was an attempt to "fit up" the pursuer I believe that regard can be had not solely to the passage itself relied on by Mr Smith but to wider matters. One wider consideration in judging that submission is the summary of evidence attached to the petition (TAB 8 of the defender's bundle). At page 35 of that summary the following is said regarding the meeting of the independent committee:

"The meeting was minuted"

[274] What can be taken from the above is that the Crown had been made aware of the minuting of the meeting at the petition stage. If Detective Chief Inspector R was seeking to "fit up" the pursuer then he was in no way seeking to hide the minutes of the meeting from the Crown which contained the primary evidence regarding what had happened at the meeting. It could be argued that this showed that there was no malice in the actings of Detective Chief Inspector R and is an adminicle of evidence that could be founded upon by the defender at a proof.

[275] I now turn to the passage in the Subject Sheet prepared by Detective Chief Inspector R relied upon by Mr Smith which was in the following terms:

> "…the cash flow part of the document details the agreement CW completed with Ticketus on 9 May 2011. Ticketus name is included in the document as providing an advance of £20,000,000 excluding VAT with a season by season breakdown also included.
>
> This clearly contradicts statements and evidence provided by Duff & Phelps that they were unaware of the Ticketus deal prior to acquisition. David Grier in particular presented a version of this document on and around 24 April 2011 to the Rangers directors and Murray Group personnel which had Ticketus name removed and replaced with Wavetower."

[276] In paragraph 20 of his supplementary statement Detective Chief Inspector R comments as follows regarding the above passages:

> "As I state at paragraph 336 of my previous statement, my position is not that David Grier provided the cash flow to the directors at the meeting on 24 April 2011 or that he made any presentation at the meeting' more, specifically, it was not my position that David Grier actually made any presentation at the meeting of the Independent Committee on the cash flow document which had Ticketus name removed and replaced by Wavetower. Insofar as my reference on the 19th June 2014 Subject Sheet that 'David Grier in particular presented a version of the document' could be construed as a representation that Mr Grier actually either presented the amended cash flow to the Independent Committee or presented on that document to the Independent Committee, then I accept that as an error. On reflection the correct wording I should have used is that he 'commented on' cash flow (see statement of David Grier dated 24 October 2012) that David Grier 'explained' 'their analysis' of the cash flow (as per minutes of that meeting)".

[277] Accordingly Detective Chief Inspector R's position is the same as in respect of the statement founded upon in the SPR, namely: there is an error of expression which has resulted in an ambiguity. He has not properly conveyed in the passage in the Subject Sheet what he intended.

[278] Once more Mr Smith contends that there is no explanation for the error and in so far as there is any explanation tendered it is unsustainable. The question is this: is the position put forward on behalf of the defender in respect of this error bound to fail? Whether the defender is likely or even highly likely to fail, is not the true question. Rather the hurdle is the extremely high one, namely: is the defence bound to fail.

[279] I think it impossible to hold at this point that no court having heard the whole evidence could not accept the position advanced by Detective Chief Inspector R regarding this passage. He clearly made an error. However, he explains that this is an honest error. I cannot see how it can be ruled out that a court may accept that explanation. It is clearly possible that a court following proof may accept that Detective Chief Inspector R is not someone who finds it easy to express himself clearly in writing, the court may even hold that he was careless in

the way he expressed himself or even negligent in the way he expressed himself, however, that does not lead to an inference of malice. It is possible that the court may hold that at all stages Detective Chief Inspector R was acting in good faith. This is not an issue which I think can be decided safely on a consideration of documentary evidence including his statements. Such possible findings make it clear why it would not be appropriate for this court to reach the conclusion for which Mr Smith contends at this stage.

[280] Beyond the foregoing in considering whether the said statements in the SPR and Subject Sheet are the product of malice and therefore made without probable cause there are as argued by Mr Duncan certain further factors which militate, at the stage of a summary decree motion, against this conclusion.

- The first factor is this: I think Mr Duncan is correct that what underlies Mr Smith's position is as I have already mentioned a contention that Detective Chief Inspector R was seeking deliberately to "fit up" the pursuer. The language used by Detective Chief Inspector R in particular within the SPR is not redolent of such a deliberate attempt. The use of language is poor: "also provided". It more looks like carelessness in expression rather than a "fit up". As Mr Duncan says you would expect rather better use of language and clarity of expression if the purpose of the passage was to "fit up" the pursuer.
- A further factor which points away from malice on the part of Detective Chief Inspector R is as pointed out by Mr Duncan, the history of the use of the phrase and in particular that it first appears in a report at a point where the pursuer was not even a suspect. Once more this tends to suggest that this is an error of expression rather than a deliberate attempt to "fit up" the pursuer.

- The next factor is this: given the size and complexity of the case and I believe there can be no dispute that the case was of a very substantial size and of considerable complexity how appropriate is it to focus on individual short passages within lengthy reports and to take from these passages an inference of malice and want of probable cause? The pursuer at least as a primary argument puts forward that such a narrow approach is appropriate, although as is clear Mr Smith then seeks to widen out his focus. I think such a narrow approach in a case of this type is not appropriate. In any event I am not convinced that merely by looking at the passages in isolation it can be held that the only possible explanation for the passages is malice and want of probable cause. The example given by Mr Duncan for arguing that such a narrow focus is inappropriate does in my opinion have considerable force. At paragraph 21 of his supplementary statement Detective Chief Inspector R says this:

> "In terms of criminality, the significance of this meeting is that Grier was present when CW told the Independent Committee that he was funding the acquisition with his money and Mr Grier knew that this was a lie but kept silent. In my assessment, David Grier was involved with GW and CW in the acquisition process and was part of the inner circle. Again as evidence of this involvement, I point to the email summary provided in the appendix to this statement."

[281] Against the background of that paragraph in Detective Chief Inspector R's statement I think Mr Duncan's argument that standing the evidence available to the police indicating that the pursuer knew CW's answer to be dishonest which Mr Duncan detailed in the course of his submissions, by reference to section C of Detective Chief Inspector R's statement it cannot be ruled out that the court following a proof could hold that Detective Chief Inspector R had probable cause to suspect and report dishonesty on the part of the pursuer.

[282] I do not consider that at the stage of a summary decree motion the court can reject the evidence of PAB, the email traffic both pre and post-acquisition and the parts of the CW transcript relied on by Mr Duncan. The whole of this evidence requires to be considered at proof.

[283] The second matter relied on by Mr Smith was the comfort lie. This relates to statements made in the SPR about the effect the provision of a letter from MCR had on the release of funds by Ticketus on 7 April 2011.

[284] The relevant parts of the SPR are:

> "…The completion monies (circa £24 million which included £4 million VAT) for the transaction between Ticketus and CW's acquisition of the Club were transferred from Ticketus via Clarke Willmott on 7th April 2011 to Collyer Bristow and held in a separate joint client account set up with Collyer Bristow bankers, C Hoare & Co.
>
> These monies were transferred after Ticketus Investment Committee received the comfort it sought from CW and GW regarding what would happen to their investment should there be an insolvency event."
>
> And
>
> "On 7th April 2011 at the request of the accused GW who stated this would allow the deal to progress with Lloyds and MIH, Ticketus (after receiving the letter from MCR via CW) authorised the completion monies circa £24million to be transferred from their solicitors Clarke Willmott's client account to the Collyer Bristow client account. The monies were held to the order of Clarke Willmott and not the accused GW or CW as no deal had completed."

[285] The position taken in respect of the above passages by Detective Chief Inspector R in his statement is this:

> "I now accept that my conclusion that Ticketus funds were transferred on receipt of a letter prepared by MCR dated 7 April 2011 was an error." (see: paragraph 7)

[286] Detective Chief Inspector R having admitted an error, the question again becomes does Detective Chief Inspector R offer any form of explanation as to how this error occurred?

[287] Detective Chief Inspector R offers this explanation:

> "I now appreciate that the times and dates regarding the comfort the letter do not follow chronologically but, at the time of David Grier's detention, I believed that they did and in the spirit of what was being asked for, I also believed that David Grier and others (at the date in 2011) at MCR believed that also (they were providing the letter for that specific purpose)" (see: paragraph 220).

[288] Accordingly in substance Detective Chief Inspector R in respect to this one aspect of a highly complex case and in relation to a part of that case which was of some complexity in that a number of transfers in respect to the sum being supplied by Ticketus took place over a fairly short period of time admits he made an error about the specific date at which a particular transfer in respect of that sum took place and its relationship to the date of the sending of a letter. I believe that it once more cannot be ruled out that that explanation for the error could be accepted by a court at proof. A court could I believe accept this explanation of a genuine mistake given the context within which that error occurred.

[289] I consider it is not correct to say that the only explanation for this error is that it resulted from malice and lack of probable cause. Such an error could perhaps at the highest properly be characterised at this stage as careless. However, I think it is difficult to say at this stage with any degree of confidence that this statement was even negligently made far less to say that the only explanation for it being made was malice. Once more the pursuer seeks the court to hold that Detective Chief Inspector R was not acting in good faith in respect to this matter. This I believe is clearly an issue which requires to be dealt with at proof and no finding regarding this issue can be made at the stage of a summary decree motion.

[290] Widening out the focus in respect to the letter of comfort lie Mr Duncan directed the court's attention to a passage at page 32 of the SPR (earlier quoted in full) and he made three submissions arising from the terms of this passage I believe that these submissions had considerable force at this stage in that it could not be ruled out that a court at proof could hold that these matters were of materiality in considering whether DCI R's statement was based on

malice. Equally I thought his reference to the note prepared by Detective Chief Inspector R for the advocate depute again pointed away from the statement being the product of malice. The passages in the SPR and the note to the Advocate Depute highlighted the complexity of what was being dealt with and that overall in what Detective Chief Inspector R was saying there was a lack of clarity. This did not support an attempt to "fit up" the pursuer, rather it pointed towards the explanation proffered on behalf of the defender, namely: a genuine mistake. It seems to me the foregoing supported Mr Duncan's general position that single sentences or passages should not be looked at in isolation as was the underlying primary position of Mr Smith but should be viewed in a wider context and thus required the whole evidence in the case to be heard at proof. This militated against the court reaching a decision on these issues at this stage.

[291] In summary I think that in respect to the Independent Committee lie and comfort lie the defender is entitled to put forward the defence offered that rather than lies which were the product of malice they were genuine errors. I cannot see how at this stage the court could say that the defender was not entitled to put forward this explanation for the errors being made.

[292] Mr Smith seeks to put forward a black and white picture. I consider that the picture is materially more nuanced than he seeks to present. There is on a consideration of the passages in the documents relied on no clearly established single answer as to the basis of these statements, as contended for by Mr Smith, namely: malice. I think the defender is entitled to put forward the defence he advances at proof. It would I am persuaded be an injustice for him not to be able to put forward his defence at proof.

[293] I conclude that the pursuer has failed to establish the necessary first plank in support of his motion seeking summary decree, namely: that there are errors for which no explanation

is given by Detective Chief Inspector R and that there is therefore only one possible explanation for these errors namely: malice.

[294] Overall I do not accept the arguments advanced by Mr Smith that there are no issues of fact to be tried in respect of these matters. Rather I believe that the issue of the basis for these errors and accordingly the explanation for these errors which form the core of the case requires to be decided following the hearing of evidence. For the foregoing reasons on their own the pursuer's motion cannot be granted.

[295] Logically the next issue is probable cause which I have already touched upon when considering the issue of the two lies and could the court at this stage be satisfied that at the point of reporting to the Crown there was no probable cause.

[296] I accept Mr Duncan's general point that he made at the outset of his submissions under this head that Detective Chief Inspector R covers in some detail the basis for his reporting this matter and that the length of this, the number of factors and their nature relied on by Detective Chief Inspector R to which I was directed by Mr Duncan pointed strongly to there being an issue to try in respect of the question of probable cause. I cannot at this stage see how the court could hold itself satisfied that there was no probable cause.

[297] There was an acceptance by Mr Duncan that Detective Chief Inspector R had placed considerable reliance on the evidence of PAB in relation to the issue of probable cause. Again it seemed to me to underlie the position being advanced by Mr Smith that Detective Chief Inspector R was not entitled to place reliance on the evidence of this witness. In respect of this issue no decision could be reached by the court at this stage. The decision as to whether any reliance and if so the extent of the reliance that could be placed on the evidence of PAB must be a decision for the court after hearing the whole evidence in the case.

[298] Overall I conclude that at this stage I am unable to find in favour of the pursuer in respect of the issue of probable cause for the above reasons. This creates a further insuperable problem in respect of the motion for summary decree.

[299] The next question which arises is this: did the errors go anywhere? In other words did the errors procure the prosecution?

[300] I am of the view that there are a number of difficulties in respect to the above causation question which the pursuer has not surmounted.

[301] First I accept the submission of Mr Duncan that having regard to section C of the statements of Detective Chief Inspector R that the suspicions of the police went beyond (a) the Independent Committee meeting and (b) the letter of comfort.

[302] Secondly for the reasons advanced by Mr Duncan the following submission in Mr Smith's note of argument is an overstatement:

> "Until a time after the pursuer was arrested, charged and appeared upon indictment, the Crown did not have available to them the original evidence upon which they could make an independent assessment of the guilt or innocence of the pursuer" (see: paragraph 2.1(g)).

[303] Accordingly at this stage I cannot say that the Crown did not have the information to make an independent decision relative to the decision to prosecute at any particular stage. It seems to me that it is a matter for proof the extent to which the Crown had access to and considered primary evidence and thus were able to make an independent assessment of the evidence prior to the pursuer being charged or at any particular stage in the prosecution.

[304] I also believe Mr Duncan is correct that at its highest some reliance was placed by the Crown on the reporting of Detective Chief Inspector R in the framing of the petition but not beyond that.

[305] Thirdly Detective Chief Inspector R says this in his statement at paragraph 71:

> "The witness statements and documents would have been submitted to the Crown after the submission of the SPR".

[306] It follows from this that the first and second indictments and the substantial amendments to these resulted from the Crown's own legal analysis and they were formulating the charges on that basis. This would fit in with the Crown's legal responsibilities in respect to the prosecution of crime as outlined by Mr Duncan and to which I will later turn. Further no evidence was produced that the above normal course was not followed in the present case. I do not consider against that background that at this stage the court could hold that the pursuer is bound to be successful at proof in establishing the police procured the prosecution and the defender's defence on this aspect of the case is bound to fail.

[307] The next point in respect of causation is this: the perceived confusion or ambiguity regarding Detective Chief Inspector R's reporting of what the pursuer did at the Independent Committee meeting in the Subject Sheet and the SPR does not on the face of it appear to have had any effect on the Crown's formulation of any averment comprising the fraud charge at any stage in the proceedings.

[308] At all stages, as argued by Mr Duncan, the relevant averments regarding the pursuer and his involvement with the Independent Committee were more broadly framed than any of the statements made by Detective Chief Inspector R in the Subject Sheet or the SPR. Thus I accept Mr Duncan's argument that the basis for the Crown's charge cannot be properly ascribed to any misreporting on the part of Detective Chief Inspector R.

[309] Further as argued by Mr Duncan the chronological error regarding the date at which the letter of comfort was provided was included in the petition but was corrected by the stage of the first indictment (see: charge 1(d)(vi)). What is noteworthy in respect of this is that this error did not prevent the Crown from proceeding with the charge. This appears to break the

chain of causation. It does not appear that the error in chronology was an essential part of the Crown's case. By the stage of the first indictment there is no reference in charge 1(d)(vi) to the letter being used "to induce Ticketus to release the …... £18,161,500 to a Collyer Bristow account …"

[310] Next as referred to by Mr Duncan the second indictment contains seven charges against the pursuer (namely: charges 1, 3, 4, 7, 8, 9 and 10) thus at that point it was the Crown's intention to prosecute the pursuer on all of these charges. I think it is correct, as argued by Mr Duncan, that these charges cannot all be laid at the door of Detective Chief Inspector R. Charges such as 3, 4 and 7, for example cannot I believe be said to be based on either of the lies relied on by Mr Smith. Against this background it is difficult to see how the prosecution can be said to have been procured by Detective Chief Inspector R.

[311] Lastly Mr Duncan argued that the Crown's case against the pursuer in substance was one of wilful concealment, and in these circumstances submitted that the court could not hold that the errors of expression relied on procured a case of wilful concealment. I think that there is some force in this argument. The passages relied on by Mr Smith do not clearly support such a case.

[312] Overall for the foregoing reasons I consider there are material difficulties in respect to the issue of causation for the pursuer. At the very least the defender is entitled to put forward its defence at proof in respect of the issue of causation.

[313] In respect of the issue of causation there was a connected question, Mr Smith in the course of his oral submissions sought to advance an argument to this effect: it was sufficient in respect to the pursuer being successful in establishing a case of malicious prosecution to show that the petition was procured by the police.

[314] I am not clear that the above is the case which the defender is asked to meet in the pleadings, which as submitted by Mr Duncan put forward a case that the defender's officers drove the case from start to finish. Examples of this in the pleadings are references to the "entire investigation" of the police and reference to both of the indictments and not merely to the petition. The pursuer's case on record is I think on a proper analysis founded upon this: the prosecution is a *unum quid*. Against that background I do not think the pursuer is entitled to put forward this distinct argument. Moreover, even if it is appropriate for this argument to be advanced it appears to me to be a legal issue of the type which cannot be competently dealt with at a summary decree motion. Rather it should be dealt with at a debate. I observe that the point is one on which there is no Scottish authority; it raises an important point of principle, and it is clearly a significant legal question. For these reasons I do not think it appropriate to decide this issue at the stage of a summary decree motion.

[315] Lastly in relation to the issue of causation, it appears to me that on the basis of Mr Duncan's submissions it is not open to the court to hold at this stage that even at the stage of the petition the Crown was unable to make an independent judgement in respect of the case. It is arguable on the basis of Mr Duncan's submissions that the Crown had access to the primary evidence and the time to consider that evidence prior to the stage of the petition. Thereafter it is clear from the drafting and amendment of the various indictments that the Crown was in a position to make an independent judgement.

[316] For the above reasons I am not persuaded by Mr Smith's argument in respect of this aspect of the case.

[317] The next issue is the role of the Crown and this issue overlaps with the issues of procurement, malice and want of probable cause.

[318] It appears to me clear that the police and Crown have different roles and responsibilities in respect to the investigation and prosecution of crime.

[319] I accept the argument advanced by Mr Duncan that the ultimate responsibility for investigation of crime lies with the Crown and not with the police. It seems to me clear on the basis of section 12 of the Criminal Procedure (Scotland) Act 1995 and section 17(3)(a) of the Police and Fire Reform (Scotland) Act 2012 and the authorities to which I was referred by Mr Duncan that that is the position.

[320] Secondly it is I think absolutely clear that it is for the Crown and not for the police to decide whether the results of an investigation justify prosecution. Thus as advanced by Mr Duncan the mere reporting by the police to the Crown does not mean that a criminal case will automatically follow. Thus no matter what the view of the police as regards what is disclosed in the evidence in respect to the commission of a crime the matter is ultimately one for the Crown. It is the Crown's legal responsibility to decide if a prosecution should proceed.

[321] As argued by Mr Duncan the pursuer in essence in the present case seeks to argue that the above legal framework was not followed. On the contrary it is argued on behalf of the pursuer that the framework was inverted and that in the present case the analysis of whether there was sufficient evidence for the libelling of specific charges became a matter under the control of the police and not the Crown.

[322] Mr Duncan in his submissions carefully took the court through how the police in carrying out their role of investigating these matters operated under the direction of the Crown and emphasised their obligation in terms of section 12 of the Criminal Procedure (Scotland) Act 1995 to comply with instructions from the Crown.

[323] It is I believe noteworthy in considering whether the well understood framework was followed in the present case to consider this: as part of their duties in considering whether a

prosecution is justified it is for the Crown to keep under review the charges from the outset (the stage of the petition) to the matter finally going before a jury. In this respect I observe that in the present case the petition was materially different from the first indictment served, there were two indictments; and the second indictment was subject to multiple substantial amendments in light of legal challenges to it. Thus there is substantial evidence that the Crown repeatedly exercised independent judgement in pursuing this case from the initial stage of the petition until the final conclusion of the criminal proceedings.

[324] Accordingly in the present case, at this stage, the pursuer has not I believe got over the obstacle of showing that the normal framework in respect to a prosecution in Scotland was not conformed with. In summary there are substantial averments and documentation evidence that the Crown was directing the case and taking an independent view in respect of the decision to prosecute the pursuer; in respect to the decision as to what charges the pursuer should face and as to whether after being charged the prosecution should continue and in particular in respect of what specific charges.

[325] I am persuaded that having regard to the above there is an issue to try in respect to whether the police were acting under the direction and control of the Crown at all relevant points and therefore whether there can be any question of the police procuring the prosecution. It cannot be said for these reasons that the pursuer is bound to succeed at proof in showing that the police procured the prosecution. These considerations in respect to procurement are separate from those to which I referred earlier and I believe add considerable weight to the reasons which I earlier gave as to why the issue of causation is not a straightforward one for the pursuer and it cannot accordingly be said that the pursuer is bound to be successful in respect of the issue of procurement. There appears to me to be an issue to try in respect to the matter of procurement and thus causation. Lastly in respect to the

issue of the relationship between the police and the Crown a further matter was raised by Mr Duncan, namely: if the police are the "hands" of the Crown in the present case then why are the police not entitled to the same immunity from suit to which the Crown is currently entitled (see: *Whitehouse* at first instance). Following the hearing of submissions in the present case the decision in the reclaiming motion in the *Whitehouse* case (*Whitehouse* v *Chief Constable Police Scotland* [2019] CSIH 52 paragraphs 74 to 105): was issued. In terms of that decision the Crown's immunity from suit in cases such as the present one was removed. I am bound by that decision and accordingly Mr Duncan's argument requires to be rejected.

[326] I now turn to consider the "Don't tell David email" and what, if any, significance can be attached to its content and the circumstances surrounding its disclosure.

[327] First I note that the obligation to disclose arises under section 117 of the 2010 Act. As contended by Mr Duncan this causes two difficulties for the pursuer: (a) the obligation is only engaged after service of the petition and (b) is subject to a "reasonable practicability" limitation. I agree with Mr Duncan's position that the latter is of considerable significance in that the email was one of approximately 130,000 documents in the cache. In addition I also agree with the argument stated by Mr Duncan that a failure to disclose one out of 130,000 documents does not result in a natural inference of malice.

[328] Beyond the above there are in any event arguments, as advanced by Mr Duncan, as to first the significance, if any, of the document and (b) regarding the providing of the document to the Crown as asserted by Detective Inspector O.

[329] Having regard to the above there are a number of issues in respect to the email and this court cannot be satisfied at this stage that the pursuer's position in respect of this document is the correct one, namely: that it points to malice on the part of Detective Chief Inspector R. There is I consider an issue to try in respect of this matter.

[330] As to the wider issue of disclosure I think that Mr Duncan has correctly analysed the question and that what is of importance is the availability of productions to the Crown. If the productions were available then the Crown was in a position to make an independent judgement in respect of them. I believe that the defender's argument in respect of this issue is to be preferred.

[331] The final chapter is the further wider factors which Mr Smith relies on as supporting his argument regarding malice and lack of probable cause.

[332] The first of these chapters related to the obtaining of a warrant at Glasgow Sheriff Court.

[333] So far as the obtaining of that warrant the starting point is an email which is to the effect that the application was submitted "following a meeting with Crown and senior counsel…" In addition Detective Chief Inspector R states that prior to executing the warrant advice was sought from the Crown about the specific issue of LPP and he was advised to seize anything relevant to the warrant.

[334] Thereafter I note that it was accepted by the Lord Justice General in *Holman Fenwick Willan LLP and Duff & Phelps Limited* v *PF Glasgow* that the "procedure (in respect to the warrant) was known to, an authorised by, the advocate depute in charge of the High Court prosecution."

[335] I am persuaded that against the above background it is at least possible that after a proof a court would hold that the procedure gone through by the police for the obtaining of the warrant was entirely proper and gave rise to no inference of malice. It is tolerably clear that the obtaining of the warrant and the terms of the warrant were entirely under the control of the Crown and therefore the faults in the warrant (its entire failure to deal with the issue of LPP) resulted from the failure of the Crown and not Detective Chief Inspector R. It is not the

police who decide the terms of a warrant. I am of the view that there is a case to be argued that no criticism can be made of Detective Chief Inspector R in respect to the obtaining of the warrant and the terms of it.

[336] As to what was said before the sheriff in Glasgow Sheriff Court when the warrant was sought this is a matter in respect of which there is a factual dispute and therefore upon which I am unable to adjudicate at this point. There is an issue to try in respect of this matter.

[337] The matter of the obtaining of the warrant was considered both by the High Court in England and Scotland. I agree with Mr Duncan that the criticisms of the two courts in respect of the warrant related to in substance the failure in the course of the procedure to obtain the warrant to make adequate provision for the recovery of documents in circumstances where there was a known ongoing dispute about LPP. For the reasons I have above given that seems to be a criticism which properly falls at the door of the Crown not the police.

[338] The English court found that the acting of the Lord Advocate and the Chief Constable had been an abuse of state power. In the bill of suspension process in Scotland it was observed that: "Although the actions of the Crown were classified by the court as oppressive in a legal sense, they were not motivated by bad faith …".

[339] I consider that the above is a helpful analysis when considering the observations of the English court relative to abuse of state power.

[340] It does seem that the bulk of the criticism was in respect of the Crown. I do not think that it is correct that the characterisation of what happened as an "abuse of state power" gives rise to a necessary inference that Detective Chief Inspector R in obtaining and executing the warrant was acting maliciously. The actings of Detective Chief Inspector R in this respect have to be seen in the context of the Crown framing the warrant and in particular it being for the Crown to make the decision as to what precautions needed to be provided for in the

warrant to deal with the issue of LPP. I conclude that there is an issue to try as regards what properly can be inferred from the matters surrounding the obtaining of the warrant.

[341] In respect to the execution of the warrant there is a finding that in respect to this the actings of the police were "heavy handed" however, I do not think at this stage that this necessarily points to malice on the part of Detective Chief Inspector R. I think that it is important not to look at this finding in isolation. Rather it requires to be looked at in the context of all of the evidence and therefore it requires to be considered after proof.

[342] The second matter raised by Mr Smith is the approach to Novae by Detective Chief Inspector R. I was referred by Mr Duncan to Detective Chief Inspector R's explanation at paragraph 131 of his statement. Mr Duncan described this explanation as amounting to a pragmatic response to the LPP issue given Mr Gregory's assurances. It seems to me that a court having heard the evidence could accept this explanation and not hold that this behaviour evidenced malice. Therefore at this point there is an issue to try in respect of this matter.

[343] Turning to the next factor, namely: the handling of the schedule 9 document. It is the pursuer's position that it was the foundation of the charges against the pursuer. I am not satisfied that that is necessarily correct. I accept Mr Duncan's argument under reference to the Subject Sheet and SPR that the police recognised the limitation of their knowledge regarding the provenance of this document and how it came to be in the possession of Duff & Phelps. In addition I accept for the purposes of this motion his argument under reference to the Subject Sheet dated 6 November 2015 that by November 2015 any possible significance of said document had been dismissed by the police. There are clearly a number of disputed matters in respect of the significance and handling of this document. Again I believe that there is an issue to try regarding whether schedule 9 was accessed in breach of the accepted LPP claim

and its significance. It seems to me that the contemporaneous documents relied on by the defender support my conclusion that there is an issue for proof regarding the whole circumstances surrounding this document.

[344] Turning to the accessing of the CD envelopes there is a clear difference between the parties as to what happened and thus a factual issue which requires to be the subject of proof.

[345] In respect to the alleged behaviour by Detective Chief Inspector R towards certain professional witnesses I do not understand that he accepts the position advanced by Mr Smith and therefore there is an issue to try in respect of this matter.

[346] The next factor relied on was in respect to the IPA and Lord Hodge. Each party relies on a different passage within page 19 of the SPR. It seems to me that the two passages, one which follows the other should be read together. It appears that if these are read together it is possible to read the sentence relied upon by the pursuer as an error. It does appear from the sentence relied upon by Mr Duncan in the course of his submissions that Detective Chief Inspector R has in fact made a mistake. There is a clear difference between the two sentences and in the second sentence Detective Chief Inspector R clearly appears to accept that it was only against the joint administrators that Detective Chief Inspector R was alleging that there had been an attempt to defeat the end of justice by lying to both the IPA and to Lord Hodge. I am not persuaded at this stage that this matter necessarily points to malice on the part of Detective Chief Inspector R and that once more there is an issue to try in relation to this matter. It cannot be concluded at this stage that the explanation of mistake would not be accepted by a court following proof.

[347] Lastly Mr Smith relied on various factors surrounding the detention of the pursuer and his appearance on petition. These circumstances I think can be construed as perhaps showing

malice on the part of the pursuer. However, I believe they would have to be assessed in the context of the whole evidence led at proof.

Conclusion

[348] For the foregoing reasons I refuse the motion for summary decree. I hold that the defender is not bound to fail at proof in his defence regarding malice. That is the case no matter whether one takes a narrow approach focused entirely on the two errors founded upon by Mr Smith or if one widens the focus and has regard to the further factors upon which Mr Smith seeks to rely. Beyond that for the reasons I have set out I do not believe that the defender is bound to fail in his defence on the question of probable cause. Lastly, as regards to the issue of causation, I believe that one cannot hold at this stage that the defender is bound to fail in his defence in respect of that issue. Overall I am of the view that I cannot conclude that the defender's defence is bound to fail. I consider that there are issues to try in respect of material issues as above set out.

Disposal

[349] For the above reasons I refuse the motion for summary decree. I was not addressed on the issue of expenses or further procedure. Parties may enrol a motion as they see fit in order for these matters to be addressed.

Postscript

[350] In his written submissions the defender advanced a case that the pursuer's pleadings were irrelevant. This was not pressed in oral submissions and I do not further deal with the issue. In any event the pursuer's pleadings appear to me to be relevant.

[351] Secondly there was an argument relative to averments regarding the actings of the former Lord Advocate in respect of the criminal proceedings. I took the view that the argument advanced neither sides' case.