OUTER HOUSE, COURT OF SESSION

[2021] CSOH 18

CA72/20

OPINION OF LORD TYRE

In the cause

DAVID HENRY GRIER

Pursuer

against

THE LORD ADVOCATE

Defender

Pursuer: Smith QC, MacLeod; Kennedys Scotland
Defender: Moynihan QC, Hamilton; Scottish Government Legal Directorate

16 February 2021

Introduction

[1] The pursuer is one of a number of individuals who were charged with various offences, including conspiracy to defraud, in connection with the acquisition in 2011 by a company controlled by Mr Craig Whyte of a controlling shareholding in Rangers Football Club plc ("the Club"). At the material time the pursuer was employed as a consultant in business restructuring by MCR Business Consulting, London. He appeared on petition on 17 November 2014 and an indictment was served upon him on 16 September 2015. A second indictment containing additional charges was served prior to a preliminary hearing before Lord Bannatyne on 6 January 2016. A further, substantially amended, version of the

indictment was produced on 4 February 2016. In two opinions dated 22 February 2016 and 15 April 2016, Lord Bannatyne held that all of the charges against the pursuer were irrelevant in law. The Crown appealed against, *inter alia*, Lord Bannatyne's decision in relation to the charge of fraud against the pursuer. On 13 May 2016, the High Court of Justiciary refused the Crown's appeal.

[2] In this commercial action, the pursuer sues for damages for wrongful and unlawful prosecution and, separately, malicious prosecution. (A separate action for damages has been raised by the pursuer against the Chief Constable.) At the instance of both parties, the present action was set down for a debate of issues of relevancy, and notes of argument were lodged. As regards the defender's arguments, the pursuer undertook shortly before the hearing to make certain deletions from his pleadings to address most of those arguments. One matter remained contentious, but at the close of the debate the pursuer undertook to make a further amendment to deal with that point too. It is therefore unnecessary for me to address any of the points raised by the defender, and this opinion is concerned solely with the arguments presented on behalf of the pursuer.

[3] The pleadings of both parties are lengthy and complex. At the close of the debate, there was consensus between the parties that the issues which can be determined by me at this stage are as follows:

(i) whether the defender has pled a relevant and sufficiently specific defence that the prosecution of the pursuer was subjectively justified, ie that the Crown personnel responsible for the decision to prosecute the pursuer considered that they had reasonable and probable cause to initiate and continue the proceedings against him; and

(ii) whether the defender has pled a relevant and sufficiently specific defence that the prosecution was objectively justified, ie whether as a matter of law there was reasonable and probable cause to initiate and continue the proceedings.

The indictments

[4] The background to the indictments was the funding of the purchase of the Club. In very broad terms, the fraud charge was based upon an allegation that Mr Whyte persuaded the owners of shares in the Club, Murray MHL Ltd ("Murray"), to sell them to Wavetower Ltd, a company controlled by him, by falsely representing that he was providing the funding for the purchase from his own funds when in fact he was obtaining it from an entity called Ticketus LLP in exchange for the proceeds of sale of season tickets for the next three football seasons. I should make clear at this stage that no individual has been convicted of any criminal offence in relation to any of these matters.

[5] Charge 1 of the indictment as originally worded (dated 16 October 2015) was directed against the pursuer and four others, and stated that they did:

> "… conspire together to acquire and obtain by fraud a majority and controlling stake in the shareholding of the Club … through Wavetower Limited … this being a company incorporated for the purposes of and the means used to effect said acquisition …"

[6] The charge then set out in a large number of sub-paragraphs how it was alleged that "in furtherance thereof by means of fraud, false representations and false pretences" by them, the five individuals

> "… did obtain from Murray through Wavetower Limited 92,842,388 ordinary shares this being 85.3% of the issued capital of the Club for £1 by fraud and did thus obtain a majority and controlling stake in the shareholding of the Club through Wavetower Limited aforesaid by fraud".

Some of those sub-paragraphs contained charges against the pursuer. It is unnecessary for me to set these out at length here.

[7] In the 4 February 2016 version of the indictment, the charge of conspiracy to acquire by fraud libelled against the pursuer had reduced to one sub-paragraph, stating as follows:

> "(ii) You CRAIG THOMAS WHYTE, GARY MARTYN WITHEY 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 sale; induce the Independent Committee to believe that there was no requirement to arrange ring-fenced accounts for season ticket sales for the forthcoming season 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 for the acquisition of the Club, the ability to provide cash to invest in the Club for player 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;"

The decision of the Appeal Court

[8] Delivering the opinion of the court, the Lord Justice-General (Lord Carloway) observed that despite the complexity of the indictment the case libelled against the pursuer was relatively straightforward. His involvement was limited to attending the meeting on 24 April 2011, at which it was said that he wilfully concealed from the Independent Committee (a committee set up to make recommendations to the board of the Club in relation to Mr Whyte's offer) the fact that an agreement had been reached with Ticketus whereby money from season ticket sales for three years would not be available to Rangers because it had effectively been diverted into the hands of the potential acquirers. It was further alleged that it had been represented to the Independent Committee that evidence

about the true financial position would be provided, whereas there had been no intention of doing so, because no such evidence could exist. The result was the sale of the majority shareholding.

[9] The Lord Justice-General continued (references to the "second respondent" are to the pursuer):

> "[30] Fraud requires there to be a false pretence, made dishonestly, in order to bring about a definite practical result (Macdonald: *Criminal Law* (5th ed) 52). The false pretence averred in subparagraph (c)(ii) is the wilful concealment of the Ticketus Purchase Agreement from the Independent Committee. It is not said that the inducement of a belief in the collective mind of the Committee itself amounted to a fraud. The creation of a belief is not normally to be categorised as a practical result. Rather, the result libelled, and hence the completed crime, was the obtaining of the majority shareholding in Rangers.
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> [31] The fundamental difficulty with the relevancy of this limited libel, in so far as it is directed against the second respondent, is that there is no apparent link between the representation and the practical result. The charge does not aver a representation to the persons whom, it is alleged, were defrauded or a representation targeted at those persons through another. The majority of shares in Rangers were owned by Murray MHL Limited. If any fraud were to be perpetrated, it must have involved a representation in some way directed towards Murray, as, in effect, the owners of Rangers. This is indeed the concluding part of the libel. The difficulty is that the second respondent's particular acts, in concert with Mr Whyte and the first respondent, libelled in subparagraph (c)(ii), relate to the concealment of facts not from Murray but from the Independent Committee which, it is also libelled, was set up to advise the board of Rangers. There is no apparent connection between the pretence said to have been made by, or in the presence of, the second respondent and the alleged practical effect on the owners of Rangers. In these circumstances, the essentials of the charge of fraud are not present and the libel, so far as the completed crime of fraud is concerned, is irrelevant."

The court further noted, at paragraph 32, that the concealment of the Ticketus Purchase Agreement from Murray was not libelled, nor was it stated that the accused knew that the concealment of the Agreement from the Independent Committee could, or did, have any effect on Murray's corporate thinking.

[10] The court also held that a charge (charge 5) against *inter alia* the pursuer under section 993 of the Companies Act 2006 was irrelevant. This charge narrated that the accused

> "… were knowingly a party to the carrying on of the business of The Rangers Football Club plc with intent to defraud creditors of the said company or for any fraudulent purpose in that you did exercise control and de facto control over the business/business, assets and financial management of the company in such a manner so as make the Administration of the company inevitable and did fail to pay £2,800,000 to discharge a tax liability due by the company, fail to pay VAT, PAYE and National Insurance, fail to pay other debts due by the company, when funds were available to the company, pay debts due by Liberty Capital Limited from funds of the company receive a further sum of £6,090,255.72 colloquially referred to as 'roll over money' from Ticketus LLP and apply same to pay sums due in terms of the said Ticket Purchase Agreement dated 9 May 2011, all in order that you CRAIG THOMAS WHYTE could buy back the said company from the Administrators free of debt: CONTRARY to Section 993(1) & (3) of the Companies Act 2006".

The court considered that the fundamental problem with this charge was that it contained no allegation that the accused were trading while Rangers were insolvent: the allegation was simply one of not paying some debts and paying others, which was not a relevant averment of fraudulent trading. The allegation that the motive for putting the company into administration was to "buy back" the company "free of debt" was not easy to understand, but the charge was, in any event, an irrelevant one.

The pursuer's case

[11] In his summons, the pursuer identifies the charges that were brought against him (in the first indictment or subsequently) as "the Independent Committee charge", "the Letter of Comfort charge", and other charges. It is averred that no evidence existed to prosecute the pursuer for any of the charges against him, and that the Crown failed to follow proper procedures in bringing the prosecution. Their conduct amounted to conduct that no reasonable prosecutor would have followed and, further, was for that reason malicious. The pursuer sets out procedures that Crown Office staff and prosecutors are required to follow, including the preparation of an analysis of the evidence known as the "precognition". He

avers that in his case no precognition was prepared, and that no instruction was given to indict him by any advocate depute on his own authority. As regards the defender's averment that there was a draft of certain chapters of a precognition, the regulations did not permit prosecutions to proceed on the basis of a draft, and in any event it was insufficient and contained errors and inconsistencies. If a proper analysis had been carried out, it would have been apparent that there remained no evidence upon which to charge the pursuer with any offence. No Crown Counsel Instruction was issued for the prosecution to continue. Neither the Lord Advocate nor any authorised Crown Counsel had authorised it. It was accordingly unlawful.

[12] In relation to the Independent Committee charge, it is averred that there was no evidence that the pursuer made any misrepresentation to the committee. The charge in the first indictment was based solely upon an incorrect assertion by the investigating police officer that the pursuer had misled the committee regarding the source of the funds being used to buy the Club, by handing over a document containing a cash flow forecast. In the absence of evidence, no reasonable prosecutor would have brought the charges against the pursuer on the indictment. In the 4 February 2016 indictment, the charge had been amended from positive misrepresentation to concealment of certain things from the committee. That charge required the Crown to show that the pursuer knew of deception by others, of which there was no evidence, and that he was under a duty to disclose that fact to the committee, which he was not. In any event the committee had no executive power. No reasonable prosecutor would have brought the amended charge, and the actions of the Crown were therefore wrongful, without probable cause and malicious.

[13] In relation to the Letter of Comfort charge contained in the first indictment, there was no evidence that any version of the letter contained false information. There was no

evidence that the pursuer conspired with Messrs Whitehouse and Clark to issue the letter in furtherance of a fraud. No reasonable prosecutor would have brought such a charge against the pursuer without evidence of commission of the crime libelled. In this regard also the prosecution was wrongful, without probable cause and malicious.

[14] Nor had there been evidence to support the other charges libelled from time to time against the pursuer. A charge under anti-money laundering legislation in the 6 January 2016 indictment had been brought without analysis of the evidence and had been withdrawn. The charge of fraudulent trading had also been made without evidence, and was therefore without probable cause and malicious.

[15] The pursuer further avers that the Crown failed to disclose certain critical matters, including that the police had accessed material subject to legal privilege; that a database obtained by the police containing email correspondence of Craig Whyte included material that was exculpatory of the pursuer; and that the police had information as to possible fraud by another individual in connection with the purchase of the Club. It is averred that the Crown conspired with the police to avoid disclosure of these matters to the pursuer. No reasonable prosecutor would have adopted such conduct which was deliberate, wrongful and unlawful, and malicious.

The defender's case

[16] It is asserted in the defences that the prosecution did not lack reasonable and probable cause, and in any event was not malicious. The defender lodged a schedule summarising his response to the pursuer's contentions. As regards the Independent Committee charge, the amended charge was not restricted to concealment but included allegations of false representations. There had been evidence that the pursuer was aware of

the financial commitments undertaken by the purchaser of the Club, and that he knew that the acquisition of the Club was being funded by the sale of tickets for three seasons to Ticketus and was complicit in a conspiracy to mislead representatives of the Club in that regard. There had been evidence from which to infer (a) that the pursuer was aware that the cash flow projections presented to the committee, and the associated representations referred to in charge 1(c)(ii), were false, and (b) that the pursuer associated himself with misrepresentations made by Mr Whyte to the committee. Such misrepresentations had furthered the fraud on the vendors committed by Mr Whyte by concealing the Ticketus funding and misrepresenting the source of the funds for the acquisition of the Club. The practical result had been that Mr Whyte, via Wavetower, acquired ownership of the Club.

[17] In relation to the Letter of Comfort charge, there had been evidence that the second version of the letter (without the pursuer's signature) had been sent with his authority to Ticketus. The first version of the letter, signed by the pursuer, was consistent with the inference drawn in the draft precognition that he was aware that the Ticketus monies were being used to fund the acquisition. Whether or not a letter from the pursuer's firm would actually be relied upon by Ticketus, there had been evidence that the pursuer played a part in the furtherance of a fraudulent conspiracy.

[18] As regards the procedure followed in relation to the prosecution of the pursuer, it was admitted that following the pursuer's appearance on petition the Crown were provided with all the information that they required to consider in deciding whether the charges against the pursuer could be sustained. It was further admitted that the absence of a completed precognition was a departure from due process required by Regulation. The Crown gave due consideration to the emails that were regarded as exculpatory by the

pursuer and his advisers. The averments in relation to failure to disclose critical information were denied.

Argument for the pursuer

[19] At the debate, the pursuer submitted that his plea to the relevancy and specification of the defences should be sustained, and that the defender's averments, in so far as they bore to suggest that there was evidence which could have been considered to be sufficient for bringing a prosecution against the pursuer, should be excluded from probation. It would then be the pursuer's position that with those averments struck out there would be no defence pled and that decree on the merits should be pronounced.

[20] The defender had adopted a blunderbuss approach to pleading. It was not good enough to point to large quantities of documents and, in effect, say "it is in there". That was not fair notice. Reference was made to *Eadie Cairns* v *Programmed Maintenance Painting Ltd* 1987 SLT 777. It was impossible to tell what the Crown was relying upon in support of its contention that there had been reasonable or probable cause. Even if one looked at the documents referred to by the defender, which, it was submitted, the court was entitled to do, they afforded no basis for the defence. A table was lodged in which the defender's averments were systematically challenged under reference to the documentary material that the defender was understood to rely upon in support of them.

[21] The standard required for a prosecution on indictment was that there was sufficient evidence of the commission of the offence. Where a party alleged fraud, it was incumbent upon him to make "specific and relevant" averments of fraud to be allowed to go to proof: *Shedden* v *Patrick* (1852) 14D 721 at 727. There was no basis for a lesser standard to be applied where, as here, it was asserted that there had been evidence showing that there was a *prima*

facie case that the pursuer committed fraud. An analysis of the material relied upon by the defender (in the defences and in the schedule annexed to them) demonstrated that there had never been any basis for anyone considering that the pursuer had committed a fraud. The defender failed to articulate the nature of the primary fraud alleged to have been committed by Mr Whyte, or to point to any evidence which established either that there was a primary fraud or that the pursuer in some way advanced a fraudulent scheme by active participation. The obviousness of the absence of probable cause demonstrated the lack of good faith on the part of the Crown, and thus malice. The fact that the prosecution continued, including an appeal, in the knowledge that there had been a significant departure from the correct processes, was further indicative of malice.

[22] In the criminal proceedings, the charge of conspiracy to acquire by fraud had been held by Lord Bannatyne and on appeal to be irrelevant. That called for an explanation of how an irrelevant indictment could be said to be brought with reasonable and probable cause. Although it was accepted that an acquittal by a jury did not mean that the bringing of a prosecution was without reasonable and probable cause, where an indictment was dismissed as irrelevant it necessarily followed that there had been no reasonable and probable cause. To suggest otherwise would be to subvert the decision of the court, which the defender was not entitled to do.

[23] It was accepted that the fact that an indictment was found to be irrelevant was not necessarily indicative of malice, although the absence of reasonable and probable cause could be an indicator of malice. The pursuer did not seek to contend at this stage that there was no defence to the allegation of malice, but the court should hold that there was no relevant defence that there had been reasonable and probable cause for the initiation and/or continuation of the prosecution.

[24] As a separate matter, the defender's admitted departures from correct procedure were such that they established malice on the part of the Crown in bringing and maintaining the prosecution against the pursuer. These included the absence of a completed precognition; the fact that no positive decision to indict the case was taken by either the Lord Advocate or the advocate depute responsible for prosecuting it, each believing mistakenly that the other had made that decision; and the absence of a separate decision authorising prosecution on the second indictment. The Crown must have been aware of these failings and yet proceeded with the prosecution. Reference was made to the observation of Lord Toulson in *Willers* v *Joyce* [2016] UKSC 43, at paragraph 55, that a claim of malicious prosecution required the claimant to prove "that the defendant deliberately misused the process of the court".

Argument for the defender

[25] On behalf of the defender it was submitted that in order to determine whether a prosecution was unlawful and *separatim* malicious, it was necessary to address four issues:

(i) whether the prosecutor had had a subjective belief that there was reasonable and probable cause;

(ii) what the prosecutor had regarded as constituting the grounds for there being reasonable and probable cause;

(iii) whether, looking at the matter objectively, there had been reasonable and probable cause; and

(iv) whether, in the whole circumstances, malice on the part of the prosecutor had been demonstrated.

In support of those propositions, reference was made in particular to Clerk & Lindsell on Torts, chapter 15; *Miazga* v *Kvello* [2009] 3 RCS 339 (a decision of the Supreme Court of Canada); and *A* v *New South Wales* [2007] HCA 10 (a decision of the High Court of Australia). It was emphasised that the defence in the present case was not a collateral attack on the decision of the High Court of Justiciary; it was accepted that the indictment had been irrelevant and that it would be incompetent for the Crown to attempt in the present proceedings to prove that the pursuer had committed fraud. It did not, however, follow that there had been no reasonable and probable cause, nor that the prosecution had been malicious.

[26] In relation to the first of the four issues above, the defender had made averments and lodged documents that were intended to demonstrate the subjective beliefs of the key individuals concerned with decision making in relation to the prosecution. Subjective belief was relevant both to reasonable and probable cause and to malice. As it was not suggested by the pursuer that the existence of malice could be determined as a matter of relevancy in the present debate, the defender's averments regarding subjective belief should not be excluded from probation as, regardless of the court's decision on reasonable and probable cause, they would remain relevant to the issue of malice that remained to be decided.

[27] It was not necessary or appropriate for the defender to aver fraud to the standard described in *Shedden* v *Patrick* and other case law. The indictments themselves showed what had been alleged against the pursuer. It was not, however, correct to assert that the Independent Committee charge had been based on false information that the pursuer had handed over a cash flow statement at the committee meeting; by the time of service of the first indictment the Crown had been aware that he had not.

[28] The best means of demonstrating the subjective belief of the key individuals was to look at their contemporaneous assessments of the evidence. The relevant assessments had been lodged and were sufficiently referred to in the defences. As regards the second of the four issues, ie what the persons responsible had regarded as constituting the grounds for reasonable and probable cause, the most important document was the draft precognition prepared by a senior procurator fiscal, and in particular the chapters therein which bore the headings "Role of David Grier/MCR in Craig Whyte's acquisition of the Club" and "The Independent Committee". This was where the thinking behind the prosecution was to be found. If the court considered that it was necessary, applying the observations in *Eadie Cairns*, to narrate all of this *ad longam* in the pleadings, it could be done. Fair notice was, however, already provided in the pleadings of the evidence that had been relied upon from time to time by the senior procurator fiscal and by the Advocate Depute as amounting to reasonable and probable cause in relation to each of the charges against the pursuer. In particular the defences included an accurate precis of the relevant chapters of the draft precognition.

[29] As regards the third of the issues, namely whether, objectively, there was reasonable and probable cause, the court required to consider the evidence that had been subjectively relied upon. The fact that the charges in the indictment had been held to be irrelevant was not determinative of this issue. There were circumstances, such as a narrow point of statutory interpretation, where an adverse decision on relevancy would not indicate an absence of reasonable and probable cause. It was suggested, under reference to Clerk & Lindsell at paragraph 15-37 and *Miazga*, that the test was whether there had been "a case fit to be put into court". As Clerk & Lindsell stated at paragraph 15-49, it was not evidence of absence of reasonable and probable cause that a mistake had been made on a difficult and

doubtful question of law. It could not be said here that the defender had failed relevantly to aver a basis upon which there was, assessed objectively, a reasonable and probable cause for initiating and continuing the prosecution of the pursuer.

Decision

The test to be applied

[30] As I have already noted, the only matter arising for my determination at this stage is whether the defender has pled a relevant and sufficiently specific defence in relation to the issue of whether there was reasonable and probable cause for the prosecution of the pursuer. The separate issue of averment and proof of malice does not require to be addressed except in so far as the defender contends that his pleadings are relevant to malice as well as to reasonable and probable cause.

[31] I was not referred to any Scottish authority on what constitutes absence of reasonable and probable cause in the context of a public prosecution. No doubt this is partly due to the fact that it was decided in *Hester* v *Macdonald* 1961 SC 370 that the Lord Advocate and his deputies had absolute immunity from suit, even in relation to a prosecution pursued maliciously and without probable cause. That case having been overruled by a Court of Five Judges in *Whitehouse* v *Lord Advocate* 2020 SC 133 (a case concerning two of the present pursuer's co-accused), it becomes necessary to address the issue raised in the course of this debate. The matter has, however, received attention in England and Wales, and in the Canadian case law already mentioned.

[32] As the authors of Clerk & Lindsell acknowledge, much of the English case law dates from the days of private prosecutions and cannot be applied directly to modern public

prosecution. However it is concluded (at paragraph 15-42) that the test for reasonable and probable cause

> "requires a finding as to the subjective state of mind of, in most cases, the police officer responsible (ie no honest belief), and an objective consideration of the adequacy of the evidence (ie the circumstances are such that they would lead an ordinary and prudent man to believe in the charge)".

In the Scottish context, the reference to a police officer may be taken to include a Crown prosecutor. This formulation indicates that under English law a claimant will succeed if he or she can prove either that the prosecutor had no honest belief in the guilt of the accused or that on an objective consideration there was an absence of reasonable grounds for holding such belief.

[33] The test for malicious prosecution was examined in detail by the Supreme Court of Canada in *Miazga* v *Kvello* (above). In this case charges of sexual assault of three children were brought against the children's parents and the mother's boyfriend. Some years later, the children recanted their allegations. The accused brought proceedings for damages for malicious prosecution. Delivering the judgment of the Supreme Court, Charron J observed at the outset (paragraphs 3 and 4):

> "[3] To succeed in an action for malicious prosecution, a plaintiff must prove that the prosecution was: (1) initiated by the defendant; (2) terminated in favour of the plaintiff; (3) undertaken without reasonable and probable cause; and (4) motivated by malice or a primary purpose other than that of carrying the law into effect.
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> [4] The four-part test for malicious prosecution is of long standing in the common law. It evolved in the 18th and 19th centuries at a time when prosecutions were conducted by private litigants and the Crown was wholly immune from civil liability. In *Nelles* v *Ontario* [1989] 2 SCR 170, this Court held that the Attorney General and Crown prosecutors no longer enjoy absolute immunity from a suit for malicious prosecution and set out the requisite standard for Crown liability under the pre-existing four-part test. The present appeal asks the Court to provide further guidance on the absence of reasonable and probable cause and malice requirements, in light of the unique role played by Crown prosecutors in our modern system of public prosecutions."

The background was thus similar to the current position in Scotland in the light of the *Whitehouse* decision, in which *dicta* from both *Nelles* and *Miazga* were referred to with approval.

[34] Addressing the third part of the four-part test (at paragraph 58), Charron J stated:

> "The third element requires a plaintiff to prove an absence of reasonable and probable cause for initiating the prosecution. Since malicious prosecution is an intentional tort that targets a prosecutor's decision to initiate criminal proceedings, this element is generally couched in terms of the prosecutor's belief in the existence of reasonable and probable cause. It is well established that the reasonable and probable cause inquiry comprises both a subjective and an objective component, such that for grounds to exist, '[t]here must be both actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances' (*Nelles*, at 193). Although stated in the affirmative, the onus is clearly on the plaintiff to prove the absence of reasonable and probable cause."

On this part of the test, the court held (i) that the reasonable and probable cause inquiry was not concerned with a prosecutor's personal views as to the accused's guilt, but rather with his or her professional assessment of the legal strength of the case, and therefore that belief in "probable" guilt meant that the prosecutor believed, based on the existing state of circumstances, that proof beyond a reasonable doubt could be made out in a court of law (paragraph 63); and (ii) that in the context of a public prosecution, the third element of the test turned on an objective assessment of the existence of sufficient cause, with the presence or absence of the prosecutor's subjective belief in sufficient cause being a relevant factor in the fourth element of the test, namely the inquiry into the existence of malice (paragraph 73).

[35] At paragraph 74, the court made the further important observation:

> "… Unlike the question of subjective belief, which is a question of fact, the objective existence *or absence* of grounds is a question of law to be decided by the judge: *Nelle*s, at 193. As noted in *Nelles* (at 197), the fact that the absence of reasonable and probable cause is a question of law means 'that an action for malicious prosecution can be struck before trial as a matter of substantive inadequacy', or on a motion for summary judgment. These mechanisms are important 'to ensure that frivolous claims are not brought' (*Nelle*s, at 197) …"
> (My emphasis.)

Although this observation focuses upon the power of the court to dismiss a claim as irrelevant because the facts, looked at objectively, disclose the existence of reasonable and probable cause for the prosecution (with the consequence that malice becomes immaterial), it also appears to me to envisage that the court may hold that a prosecutor defending a claim of malicious prosecution has failed to aver circumstances which, objectively assessed, amounted to reasonable and probable cause.

[36] The court went on to consider the fourth element of the test, namely malice. Although I am not required at this stage to make any finding on the relevancy of either party's pleadings in relation to malice, I note that the court (at paragraph 78) regarded malice as "a question of fact, requiring evidence that the prosecutor was impelled by an 'improper purpose'". Malice was a state of mind that could be inferred from other facts, but even if the claimant succeeded in proving that the prosecutor did not have a subjective belief in the existence of reasonable and probable cause, that might not suffice to prove malice because the prosecutor's failure to fulfil his or her proper role might be the result of inexperience, incompetence, negligence, or even gross negligence, none of which was actionable.

[37] Senior counsel for the defender invited me to adopt the analysis in *Miazga* in my approach to the present case. I did not understand senior counsel for the pursuer to disagree (although he reserved the right to argue in a higher court that there was no need to prove malice at all), and I have already noted that passages from *Miazga* were founded upon by the court in *Whitehouse*. For my part, I would respectfully say that I find the analysis persuasive. In particular, I acknowledge that there is a strong argument for treating the subjective belief component of reasonable and probable cause as an aspect of the

requirement to show malice, rather than as part of the third element of the test. However, as the case before me was argued on the basis that the court should address both components of the third part of the test before turning to consider malice, I shall proceed on that basis.

Subjective belief

[38] I address firstly the subjective component: ie whether the defender has relevantly averred (i) that the persons responsible for initiating and continuing the prosecution of the pursuer believed that they had reasonable and probable cause to do so, and (ii) what the basis of that belief was. On behalf of the defender it was contended that the correct way to plead this aspect was to set out in the pleadings the decisions taken by the individuals responsible for the prosecution, under reference to the material that was taken into account by them in making those decisions. I agree that that is the correct approach. As already discussed, the question is one of fact, to be determined on the basis of their evidence and the contemporaneous documentation. Contemporaneous statements of the prosecutors' views will be of particular relevance though by no means decisive, as it will be open to the pursuer to challenge the credibility and reliability of those statements, under reference to the material said to have been relied upon in forming the views expressed. I reject the proposition advanced on behalf of the pursuer that the defender ought to be specifying what fraud was committed or what the evidence was for such a fraud. As senior counsel for the defender accepted, the defender can do no more than point to the charge of fraud set out in the indictment from time to time, which was of course held to be irrelevant. The matter is not to be approached with the benefit of hindsight. Adopting the formulation in *Miazga* above, what the defender must offer to prove, in my opinion, is that the persons responsible for the prosecution did subjectively believe, based on the existing state of circumstances, that

proof beyond a reasonable doubt could be made out at trial. As a matter of fairness, the defender should go further than mere assertion of subjective belief and give notice of the basis upon which it is said that that subjective belief was held, in order to enable the pursuer to mount a challenge to this component if he wishes to do so.

[39] The pursuer criticised the defender's pleadings as lacking in fair notice. In support of this attack, reference was made to the well-known opinion of Lord Avonside in the *Eadie Cairns* case (above, at page 780), in which trenchant criticism was made of a party's pleadings in which two expert reports were adopted without further specification of what was to be relied upon from them. It is fair to say that pleading practices have moved on since Lord Avonside expressed his views in 1987, especially in commercial actions. Practice Note No 1 of 2017 strongly discourages lengthy pleadings and expressly authorises the adoption of documents such as expert reports as an alternative to setting the content out at length. The principle, nevertheless, remains the same: fair notice must be given by each party of the facts relied upon and of which evidence will be led.

[40] The pleadings for both parties in the present case are already very lengthy. This is perhaps inevitable due to the complexities of the case, which is concerned not with a single act or omission but with a course of acting taking place over a period of time while further information was being obtained and processed by the prosecutors. As the parties agreed at debate, the pleadings are to be regarded as a movie and not a snapshot. But from the court's perspective, their complexity has reached the point where it is becoming difficult to discern the critical aspects of each side's case. It was not, for example, obvious to me, before it was made clear by senior counsel for the defender during debate, how much weight was placed by the defender on the two chapters of the draft precognition that I have already mentioned. It may not have been obvious to the pursuer either, because the table produced at the debate

on his behalf made reference to a much broader range of documents as providing what was presumed to be the basis of the defence.

[41] Senior counsel for the defender indicated that if the court thought it necessary, he would amend his pleadings to set out at length the facts, conclusions, impressions and opinions contained in the draft precognition. I see no benefit whatever in such a course of action which would moreover create a risk that the detail of the decision-making process of the prosecutors would be inappropriately edited in the course of the exercise of incorporation into the pleadings. Nor am I persuaded that the defender's pleadings are so lacking in fair notice that the defences should be eviscerated by the wholesale exclusion of important averments from probation. Most of the points made by the pursuer in the table challenging the defender's averments appear to me to go to the substance of whether the documents relied upon by the defender provide the support for contemporaneous decisions that they are said to provide, and do not raise issues of fair notice. I am satisfied that now that the draft precognition has been identified as the primary source of evidence of the prosecutors' subjective beliefs from time to time, adequate notice is given of the basis of the defence on this component of reasonable and probable cause. The fact that it is common ground that this material will also be relevant to the question whether the prosecution was malicious affords a strong further reason for declining to exclude passages of pleading from probation on the ground of lack of specification.

Objective justification

[42] When one turns to the other component of reasonable and probable cause, ie whether there was objective justification for the initiation and continuation of the prosecution, a different approach must be taken. I respectfully adopt the view of the

Supreme Court of Canada in *Miazga* that this is an issue of law. It remains important, of course, to carry out the assessment of objective justification as at the date or dates when the prosecution decisions under challenge were taken. As the court in *Miazga* warned (at paragraph 76):

> "In carrying out the objective assessment, care must be taken in retroactively reviewing the facts actually known to the prosecutor at the relevant time — that is, when the decision to initiate or continue the proceeding was made. The reviewing court must be mindful that many aspects of a case only come to light during the course of a trial: witnesses may not testify in accordance with their earlier statements; weaknesses in the evidence may be revealed during cross-examination; scientific evidence may be proved faulty; or defence evidence may shed an entirely different light on the circumstances as they were known at the time process was initiated."

[43] In the present case, the risk of being influenced by events occurring during trial does not require to be considered because the case never reached trial. Where, as here, the charges were dismissed as irrelevant, it seems to me that it will normally be difficult to argue that reasonable and probable cause existed from an objective standpoint. A decision that a charge is irrelevant is a decision that even if the Crown were to prove all of the facts narrated in the indictment, the essentials of the criminal charge are not present. As a general rule, it can hardly be said, on an objective assessment, that there is reasonable and probable cause for initiating and continuing proceedings if a conviction cannot result because the circumstances averred do not, as a matter of law, amount to commission of the offence charged.

[44] There may be exceptional circumstances in which dismissal of a charge as irrelevant does not imply an absence of probable and reasonable cause. Senior counsel for the defenders suggested, under reference to Clerk & Lindsell, that this may be so where the charge gave rise to a complex or controversial point of law. I am doubtful whether even in that case it could be said, if the charge were held to be irrelevant, that on an objective

assessment there was reasonable and probable cause: it seems to me that the finding of irrelevancy effectively amounts to a finding that there was not. A more extreme example might be where a prosecution proceeds upon an apparently settled and uncontroversial interpretation of the law in relation to the offence charged, but where that interpretation is challenged on appeal and subsequently overruled by a larger court convened to reconsider its correctness.

[45] The present case does not, in my view, fall within such marginal territory. It raised no difficult or complex point of law. The definition of fraud is clear and well settled: what is required is a false pretence, made dishonestly, in order to bring about a definite practical result. According to the judgment of the court (at paragraph 31, set out above), there was no apparent connection between the pretence said to have been made by or in the presence of the pursuer and the alleged practical effect on the owners of the Club. The necessary link between false pretence and result was accordingly missing from the charge. It appears to me to follow from the decision of the court that, on an objective assessment, there was no "case fit to be put into court". Nothing further is relied upon in the defences, and I accordingly hold that there is no relevant defence pled to the pursuer's case that the prosecution was initiated and continued in the absence of reasonable and probable cause.

Further procedure

[46] It is acknowledged by the pursuer that a finding of absence of reasonable and probable cause does not necessarily imply that the prosecution was malicious, and that, at least on the law as currently understood, the pursuer will require to prove malice before his claim for damages can succeed. Dates have been reserved for a proof before answer, but

before pronouncing any interlocutor I will put the case out by order in order that parties may address me on any matters arising from this opinion.