



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 33

CA9/20

OPINION OF LORD TYRE

In

MINUTE FOR THE PURSUER

In the cause

DAVID JOHN WHITEHOUSE

Pursuer and Minuter

against

(FIRST) THE CHIEF CONSTABLE OF POLICE SCOTLAND and

(THIRD) THE LORD ADVOCATE

Defenders

**Pursuer: Dean of Faculty, McKinlay; A & W M Urquhart, on behalf of Livingstone Brown,
Glasgow**

First Defender: Watts; Ledingham Chalmers LLP

**Third Defender: Moynihan QC, M Hamilton; Scottish Government Legal Directorate
First, Second and Third Respondents (Aver Corporate Advisory Services Ltd, Emma Porter ACA
and William Cleghorn CA): Howie QC; Pinsent Masons LLP**

Fourth Respondent (Sally Clark): No appearance

Fifth Respondent (Helen Nisbet): Lindsay QC; Gilson Gray LLP

Sixth Respondent (Alan MacDonald): Dewar QC; Russells Gibson McCaffrey

24 March 2021

Introduction

[1] The pursuer raised an action for damages against the first and third defenders for *inter alia* unlawful detention and arrest and malicious prosecution. Proof before answer was allowed and a proof was due to commence in January 2021. Before the action came to proof,

however, the third defender admitted that there was no probable cause for the charges libelled against the pursuer in the first petition, that the decisions to place the pursuer on the second petition and the two indictments lacked objective probable cause, and that from the stage of the appearance of the pursuer on the second petition there was a malicious prosecution in the technical sense of that term in the law of delict, and accordingly that the third defender was liable to make reparation to the pursuer. Both defenders have now settled the claims by the pursuer against them, and the action is effectively at an end.

[2] In the course of the proceedings, large amounts of documents have been produced by the defenders: some voluntarily and some in response to specifications of documents and commissions for recovery of documents. The documents lodged for the purposes of the proof include witness statements prepared in accordance with interlocutors of the court.

[3] The pursuer has lodged a minute craving the court:

“To grant permission to the minuter to use and disclose a. documents recovered by commission; b. documents produced on a voluntary basis by the defenders; c. statements and affidavits lodged by the defenders; and d. productions lodged by any party in the present action for the purpose of:

- (i) reporting suspected breaches of regulations, misconduct and/or criminal conduct, arising from the factual circumstances relevant to the present action, to the police, Crown Office & Procurator Fiscal Service, Crown Prosecution Service or other public authority; and
- (ii) cooperating with any investigations, inquiries and prosecutions pursued by the police, Crown Office & Procurator Fiscal Service, Crown Prosecution Service or other public authority, whether following a report by the pursuer or otherwise, including the provision of witness statements and the giving of evidence.”

[4] The first defender does not oppose the granting of permission as sought. The third defender does not oppose the granting of permission except in so far as paragraph (ii) refers to “inquiries” that may be pursued, on the ground that until the nature and scope of such an inquiry have been determined and announced, the application is premature. Answers have

been lodged by a number of individuals referred to by name or by implication in the minute, objecting to it on various grounds. Some of those grounds fell away in the course of the hearing of the pursuer's application.

The law

[5] The relevant law is not in dispute. It is as stated by Lord President Rodger in *Iomega Corporation v Myrica (UK) Ltd* 1998 SC 636, and may be summarised as follows:

1. A party who, as a result of commission and diligence, obtains possession of documents or other items is subject to an implied obligation or undertaking to the court not to use them nor to allow them to be used for any purpose other than the conduct of the actual or prospective proceedings in respect of which they have been recovered.
2. The Court of Session has power to permit items recovered for particular proceedings in this court to be used for other proceedings, where that would be in the interests of justice.
3. Since it is the court which has the power to give the necessary permission and the party can do nothing without that permission, the court can attach any conditions which it thinks fit to any permission that it grants. The attaching of appropriate conditions gives rise to no issue of competency, and the framing of such conditions is a matter for the exercise of the court's discretion.
4. In deciding whether to grant permission and, if so, on what conditions, the court is exercising a discretion and the guiding principle in the exercise of that discretion will be the interests of justice in the circumstances of the particular case.

[6] It was also common ground at the hearing before me (i) that the implied undertaking not to use documents for other proceedings, and the court's discretion to permit their use, applied to documents produced voluntarily in the same way as they did to documents recovered by commission and diligence; and (ii) that the implied undertaking applied not only to the documents themselves but also to the information that they contained (cf *Cobra Golf Inc v Rata* [1996] FSR 819 (a case cited with approval in *Iomega*), Laddie J at page 830).

Matters not in dispute in this application

[7] In the course of his submission on behalf of the pursuer, the Dean of Faculty confirmed certain important matters which reduced the scope of the issues between the parties. Firstly, he confirmed, for the avoidance of any doubt, that the permission that was sought was restricted to reports to and other communications directly with the bodies mentioned in the application. Permission was not sought to use or disclose the documents and information in any other way, such as by way of communication of any of it to the media. Secondly, he confirmed that in relation to use or disclosure of the documents and information for the purpose of making a criminal complaint, permission was sought only in relation to disclosure to the police, the Crown Office and the Crown Prosecution Service of England and Wales. Permission was not at this time sought to disclose documents or information to any other body such as a disciplinary body. Thirdly, in relation to documents disclosed to the pursuer by the Crown for the purposes of the criminal proceedings against him (and therefore falling within section 162 of the Criminal Justice and Licensing (Scotland) Act 2010), permission was sought only in relation to such documents as had been brought into the damages action by means of an application for commission and diligence. Permission was not sought in relation to documents disclosed by the Crown for

the purposes of the criminal proceedings which had not been included within that application. In this context, the Dean of Faculty confirmed expressly that no report produced by the first, second and third respondents for the purposes of the criminal proceedings had been included in the application for commission and diligence, and that permission to use or disclose those reports was not being sought.

Arguments against the granting of permission

[8] On behalf of the third defender, it was submitted that the application was premature in so far as it sought permission to use and disclose documents to any “inquiry”. Although it had been confirmed by the Lord Advocate to the Scottish Parliament that an inquiry would in due course be held, the nature and form of the inquiry had not yet been determined. No decision had been made as to whether it would be a statutory public inquiry, or as to its terms of reference. It was, however, acknowledged that whatever form of inquiry was held, the pursuer would be a key witness. It was also submitted on behalf of the third defender that any permission granted should be under reference to a list of the documents intended to be covered by it. This would be appropriate to avoid uncertainty as to whether documents initially disclosed for the purposes of the criminal proceedings had been included in those brought into the civil proceedings and therefore covered by the permission.

[9] The objection by the first, second and third respondents was addressed by the pursuer’s confirmation that permission was not sought in relation to their reports.

[10] The fourth respondent’s objection related solely to use and disclosure of the witness statement that she had provided in the damages action. She did not object to its disclosure to the police, the Crown Office or a statutory inquiry. She did, however object to its

disclosure to the Crown Prosecution Service or other public authority. No reasons had been given as to why such disclosure would be in the interests of justice.

[11] The fifth respondent objected to the granting of permission unless and until she had had an opportunity to peruse all of the documents sought to be disclosed. The application did not make clear what allegations of criminal conduct, if any, were to be made against her, or what documents might be relied upon in support of such allegations. She denied any wrongdoing, but she had a right to protection against self-incrimination. In order to know whether that right had to be insisted upon, she required to know what was being disclosed, and whether it was said to give rise to criminal conduct on her part. Her right extended not only to her witness statement for the purposes of the damages action but also to contemporaneous material in which she may have given advice. In the meantime the pursuer's application should be refused *in hoc statu*. The fifth respondent also adopted the third defender's prematurity argument.

[12] The sixth respondent adopted the third defender's prematurity argument and also adopted the fifth respondent's submissions *mutatis mutandis*. He too denied any wrongdoing. His witness statement had been accompanied by an analysis, prepared in conjunction with the witness statement, of the evidence considered in relation to the pursuer's criminal prosecution. Such material fell within the protection from self-incrimination. It was not in the interests of justice to grant a blanket permission until details had been provided to him of the documents and information covered by it.

Argument for the pursuer

[13] In response to the prematurity argument, the pursuer submitted that there was no reason to delay the grant of permission. The Lord Advocate had confirmed that there would

be an inquiry; regardless of its nature or terms of reference, it was inconceivable that the pursuer would not be required to give evidence, which he wished to do. In relation to use of the documents in a complaint to the Crown Prosecution Service, it was to be recalled that the pursuer had been arrested and detained in England, and that documents had been seized there. It was in the interests of justice to extend the permission accordingly. As already noted, permission was not sought for disclosure to any other bodies at this time. There was no need for a list to be produced of the documents in respect of which permission was sought. It would remain at the pursuer's risk to ensure that only documents brought into the damages action were used or disclosed. It was not for the pursuer to specify the person or persons alleged to have committed offences; that was the task of the investigating authorities once the complaint had been made. The protection against self-incrimination did not extend to contemporaneous documents, even if they were incriminatory. In any event these respondents would have been fully aware of their right not to self-incriminate when they provided their witness statements.

Decision

[14] In my opinion, subject to the qualification below regarding witness statements, the interests of justice favour the granting of the permissions sought. As regards use of the documents for the purposes of making a criminal complaint, I accept the pursuer's submission that it is unnecessary for him to specify at this stage which offence he alleges was or may have been committed by any particular person; that is what would require to be investigated by the police. Standing the admissions made on behalf of the third defender in the damages action, I consider that if the pursuer regards it as appropriate to make a complaint of criminal conduct, then he should be able to do so without being hindered by

being unable to use material that came to his attention as a result of being produced in the civil proceedings. I am also satisfied that the fact that certain events took place in England renders it appropriate and in the interests of justice to grant permission for disclosure to the Crown Prosecution Service as well as to the police and to the Crown Office and Procurator Fiscal Service. I emphasise that permission is neither sought nor granted for use in any other way or disclosure to any other person or body, and in particular is not sought or granted for disclosure of the terms of any criminal complaint, in so far as founded upon the material in respect of which permission is granted, to the media.

[15] As regards use or disclosure for the purposes of an inquiry, I see no good reason to delay consideration of the application until the nature and terms of reference of the inquiry have been determined. As has been noted, the Scottish Parliament has been informed that an inquiry in some form will be held, and it cannot seriously be doubted that the pursuer will be invited to provide evidence to that inquiry. In these circumstances it is unnecessary to incur the expense of a further application after the details of the inquiry have been determined and announced.

[16] I am not persuaded that there is a need for the pursuer to list the documents in respect of which permission is sought. I suspect that that would be an onerous and expensive task, and I am content to rest matters on the basis that it will be the responsibility of the pursuer to ensure that nothing is used that was disclosed by the Crown in the criminal proceedings but has not been included in productions for the purposes of the damages action. I shall note in the minute of proceedings that permission is not sought to use or disclose any reports by the first, second and third respondents.

[17] As regards the objections of the fifth and sixth respondents, I accept that their right to protection from self-incrimination must be respected, but in my view that right is much

more circumscribed than was suggested by senior counsel for the fifth respondent. The scope of the right has been examined by a number of courts in the context of the taking of bodily samples such as DNA swabs, and it has been emphasised that “the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent”: see eg *HMA v P* 2011 SLT 1097; *Jalloh v Germany* (2007) 44 EHRR 32; *Maclean v Procurator Fiscal, Glasgow* [2012] HCJAC 34 at paragraph 20. It does not extend to the use of potentially self-incriminatory statements made by an accused person before criminal proceedings are pending. In the circumstances of the present case I am doubtful whether it extends to anything that was lodged for the purposes of the damages action. However, in the interests of justice, although I am clearly of the view that the fifth and sixth respondents have no entitlement to review all of the documents for which permission is sought before it is granted, I consider that they should be given an opportunity to consider whether there is anything in the witness statements that they provided for the purposes of the damages action that might amount to self-incrimination. I bear in mind that if they had declined to provide witness statements they could nevertheless have been cited and led as witnesses, but they would have been entitled to receive the usual warning if a possibility of self-incrimination arose. I shall accordingly allow each of the fifth and sixth respondents a period of 7 days in which to state whether they consider that there is anything in their statement that amounts to self-incrimination and which ought to be excluded from the permission to use and disclose. If they do (or either does), a hearing will require to be fixed to hear argument. If they do not, the permission that I am granting will extend to their witness statements. For the avoidance of doubt, I include within the scope of “witness statements” any analysis prepared by the witness in conjunction with the statement, but not

any analysis or other material that was prepared at the time of the criminal proceedings against the pursuer.