OUTER HOUSE, COURT OF SESSION

[2018] CSOH 105

P341/17

OPINION OF LADY WOLFFE

In the petition

THE PANEL ON TAKEOVERS AND MERGERS

Petitioner and Minuter

against

DAVID KING

Respondent

For orders under section 955

Pursuer: Johnston QC, Turner; Dentons UK
Defender: J Mitchell QC; Lindsays

14 November 2018

Introduction and background

The legal issue

[1] This is an application by The Panel On Takeovers And Mergers ("the Panel") asking the court to find David King ("the respondent") guilty of contempt of court by reason of his failure, it is said, to obtemper the court's interlocutor of 22 December 2017 ("the first interlocutor"), as confirmed and varied by the interlocutor of the Inner House of the Court of Session dated 28 February 2018 ("the Inner House interlocutor"), and which read together with the first interlocutor, I shall refer to as "the Interlocutor".

[2] The matter called before me for debate on the issue of whether the Panel was obliged first to obtain the concurrence of the Lord Advocate to the raising of these proceedings and, whether, having failed to do so, the Panel's application is incompetent.

Outline of the respondent's challenge

[3] The respondent's principal argument as to why the Minute was incompetent was as follows:

(1) The Panel's application was incompetent in the absence of the concurrence of the Lord Advocate. In brief the argument was that, historically, all cases involving a contempt of court required the prior concurrence of the Lord Advocate. This flowed from the penal character of the consequences of a contempt and there was no coherent policy reason to distinguish between contempt involving an interdict and other forms of orders ("the concurrence challenge")

The respondent referred to a subsidiary argument:

(2) In any event, proceeding by Minute was arguably incompetent and the present application required to be by petition and complaint to the Inner House ("the procedural argument"). This flowed from a narrow reading of section 47 (1) of the Court of Session Act 1988 ("the 1988 Act"), which the respondent did not himself espouse. For this reason, the procedural argument was not ultimately advanced as a separate challenge to the competency of the Panel's Minute. The concurrence challenge sufficed for the respondent's purposes. The procedural argument was made to highlight, it was said, the illogicality of the Panel's application.

Outline of the Panel's reply

[4] The Panel's reply is as follows:

(1) In relation to the concurrence challenge, the modern law is that the concurrence of the Lord Advocate is required only in proceedings for contempt of court for breach of an interdict and, accordingly, no concurrence was required in proceedings for contempt of court for breach of a positive order (such as imposed on the respondent by the Interlocutor); and

(2) In relation to the procedural argument, proceeding by Minute in the original proceedings (as after defined) was competent.

The procedural history

[5] The procedural background is lengthy. It suffices for present purposes to note that the respondent's original acquisition of shares in Rangers International Football Club plc ("the Company") gave rise to the need for certain rulings by the Panel. It did so in furtherance of its function of administering the City Code on Takeovers and Mergers ("the Code") and in the exercise of its statutory functions in chapter 1 of Part 28 of the Companies Act 2006 ("the Companies Act"). One of the rulings required the respondent to make an offer for certain other shares in the Company and, related to that, to publish a Code-compliant announcement of his offer to do so. These rulings were subsequently confirmed by court orders sought in the Panel's petition proceedings in this court ("the original proceedings") and embodied in the first interlocutor. By the Inner House interlocutor, the Inner House confirmed and varied the first interlocutor. The respondent was required to implement the Interlocutor by 30 March 2018. He has not done so.

The character of the Interlocutor

[6] In the course of submissions reference was made to the character of the Interlocutor, which required the respondent to take certain steps within a prescribed timescale. Conventionally understood, it was an order *ad factum praestandum*, i.e. requiring "positive" steps, rather than a "negative" or prohibitory order such as an interdict. In terms of the first interlocutor, as varied by the Inner House interlocutor (shown by underlined text) , the respondent was obliged to do the following:

> "in terms of section 955 of the Companies Act 2006, ordains David Cunningham King to announce in accordance with the City Code on Takeovers and Mergers ("the Code"), within 30 days of today's date, and thereafter make in accordance with the Code, a mandatory offer, at a price of 20 pence per share for all the issued ordinary share capital of Rangers International Football Club plc not already <u>owned by New Oasis Asset Limited ("NOAL") or</u> controlled by him, Mr George Letham, Mr George Taylor and Mr Douglas Park (all as fully designed within the prayer of the Petition)".

The Interlocutor obliged the respondent to announce and make a mandatory offer (in prescribed terms) for certain shares in the Company.

The form of the Panel's application to this court

[7] The Panel brought the alleged contempt of court before the court by Minute in the original proceedings in the Outer House. As noted above, the asserted failure to proceed by way of petition and complaint to the Inner House was the subject of the procedural argument.

The order sought if contempt of court is established

[8] If the court finds that there has been a contempt of court, the Panel invites the court to impose upon the respondent "such penalty, whether by fine, imprisonment or otherwise

as to the court shall seem appropriate in respect of that contempt". The respondent relied on this as part of his argument as to the penal character of these proceedings.

Submissions on behalf of the respondent

Propositions about contempt of court

[9] Senior counsel for the respondent, Mr Mitchell QC, began by observing that what the Panel complained of is not a wrong to it but an affront to the administration of justice in the form of a contempt of court. He cited a number of cases (e.g. *CM* v *SM* 2017 SC 235, [2017] CSIH 1; *AB and CD* v *AT* 2015 SC 545, [2015] CSIH 25; and *Robertson and Gough* v *HM Advocate* 2008 JC 146, [2007] HCJAC 63) to vouch certain propositions, which I summarise as follows:

(1) Proceedings for contempt of court had many features in common with criminal proceedings. They are subject to the criminal side of Article 6 and attract the same criminal trial guarantees;

(2) The contempt must be proved beyond reasonable doubt;

(3) The respondent (as the alleged contemnor) was no more compellable as a witness than if he were the accused in a criminal trial;

(4) What must be shown is not simply a breach of the Interlocutor but a wilful defiance of it, and this involves proof of the requisite *mens rea*;

(5) Contempt of court is an offence which is *sui generis*. It is not a crime *per se,* although some contempts may be criminal in themselves. Contempt of court can take many forms and often will not constitute criminal conduct;

(6) A penalty imposed for contempt of court is not regarded as a sentence and the contemnor is treated like a prisoner on remand.

He noted in passing, under reference to the English case of *Daltel Europe Ltd and others* v *Makki and others* [2006] 1 WLR 2704; [2006] EWCA Civ 94, that hearsay evidence was admissible in English contempt of court proceedings. He referred to other cases, e.g. to vouch the opposition that precision was needed in the articulation of the alleged breach constituting the contempt (*In re L (a Child)* [2016] EWCA Civ 173). Although I understood Senior Counsel for the respondent to acknowledge that this was not a debate about specification issues.

Preliminary remarks on the procedural argument

[10] Notwithstanding eschewing the procedural argument as a ground of challenge, Mr Mitchell made a number of submissions about this. Under reference to the case of *AB and CD* v *AT, cit. supra,* he noted the court's observations that in respect of contempt that occurred outwith the court, the matter of the alleged contempt is brought to the attention of the court by an application of an interested party. Where there is no subsisting process then, in the Court of Session, proceedings are by petition and complaint or, in the sheriff court, by summary application (*per* the Lord Justice Clerk at para 3). In that case the alleged contemnor was a social worker who had reduced contact by a parent with its child, notwithstanding a court order for weekly contact. There were no ongoing court proceedings and the observation of the Lord Justice Clark (at paragraph 3 and 7) must be understood in that context. The Lord Justice Clerk stated:

> "In the type of situation arising here, where the proceedings are no longer pending, and there is no alternative procedure such as application by minute…, the normal procedure is for the complaining party to lodge a summary application in the form of an initial writ, no doubt craving that the defender be ordained to appear at the bar of the court to explain his/her breach of the relevant order."

As I understood Mr Mitchell's purpose in referring to this case, it was to note the observation that there was no similar initiating process (i.e. a summary application in the sheriff court) available in the Court of Session. (*White* v *Magistrates of Dunbar* (1915) 52 SLR 337 is cited in the respondent's note of argument for this proposition.) In the Court of Session, any similar application required to be by a petition and complaint and not, as the Panel had purported to use here, a Minute in the original proceedings.

[11] In relation to the question of the proper procedure, Mr Mitchell referred to paragraph 24 of *Robertson and Gough* v *HM Advocate (cit supra)*, where the court set out the procedure by which contempt of court was dealt with prior to 1975. At that passage the court explained that a contempt of court could be punished summarily (*per* Hume), or on the presentation of a petition and complaint by an interested party (Alison, ii, 549; *HM Advocate* v *Airs* [1975] JC 64). If the contempt also amounted to a crime, it was open to the Crown to prosecute the offender (Alison). From this, Mr Mitchell argued that until 1975 the court had a free hand in dealing with contempt of court and that these comments were applicable to all civil cases. He drew a distinction between some classes of criminal contempt which could be punished summarily and others which required a formal application to bring the matter before the court, a point he relied on in the instant case. He observed that concurrence in the context of High Court cases was unlikely, because most contempt proceedings were brought by the Lord Advocate.

The procedural argument

[12] Mr Mitchell developed his procedural argument, as follows. He referred to rule 14.2 of the Rules of the Court of Session 1984 ("the Rules") and the commentary at paragraph 14.2.6. This described a breach of interdict in a depending cause being dealt with by a

minute in the process, as provided for in section 47 (1) of the Court of Session Act 1988 ("the 1988 Act"). Any other proceedings were by way of petition and complaint. The distinction turned on whether or not there was a "depending cause". A cause was "depending" until final decree, whereas a cause is "in dependence" until final extract. By contrast, rule 14.3 of the Rules required any petition and complaint, other than one for breach of interdict, to proceed by petition presented to the Inner House.

[13] From this he argued there was a two-fold division requiring one to ask first, whether there was a "depending" process and, secondly, did the alleged contempt concern a breach of interdict or another form of court order. The provision for an application to be made in a depending process (i.e. other than by an initiating application constituting new proceedings) was available only for breach of an interdict and where there was a depending process. He noted that until 1933 an application was traditionally by way of petition and complaint and historically was presented to the Inner House. Mr Mitchell asked: does the Panel say it is within the statute (and to be done by minute) or not? If the Panel says that this is not a contempt for breach of interdict, then it is, he submitted, stuck with the position that in terms of the Rules this may only be done by petition and complaint to the Inner House.

[14] He sought to illustrate the operation of this distinction with the following examples. If the alleged contempt concerned breach of an interdict which was final, that required to be by petition and complaint but could be presented to the Outer House. In other words, the Panel was either within the statutory provisions, or it was not. If it were not, the application required to be by petition presented to the Inner House.

[15] Mr Mitchell next referred to subsections 6(3) and (4) of the Administration of Justice (Scotland) Act 1933 ("the 1933 Act"). This contained a general requirement for petitions and complaints to be presented to the Inner House: section 6(3). However, this was subject to

subsection 6(4) which provided that, notwithstanding the terms of the preceding subsection, it was competent for the Division (i.e. the Inner House) or the Lord Ordinary before whom a cause was depending to deal with a breach of interdict without presentation of a petition and complaint. Mr Mitchell argued that subsection 6 (4) of the 1933 Act reflected a general policy consideration. Namely, if there was already a depending process and an order reached such as to constitute a contempt of court, that it was good practice to keep the complaint about non-compliance in that same process. Even though this subsection did not extend to breach of an interim order *ad factum praestandum*, the same policy considerations should apply. Consideration of whether breach of such an order constituted a contempt of court should be retained within the same depending process, regardless of whether the order was expressed in positive or negative terms. On this approach, one could avoid arguments about whether the terms of the order broken constituted breaches of negative or positive elements of the order. As I understood Mr Mitchell, he argued that the same policy considerations should apply for breach of an order *ad factum praestandum* to be dealt with in the same way. Section 6 of the 1933 Act was carried over into section 47(1) of the 1988 Act. Section 46 provided for interdict proceedings. Accordingly, by the reasoning process he had just explained, read broadly, section 47(1) of the 1988 Act extended to breach of any court order.

[16] The Panel required to commit and state whether its application was within section 47(1), or not. If it was within section 47 (1), then the case of *Gribben* v *Gribben* 1976 SLT 266 (*"Gribben"*) applied. If not, it cannot use this provision to make an application in a depending process without a petition and complaint. He stressed that, contrary to what he understood to be the Panel's argument, there was no distinction to be drawn between a

breach of interdict and breach of other court order. In policy terms, section 47(1) should be given a broad reading.

The concurrence challenge

[17] Turning to the concurrence challenge, Mr Mitchell suggested that the Panel would argue that the rule requiring the concurrence of the Lord Advocate is arcane and is required only in respect of a breach of interdict. This was wrong. Mr Mitchell argued that the rule requiring concurrence applied to a contempt of court arising from a breach of any type of court order.

[18] As I understood Mr Mitchell's argument it was, in effect, to collapse any distinction between a negative order (such as an interdict) and a positive one (such as an order *ad factum praestandum*). By way of illustration he offered the example of cases involving children. It was, he argued, pure happenstance as to whether there was an interdict against removal of a child or a positive order requiring delivery of a child to a carer. In the case of *Beggs* v *The Scottish Ministers* (2005) 1 SC 342; [2005] CSIH 25) the court was concerned with an undertaking. Even in the case where the court order is expressed in negative terms, it can carry with it the requirement to take positive action. However, Mr Mitchell argued that this necessarily carried positive obligations to take reasonable steps to ensure that the undertaking given to the court was drawn to the attention of the correct personnel. The breach was the failure to take reasonable steps, i.e. which he characterised as containing elements of a positive order. All of this was implicit even in an order expressed in wholly negative terms. It was not controversial that an undertaking given to the court was practically the same as a court order, and the same result followed from breach of an undertaking as would follow from breach of a court order. Under reference to paragraph 31

of that case, Mr Mitchell argued that the undertaking not to do something (not to open correspondence to Mr Beggs from his legal advisers) could also include a requirement to do something positive, such as taking steps to ensure that those who undertook the distribution of prisoners' post were aware of this undertaking. While the case of *Beggs* concerned an undertaking, it was accepted that the Scottish Ministers could be liable for a breach of undertaking in like fashion as for breach of an interdict. None of this was controversial in the House of Lords. From this he drew two propositions: first, that there was no difference between a court order and an undertaking provided to the court and, secondly, even negative interdicts carry within them positive implications. There was, therefore, no workable distinction to be drawn between negative and positive features of a court order. He went further and contended that there was no distinction to be made between a court order which was *ex facie* in positive or negative terms. The case of *Beggs* was a key case, as a stepping stone, in the development of his argument to collapse any difference between a positive or negative court order.

[19] Mr Mitchell was adamant that the policy rationale for requiring the concurrence of the Lord Advocate was not to protect against any prejudice to criminal proceedings that might follow a breach of interdict which was also criminal. He maintained that the court had never distinguished between circumstances where the original conduct was criminal or not. Rather, he argued, the true rationale for requiring concurrence was the essentially penal nature of proceedings for contempt of court. These were quasi-criminal and therefore appropriate for the Lord Advocate to be aware of, as he oversaw all criminal proceedings. Because of the essentially penal and quasi-criminal nature of contempt proceedings, this always brought in train the need to seek the concurrence of the Lord Advocate. He accepted that this was not an absolute rule and that, for example, the contempt constituted by a

prevaricating witness in a High Court trial did not require the concurrence of the Lord Advocate. This was because this was conduct in the face of the court and was dealt with summarily. His final stance was that concurrence was required only if there was a formal court process.

[20] Turning to the case of *Gribben* v *Gribben* 1976 SLT 266 ("*Gribben*"), Mr Mitchell referred to the report of the Lord Ordinary to the Inner House setting out the history and practice of the rule requiring the concurrence of the Lord Advocate. In his submission, this showed that the rule requiring concurrence was of general application and came into play if there was a penal consequence for breach. While the majority of cases concerned breaches of interdict, they were not confined solely to breaches of that form of court order- as illustrated by the old case of *Bell* v *Gow* (1862) 1 M 84. The effect of the 1933 Act was, he argued, to provide a new procedure, namely an application by Minute. That was the procedural point before the court in *Gribben*. The concurrence of the Lord Advocate was required in all cases where there were semi-criminal consequences and the rule requiring concurrence was not confined to breach of interdicts. The Inner House in *Gribben* was concerned with the dividing line between a petition and complaint on the one hand, and a minute, on the other hand. The propositions referred to by the Inner House (in the first to fourth paragraphs of its decision) were, he argued, equally applicable to breaches of court orders other than interdicts. He did not agree with the court's observation (in the third paragraph) that the rule was predicated on a flimsy basis. Notwithstanding that the court was dubious about the underlying rationale, it had confirmed the rule. In Mr Mitchell's submission the fact that the court was concerned with breach of an interdict in that case was wholly incidental; the court's rationale applied equally to breaches of other types of orders.

The rule of expediency was long-hallowed over the centuries, requiring the concurrence of the Lord Advocate.

[21] He emphasised that the concurrence of the Lord Advocate was required because of the penal consequences for contempt. The question of concurrence was not determined by the character of the order which was said to have been breached. It is "penal" because what is sought is punishment. He referred to the terms of the order sought by the Panel, quoted above, at paragraph [8]. Furthermore, what fell to be proved was wilful non-compliance regardless of whether the order was positive or negative.

[22] His position was fortified by the pre-1933 Act cases. They supported a general proposition that all applications to the court for contempt of court for breach of an order required the concurrence of the Lord Advocate. This extended the rule requiring concurrence beyond breach of an interdict. He submitted that no distinction was ever drawn in the earlier authorities based on the nature of the court order said to have been breached.

The pre-1933 cases

[23] Mr Mitchell turned to consider the pre-1933 cases, as these were said to give rise to the general proposition that applications of this kind, being penal in nature, required the concurrence of the Lord Advocate. The pre-1933 cases extended beyond interdict cases. In his submission, no distinction was ever drawn in the authorities as to the nature of the court order said to have been breached. In anticipation of an argument on behalf of the Panel, Mr Mitchell did accept that some forms of contempt could be enforced by a summary procedure for which the concurrence of the Lord Advocate was not required. He answered

this by distinguishing between such circumstances and cases of contempt initiated by a formal process, as in this case.

[24] The case of *White* v *Dunbar* (1915) 52 SLR 337 proceeded by petition and complaint. The order said to have been breached was a failure to hand over documents. In holding that a petition and complaint was an incompetent means to enforce such an order, the court made certain general observations about petitions and complaints (on which Mr Mitchell founds). The Lord President referred to proceedings by petition and complaint as a well-defined form a process to inflict punishment. Mr Mitchell also referred to the observations of Lord Johnston (at the foot of p339) about the absence of any general power to proceed by way of a sort of summary application in the Court of Session. Mr Mitchell founded on the observations as to a petition and complaint being of a "quasi-criminal" character requiring the concurrence of the Lord Advocate. He noted that punishment could simply be by admonishment. If punishment was sought, the Lord Advocate's concurrence was required; if not, a different form of process had to be used. Mr Mitchell argued that this was a consistent dividing line in the older cases.

[25] The case of *Bell* v *Gow* (1862) 1 M 84 involved a complaint for breach of statutory duty or malversation of those in public office. In that case censure was sought. The Lord Justice Clerk in that case looked at the nature of an application by petition and complaint. As it sought infliction of punishment, one could not proceed without the concurrence of the Lord Advocate. Lord Cowan's observations were to similar effect: because what was sought included censure, the concurrence of the Lord Advocate was required if the complainer was not proceeding on the basis of a statutory procedure. The petition and complaint would otherwise proceed at common law. This, argued Mr Mitchell, was the key feature: that there a conclusion for punishment. Since a petition and complaint always did

so, concurrence of the Lord Advocate was always required. If there were no conclusion for punishment, then the concurrence of the Lord Advocate was not required.

[26] In the case of *Paterson* v *Robson* (1872) 11 M 76 the application was found to be incompetent because there had been no concurrence. The petitioner's attempt to amend was refused, because this would alter the whole character of the action. He relied on the observation (at page 79) that a penal complaint could not proceed without the concurrence of the Lord Advocate and any deficiency could not be corrected by amendment. The court in that case then dealt with the unamended application, i.e. under common law, and held the application was incompetent because the court had no jurisdiction without the concurrence of the Lord Advocate. Mr Mitchell stressed that this was stated as a general rule and that the court proceeded by looking at the "penal" consequence, including the crave for punishment, and it was these qualities that attracted the requirement for the Lord Advocate's concurrence. He accepted that most of cases concerned a breach of interdict but this did not detract from his argument.

[27] Mr Mitchell argued that if he was correct, then there were three ways a contempt could be bought before the court. The first of these was by petition and complaint to the Outer House; the second was by a minute in a depending process; and the third was a petition and complaint to the Inner House. There were difficulties in saying whether the Panel should proceed by the second or third route. In any event, that did not matter, so much as that in each case the requirement for the Lord Advocate's concurrence was the same and was required for any "penal" process (ie being one in which punishment was sought).

Submissions on behalf of the Panel

Response to the concurrence challenge

[28] Dr Johnston invited me to repel the respondent's plea to the competency and to allow these proceedings to proceed in accordance with the normal procedure. He contended that the respondent's competency challenge and procedural argument were both wrong. In outline his position was as follows: there was a fundamental misconception affecting most of the respondent's argument. In his submission, all of the cases, old and recent, made it clear that breach of interdict was in a special class of its own, with its own procedures and rules. A breach of interdict was a species of contempt of court, but the converse was not true (i.e. there are other contempts of court and breaches which are dealt with differently). The respondent's argument failed to engage with relevant authorities on contempt of court; there was no mention of the case of *Robb* v *Caledonian Newspapers Ltd* 1995 SLT 631 ("*Robb*") as just such a case.

[29] He noted that the respondent's argument was founded on the following contentions:

(1) it is an essential requirement for a Minute for breach of interdict that the concurrence of the Lord Advocate be obtained; and

(2) while the order in issue in the present case is a positive order in terms of s.955 of the Companies Act 2006, the same considerations apply to failure to comply with a positive order as a failure to comply with an order prohibiting a respondent from doing something. That is because in either case, where a deliberate failure to comply with an order of the Court is established, that may lead to the imposition of a penalty.

[30] Dr Johnston submitted that the respondent's argument was misconceived and that *Gribben* does not support it. *Gribben* was concerned with breach of interdict. The Inner

House explained clearly why in the case of breach of interdict, and only in that case, the concurrence of the Lord Advocate is still required in modern practice (see p269). In particular, the court in *Gribben* made the following observations:

(1) There is no doubt that for almost 200 years the competency of a petition and complaint for breach of interdict had depended upon the concurrence of the Lord Advocate.

(2) This general rule has never been applied to any other types of contempt which may lead to punishment. Contempt of court is an offence *sui generis*, and a complaint of disobedience to an order of the Court involved no question of criminal or quasi-criminal proceedings.

(3) While there is room for considerable doubt about the soundness of the rule that concurrence is necessary in the case of breach of interdict, the rule should be maintained for the following reasons:

(i) it has been followed in practice for 200 years;

(ii) the facts relied upon to demonstrate breach of certain interdicts also constitute a criminal offence; in cases of that kind the Lord Advocate had a clear interest, and the need for his concurrence is justified on the view that the court should take no action with respect to a contempt which might prejudice the fairness of a prosecution or expose the respondent to double jeopardy;

(iii) even in cases where the facts would not constitute a criminal offence, there is advantage in having one rule of general application to all complaints of breach of interdict; and

(iv) the Lord Advocate favoured the continuation of this long-standing rule.

[31] Dr Johnston submitted that, on the basis of *Gribben* alone, it is clear that the requirement for concurrence is an exceptional one, which is restricted to breach of interdict. Within the area of breach of interdict, the requirement has a principled justification only in cases where the facts relied upon constitute a criminal offence, owing to the possibility that the Lord Advocate may intend, or may wish to consider the possibility of, criminal prosecution in relation to those facts; and where, accordingly there is a risk of placing the person alleged to be in breach of interdict at risk of double jeopardy. Consistently with that, the standard of proof of breach of interdict has been held to be proof beyond reasonable doubt: see *Gribben* at 269.

[32] In *Highland and Universal Properties Ltd* v *Safeway Properties Ltd* 2000 SC 297, the Lord President, Lord Roger, observed (at paragraph 302F) that "it appears that no penal consequences would follow on a failure to comply with the terms of a decree of specific implement unless it were shown that the failure had been in deliberate defiance of the order of the court" and he recognised that a deliberate breach of the order might merit punishment. Both the Lord President (at 302) and Lord Kingarth (at 313) recognised the need for precision in framing the terms of any decree for specific implement.

[33] While there may be some general similarities between "positive" orders of specific implement and "negative" orders for interdict, he submitted that there is no basis for transposing into the law of specific implement a special feature of the law relating to interdict which rested solely on its possible intersection with criminal conduct. In any event, given that a possible intersection with criminal conduct is the justification for the requirement of concurrence in cases of breach of interdict, if there were any justification for

extending it to an obligation of specific implement of any kind, it can only be to a case in which failure to implement that obligation constitutes criminal conduct.

[34] Dr Johnston accepted that it would be logical for the treatment of breach of an order for interdict and one for specific implement to be the same; however, that was not how the case law had developed. The respondent had not produced any case where the concurrence of the Lord Advocate was required for a contempt of court. The case law uniformly supports the view that there is no requirement for the concurrence of the Lord Advocate in relation to a minute for contempt of court. See in particular *Robb* v *Caledonian Newspapers Ltd* 1995 SLT 631, in which the Lord Justice General set out the following propositions:

(1) The common law does not impose, and never has imposed, a requirement for the concurrence of the Lord Advocate in relation to proceedings for contempt of court: 633 H.

(2) Contempt of court is dealt with under the authority of the court, in exercise of the power vested in it to maintain its authority: 633 I.

(3) Contempt of court is the name given to conduct which challenges or affronts the authority of the court; it is not a crime; it is an offence *sui generis*: 633 J.

(4) In *Gribben* the rule requiring concurrence of the Lord Advocate was maintained for reasons of principle and expediency, but there was no reason why the concurrence of the Lord Advocate should be required generally in all cases of contempt. That has never been the practice, except for cases of breach of interdict: 634 E-G.

[35] These propositions have been followed in other cases and were set out in the treatment of the subject in chapter 16 of Arlidge, Eady and Smith on *Contempt of Court* (5th edn, 2017; the consulting editor for Scotland being Lord Eassie), where it was recognised

(in paragraphs 16-22, 23, 48 under reference to, among other cases, *HMA* v *Airs* 1975 JC 64 at 69: *Cordiner, Petitioner* 1973 JC 16 at 18; and *Robertson & Gough* v *HMA* 2008 JC 146 at 29-30) that:

(1) Despite indications to the contrary in certain 19th century cases, contempt of court was neither criminal nor quasi-criminal but *sui generis*,

(2) It was peculiarly within the province of the court, whether civil or criminal, to punish contempt under its inherent jurisdiction to take effective action to vindicate its authority, and

(3) The sole case in which the concurrence of the Lord Advocate is required is breach of interdict.

Dr Johnston submitted that, accordingly, on the authorities, the concurrence of the Lord Advocate is not a necessary precondition to raising proceedings for contempt of court. In short, there is not and never has been any such requirement. Imposition of a penalty for contempt of court by a civil court does not rest on the commission of a criminal or quasi-criminal act: it rests on the inherent jurisdiction of the court to vindicate its authority.

[36] Turning to the textbooks, Dr Johnston made the following points:

1) It was significant that in the discussion in McLaren, *Court of Session Practice* (at p134), there was a separate treatment for contempt of court and procedures for breach of interdict. These separate forms of proceeding were not bundled together. Further, it was clear that formalities may not be applicable at all for some contempts of court, as was the case for on the spot or summary punishment for contempt of court. He submitted that these points raised serious questions about the

correctness of the respondent's contention that the Lord Advocate's concurrence was required in all cases of contempt of court.

2) In relation to the discussion in Mackay, *Manual of Practice* (at p587), this was about petition and complaint procedure in the Inner House. However, this case was not in the territory of such procedure. Even if it were, it was clear from the case of *Gribben* that the formal requirements did not arise in a case such as this as there was no criminal conduct involved. In the author's discussion in an earlier chapter (at p103-105), he dealt with breaches of interdict constituting contempt of court and their being dealt with in the Outer House. This is further confirmation of the distinction between this manner of proceeding and that by way of petition and complaint to the Inner House.
3) In the extract from Maxwell, *Court of Session Practice*, the author also distinguished between criminal and civil contempt of court.

The essential point Dr Johnston drew from these passages was that a contempt of court did not always require to proceed as a petition and complaint or, even, as a minute. It sufficed to draw the matter to the attention of the court by a motion or something less than full pleadings.

[37] Dr Johnson then turned to consider the modern cases of *Gribben* and *Robb*. Starting with *Gribben,* Dr Johnston regarded as significant that Mr Mitchell did not suggest that the case of *Gribben* was wrongly decided. The key point to be taken was that that case was all about a breach of interdict. It clearly spelt out that the concurrence of the Lord Advocate was not required in any other case (i.e. apart from a contempt arising from breach of

interdict). Dr Johnston lay particular stress on the third paragraph of the decision of the Inner House, where the Lord President identified a clear distinction between a breach of interdict and other types of contempt. The Lord President confirmed that the concurrence of the Lord Advocate had never been required in other forms of contempt of court. This observation was made notwithstanding that these other forms of contempt of court could nonetheless result in the infliction of punishment. Accordingly, this was fundamentally inconsistent with the respondent's principal proposition to the effect that, so long as the consequence was "penal", the concurrence of the Lord Advocate was required. It was clear that in this decision of the First Division, the rule requiring concurrence had never been applied to anything other than a breach of interdict.

[38] Turning to the case of *Robb* the High Court of Justiciary was dealing with a contempt of court brought before it by way of petition and complaint. The substance of conduct said to constitute the contempt of court was a prejudicial newspaper report. In that case, as here, the respondent objected to the competency of the proceedings in the absence of concurrence of the Lord Advocate. The Lord Justice General (Hope) rejected the proposition that the Lord Advocate's concurrence should be required generally in all cases of complaints of contempt of court. He observed, at p634F-G, that "[it] has never been the practice for his concurrence to be required except in regard to the particular case of a complaint of a breach of interdict". Accordingly, the court rejected the competency challenge. Further, in that case, the court confirmed that there was no general requirement for concurrence at common law of the Lord Advocate to an action simply on the basis that it involved a contempt of court. As the court had said in that case, "the common law does not impose and never has imposed such a requirement" (i.e. requiring concurrence to all proceedings for contempt of court): at p 633H.

[39] In that case, after reviewing the relevant authorities, the court also affirmed the well-known principles that a contempt of court is dealt with by the court under its own authority in order to maintain its authority and the speedy and effectual advancement of justice. That case also confirmed that a contempt of court was not a crime within the meaning of Scots criminal law, but was *sui generis*. The court acted under an inherent and necessary jurisdiction to preserve the due and impartial administration of justice. The Lord Justice General also observed, at p64D-E, that the Contempt of Court Act 1981 prescribed certain penalties that might be imposed for contempt of court but, for Scotland, made no provision for the procedure to be followed. Rather, the procedure continued to be regulated by common law, by which interested parties may bring proceedings for contempt of court by bringing facts to the attention of the court concerned. Such an application might be intimated to the Lord Advocate for the public interest but his concurrence was not required. By contrast, the court noted that the position was different with a contempt constituted by a breach of interdict. The court affirmed the discussion in *Gribben* and that proceedings for contempt based on breach of interdict may be brought only with the concurrence of the Lord Advocate.

[40] Dr Johnston submitted that these cases supported the proposition that it never was the law of Scotland that every contempt of court required the concurrence of the Lord Advocate. Only contempt of court arising from a breach of interdict required concurrence. Accordingly, there was no basis in the respondent's assertion that there was a mandatory requirement for the Lord Advocate to concur to validate every application to the court raising a contempt of court. While the respondent sought to deal with the inconsistency in his argument posed by summary cases (and in which no concurrence was required), the case law did not warrant drawing any such distinction. Dr Johnston argued that the very fact

that the respondent required to draw such a distinction undermined the respondent's primary proposition that there was a rule requiring concurrence generally in all cases of contempt. The respondent's argument based on the "penal" character of the proceedings was not supported by the case law.

[41] The authorities established that the requirement of concurrence applies only to breach of interdict. In *Gribben* itself, which is the modern authority for the requirement in relation to breach of interdict, it was recognized that there was considerable doubt about the soundness of the rule. It was affirmed in that specific context because of the possible intersection between breach of interdict and criminal proceedings.

[42] Dr Johnston also noted the serious doubts expressed by the court in the case about the rule, and its acknowledgement of the advantage of having a rule of general application and which was not dependent on the outcome. In other words, while not all breaches of interdict constitute criminal conduct, for the sake of expediency and principle, it was convenient to have a single rule (i.e. one requiring concurrence, even though in some cases a breach of interdict would not also constitute criminal conduct). The survival of the rule requiring concurrence was approved only for breaches of interdict, because that is what the section was concerned with. By implication the court was dealing with a breach of interdict case but Dr Johnston invited me to note the wider doubts expressed about the basis for any rule of concurrence. In other words, the doubts extended even to the application of the rule to breaches of interdict. Accordingly, this case could not afford any basis to extend the rule (as the respondent sought to do); rather, it confirmed its narrow scope. It affirmed the rule only for breaches of interdict and did not endorse any wider approach. This case was fundamentally inconsistent with the respondent's argument.

[43] In these circumstances he argued that there is no warrant for extending the requirement of concurrence into an area in which it has never operated, as Mr Mitchell's argument sought to do. This was for the following reasons:

(1) The soundness of that requirement even in the area of interdict has been doubted.

(2) That being so, there is no principled basis for extending the requirement into the law of contempt of court (other than contempt of court consisting of a breach of interdict).

(3) The justification for the requirement in the context of breach of interdict is the potential, where the conduct at issue is criminal, for prejudice to the fairness of an eventual prosecution or the risk of placing the person alleged to be in breach of interdict in double jeopardy. That justification does not apply to contempt of court.

(4) There is no principled basis for extending the requirement to apply to obligations of specific implement. In any event, there is no principled basis for extending it to an obligation of specific implement unless failure to implement that obligation constitutes criminal conduct.

[44] In the present case the conduct complained of is the respondent's failure to make a mandatory offer for shares in terms of the Code. That failure does not constitute criminal conduct. In the circumstances, and for all these reasons, Dr Johnston submitted that the concurrence of the Lord Advocate to the present Minute is not necessary.

Reply to the procedural challenge

[45] Under reference to the case of *AB & CD* Dr Johnson observed that contempt of court is *sui generis;* it could take many forms, some of which could be criminal and some not; and if it occurred outwith court and there was no subsisting process, then proceedings could be raised by petition and complaint. If there were a subsisting process then, in his submission, the matter could be brought before the court by minute or by motion and, indeed, need not even be in writing. Contempt of court are of many and various kinds.

[46] Under reference to paragraphs 16-46 to 16-47 in Arlidge, Dr Johnston noted that the authors of that work, which included Lord Eassie as its Scottish editor, simply noted that in a civil case all that was required was an "appropriate" application to bring any asserted contempt to the notice of the court.

[47] Summarising what he took from these authorities, Dr Johnson submitted that neither the old cases nor textbooks on Scottish procedure supported the proposition that a contempt of court fell to be treated procedurally in the same manner as a breach of interdict. None of them mentioned concurrence of the Lord Advocate as a prerequisite in proceedings for contempt of court. This was required only in the case of contempt arising from an alleged breach of interdict. As a contempt of court could be dealt with summarily or by motion, none of these would leave any scope for concurrence by the Lord Advocate. This did not appear to be disputed, but this was fundamentally inconsistent with the respondent's arguments. The essential point was that a contempt of court required to be brought to the attention of the court. As the authors of Arlidge observed, however, this simply required to be by "an appropriate" application. In other words, this did not mean that proceeding by petition and complaint was the prescribed and exclusive means to do so.

[48] Turning to the respondent's reliance on chapter 14 of the Rules, it appeared the respondent required the Panel to choose between rule 14.2 (proceeding in the Outer House) and rule 14.3 (proceeding in the Inner House). This is simply wrong in the light of the submissions Dr Johnston had just made. It was misconceived to suggest that every complaint of a contempt of court must find a home in chapter 14 of the Rules. This approach failed to accommodate proceedings by motions and minutes. He noted that there was a separate chapter for proceeding by minute, in chapter 15 of the Rules and this would cover the discussion of cases in Arlidge. Rare cases, such as malversation, were reserved to the Inner House, whereas the common case of a breach of interdict was allocated to the Outer House. He stressed that none of this shed any light on the question of what was the proper way to proceed for a contempt of court. The respondent's approach was wrong in trying to shoehorn the kind of contempt of court application into chapter 14. This was inappropriate and inconsistent with the relevant authorities and the current understanding and practice of the Court of Session.

[49] The case of *Beggs* involved a minute for contempt of court in a depending process. There was no suggestion that this procedure was incompetent. (Dr Johnston noted that that case was silent on the question of concurrence.) He noted that the case of *Gribben* had also proceeded by minute.

[50] In relation to the cases of *White* v *Magistrates of Dunbar*, *Bell* v *Gow* and *Paterson* v *Robson*, Dr Johnston understood that the respondent relied on these cases to support the proposition that if there were a penal element then the only competent manner of proceeding was by petition and complaint. However, on proper analysis, all these cases showed was that a petition and complaint is the procedure to be used when a civil court is asked to inflict punishment. The respondent turned this proposition on its head to argue

that this was the only process by which this can be done. However, what was said in those cases did not imply that any formal procedure by which the court was asked to impose punishment required to be by petition and complaint. All that it said was that that was **a** form of proceeding; not **the** only form of proceeding. These three cases took matters no further than to say that a petition and complaint was a means to inflict a penalty but nothing in these supported the proposition that this was the only means to do so.

[51] In relation to Mr Mitchell's reference to the Rules, and in particular rule 14.3, the respondent's position is that the key rule is in chapter 14 of the Rules. However, Dr Johnston argued that this was not applicable. What the respondent sought to do was to force this application into a formal structure to which it does not belong. Contempt of court did take many forms; sometimes they were dealt with with a minimum of formality and that fact casts doubt on the proposition of the need to find a home within chapter 14 for every case of contempt of court. Rather, Dr Johnston argued, the cases systematically distinguished between contempt of court on the one hand and breaches of interdict on the other. In relation to the 1933 Act, Mr Mitchell's procedural argument disclosed the same forcing of the case into provisions for which it was not designed. Further, section 47(1) of the 1988 Act was concerned only with interim orders. Finally, in relation to the 1933 and 1988 Acts, Dr Johnston submitted that the 1933 Act was expressly concerned only with breach of interim interdict. Similarly, section 47(1) of the 1988 Act was confined to interim regulation. These provisions were, therefore, of no assistance in the procedural argument the respondent raised.

Reply on behalf of the respondent

[52] Mr Mitchell addressed himself to the classes of contempt of court cases in which the concurrence of the Lord Advocate was not required. In the main, these cases were dealt with summarily, consistent with normal practice as it had developed. He distinguished that circumstance, which he acknowledged did not require the concurrence of the Advocate, and formal proceedings. If an action was not in dependence, only a formal procedure could be used to bring the matter before the court. In the absence of any depending process, the only process by which this could be done was a petition and complaint. This was because there was no judge who could deal with the matter summarily. This case concerned what was said to be a wilful defiance outside of court.

[53] Mr Mitchell accepted that the majority of cases for contempt of court involved breaches of interdict but, he argued, the essential character was the wilful defiance of the court's order. The effect of the 1933 Act was to permit some contempts of court to be brought before the court by minute in certain circumstances, rather than by petition and complaint, which was the only manner of proceeding prior to the 1933 Act.

[54] Mr Mitchell accepted that the law is not totally logical or coherent. The point of the pre-1933 cases was to demonstrate that the only route to bring a contempt of court before the court was by petition and complaint and for which the Lord Advocate's concurrence was required. Other contempts could be dealt with summarily. All that the 1933 Act did was to switch one category of cases for breach of interdict in a depending process from the petition and complaint procedure to something more summary. The argument in *Gribben* had been that, as a consequence of the 1933 Act, the requirement for the Lord Advocate's concurrence flew off. However, the court rejected that.

[55] More fundamentally, Mr Mitchell argued that none of this assisted the Panel on the underlying question. While the Panel suggested there were a plethora of ways to proceed, this did not sit with the broad categorisation that Mr Mitchell had identified. He accepted that there were anomalies. However, he maintained that the policy background underpinning the requirement for the concurrence of the Lord Advocate was the "penal" character of proceedings which seek "punishment", as was sought in this case. Clearly Parliament had thought this was a good policy because it had extended this by the 1933 Act. He accepted, though, that this was not logically applied to summary cases. He also accepted that there were inconsistencies, for example as between a process in the Court of Session and in the High Court of Justiciary, where forms of process were different. He suggested I look only at the Court of Session cases.

Discussion

Issue for determination

[56] The point for determination following debate, is whether the Panel required to obtain the concurrence of the Lord Advocate to its Minute inviting this court to find that there has been a contempt of court by reason of the respondent's failure to obtemper the Interlocutor.

Precis of the respondent's concurrence challenge

[57] Mr Mitchell's argument essentially was that, as all contempts of court have "penal" consequences, the concurrence of the Lord Advocate is required for all such proceedings. On this approach, the form of the underlying court order (ie as positive or negative) was of no moment. It did not matter that, incidentally, most of the cases of contempt involved

breaches of interdict. This was consistent with *Gribben*, which should be extended to non-interdict contempt of court cases. There were older cases (*Bell* v *Gow* and *Paterson* v *Robson*) in which the requirement for concurrence was applied, even in non-interdict cases. Allied to this was Mr Mitchell's subsidiary argument, as I understood it, that in any event there was no real distinction between positive and negative orders; as the case of *Beggs* illustrated, even an order (or in that case, an undertaking) expressed in wholly negative terms could carry with it obligations to take positive steps. Mr Mitchell did not accept that a special rule might apply for breach of interdict, and which might distinguish it from other forms of contempt of court. He rejected the suggestion that there was such a distinction or that the underlying rationale for such a distinction was the need not to prejudice any criminal proceedings that might follow for a breach of interdict that was criminal in character, as well as constituting a contempt of court.

The concurrence challenge

The modern cases

[58] Mr Mitchell's concurrence challenge is predicated on the proposition that the "penal" character of contempt of court proceedings necessarily required the concurrence of the Lord Advocate, regardless of the form of the underlying court order said to have been disobeyed. I begin, therefore, by considering the modern cases on contempt of court, namely *AB and CD* v *AT*, *CM* v *SM*, *Robertson and Gough* v *HMA* and *Robb*. While Mr Mitchell relied on a number of *dicta* in these cases regarding the criminal character and other features of contempt of court, it should be noted that in none of these cases was the concurrence of the Lord Advocate in fact required. Indeed, in *Robb* (a case on which Mr Mitchell made no submission), a similar argument was considered and expressly rejected by the Lord Justice

General (Hope). It is in my view no answer to the latter case to invite me to consider only the civil cases. In none of the cases was it suggested that the character of the proceedings (i.e. civil or criminal) gave rise to any relevant distinction about the requirement for concurrence, other than the practical consideration that the Lord Advocate's concurrence was obviously not required in cases brought by him.

[59] The two Inner House civil cases of *AB and CD* v *AT* and *CM* v *SM* both concerned a failure to comply with a sheriff court order for contact with a child, ie it was a "positive" order and not an interdict. In *AB and CD* the alleged contemnors were two social workers who had intervened to reduce contact (for child protection reasons) and in *CM* v *SM* the alleged contemnor was one of the parents. Much of the discussion in *AB and CD* concerned the flawed procedure followed by the sheriff (who had proceeded *brevi manu* and without affording the alleged contemnors a specific or fair representation of the acts founded on) and the court's guidance for the conduct of such proceedings in future. Similarly, the alleged contemnor in *CM* v *SM* argued successfully that the procedure adopted in the contempt of court proceedings had produced substantive injustice.

[60] In *AB and CD* v *AT* the court set out (at para 3) the well-known features of contempt of court: disobedience of a court order may give rise to a finding of contempt; a contempt of court was *sui generis* (for which proposition it cited *Gribben*); contempt of court could take many forms and in some instances the disobedience of the court order could itself be criminal. In *CM* v *SM*, after referring to this passage in *AB and CD* v *AT,* the court also noted characteristics which made contempt of court proceedings "*quasi*-criminal" in nature, including proof to the criminal standard of beyond reasonable doubt and that the alleged contemnor is not a compellable witness: paragraph 43. The *mens rea* of the offence required proof that the failure to comply with the court order was one of wilful disobedience.

[61] These are important cases as they contain detailed consideration of the essential features of contempt of court; they consider the procedure to be followed in cases where the alleged conduct took place outside of court; and in both cases the alleged contempt was a failure to comply with a court order which imposed positive obligations. Given the court's focus in both cases on providing detailed guidance as to the procedure to be followed in such cases of contempt, it is striking that the court did not stipulate that the concurrence of the Lord Advocate was required in such cases. On Mr Mitchell's approach, concurrence was necessary and the proceedings for contempt incompetent in the absence of that concurrence, yet the Inner House in *AB and CD* v *AT* and *CM* v *SM* was silent in the face of this apparent incompetency.

[62] Turning to the two recent criminal cases of contempt of court cited, *Robertson and Gough* v *HMA* concerned conduct in the face of the court (prevarication in the case of Mr Robertson and appearing naked in the case of Mr Gough). In neither case did the sheriff concerned remit the question of contempt to another sheriff. The discussion was addressed principally to whether the procedure adopted was compliant with Article 6 of the ECHR and (after reviewing the procedure before 1975 and the developments in the case law and production of memoranda thereafter) what procedure in future should be followed. The court also dealt in detail with the nature of a contempt of court (at paras 29-31) and forms of contempt (at paras 32-39). It referred to the principal criminal cases and the authoritative works (e.g. of Hume and of Alison), that vouched many of the same propositions identified in the two civil cases (*AB and CD* v *AT* and *CM* v *SM*, which did not canvass the criminal authorities). These included the *sui generis* character of a contempt of court, which was an offence committed against the court and which was peculiarly within the province of the court to punish; that contempt of court was not a crime *per se*; and that the penalty imposed

was not a sentence for the purposes of the criminal procedure statute. The court also noted (at para 42) that if facts constituting the contempt also amounted to a crime, it was open to the Crown to prosecute the offender. Again, in common with the civil cases just noted, there was no suggestion that part of the procedure for pursuing the contempts of court in question (and which do not concern breach of interdict) required obtaining the concurrence of the Lord Advocate.

[63] General *dicta* aside, *prima facie* these cases are all inconsistent with Mr Mitchell's central proposition. It is appropriate to note that the argument Mr Mitchell advances here was not advanced in these three cases. However, such an argument was advanced to, and soundly rejected by, the High Court of Justiciary in the fourth case, that of *Robb*, to which I now turn.

[64] In *Robb* the editor and journalist of an article considered to be prejudicial to the fair trial of an accused were subject to proceedings for contempt of court. The respondents objected to the competency of those proceedings on the same basis as the respondent advances in this case, namely the failure to obtain the concurrence of the Lord Advocate. The case predated the three cases I have already referred to but it affirmed the same general principles about the nature of contempt of court, namely, that it was an offence *sui generis*; that contempt of court was not a crime within the meaning of Scottish criminal law; and that it was for the court itself to punish the contempt and it did so as part of its "inherent and necessary jurisdiction to take effective action to vindicate its authority and to preserve the due and impartial administration of justice": see p 633 I-J.

[65] Lord Hope observed that, while the Contempt of Court Act 1981 ("the 1981 Act") set out maximum penalties, it did not prescribe any procedure in Scottish proceedings for contempt of court. He noted that there was no requirement in terms of the 1981 Act to

obtain Lord Advocate's concurrence and he stated that "we consider that the common law does not impose and never has imposed such a requirement": at page 633H. He then observed:

> "In some cases, although not in the present one, an act which is a contempt of court may also constitute criminal conduct. If it is to be prosecuted as a crime, then that is a matter for the Lord Advocate and the court will exercise its power to deal with it as a contempt. Where the matter is to be dealt with as a contempt of court however it is dealt with under the authority of the court, in the exercise of the power which is vested in it to maintain its authority and the speedy and effectual advancement of justice: see Hume, *Commentaries on the Law of Scotland respecting Crimes, ii, 138."*

After noting the general propositions I have already set out, and making certain observations about the procedure to be followed where the contempt is committed in the face of the court or outwith it (at p633 J-L), Lord Hope referred to a number of pre—1981 Act cases (*HM Advocate* v *Airs*, a case brought by the Lord Advocate, and *Stirling* v *Associated Newspapers Ltd, Aitken* v *London Weekend Television Ltd* and *Hall* v *Associated newspapers Ltd*) and he concluded that the 1981 Act did not alter these cases about the essential nature of the court's jurisdiction to deal with contempt of court. Lord Hope noted that the common law continued to regulate the procedure and that the concurrence of the Lord Advocate was not required (see p634D). Having confirmed that, notwithstanding its "penal" character, proceedings for a contempt of court did not require the Lord Advocate's concurrence, Lord Hope then turned, by way of contrast, to a specific category of cases where the contempt of court concerned a breach of interdict. In particular, he stated:

> "The position is different [i.e. from one in which concurrence was required] in the case of a petition and complaint for breach of interdict, where the rule is, for the reasons discussed in *Gribben v Gribben*, that such proceedings may be brought only with the concurrence of the Lord Advocate. It was recognised in that case that disobedience of the court's order constitute contempt of court which is an offence sui generis, and that where the court is invited to entertain a complaint of disobedience of one of its orders no question of criminal proceedings or quasi-criminal proceedings is involved. But the practice for about 200 years had been that the competency of a petition and complaint for breach of interdict of any kind was

> dependent upon the concurrence of the Lord Advocate, and it was held that for reasons of principle and expediency, and because the Lord Advocate had made it known that he desired that this rule should continue, the survival of the rule should be approved. Counsel for the respondents said that, as the concurrence of the Lord Advocate was required when the complaint was a breach of interdict, the same rule should be applied generally to all cases of contempt, due to what he maintained was their penal character**. In our opinion, however, there is no reason in principle why the Lord Advocate's concurrence should be required generally in the case of all complaints of contempt of court. It has never been the practice for his concurrence to be required except in regard to the particular case of a complaint of a breach of interdict."** (Emphasis in bold and underline added.)

Accordingly, the court in *Robb* repelled the respondents' plea to the competency of those proceedings.

[66] It respectfully seems to me that the court in *Robb* addressed the very proposition advanced by Mr Mitchell and resting on the same argument about the "penal" character of contempt of court proceedings: see the sentences underlined in the passage just quoted. It also respectfully seems to me that the court unequivocally rejected that proposition and affirmed (under reference to *Gribben*) the long-standing practice that concurrence is required for a contempt of court arising from a breach of interdict as a special case (the passage in bold), but not for breach of any other kind of court order. That case, which is binding on me, provides the conclusive answer to Mr Mitchell's concurrence challenge.

[67] The case of *Robb* established that not all contempts of court are dealt with in the same way; not all contempts of court constitute a crime and that there are long-established rules particular to contempt of court arising from beaches of interdict. *Robb* affirmed that it is only this class of contempt of court (ie for breach of interdict) which requires the concurrence of the Lord Advocate. It expressly rejected extension of that rule to other contempts of court. In particular, the fact that contempt of court proceedings were "penal" was not sufficient to extend the rule about concurrence to contempt of court arising from alleged breaches of non—interdict orders.

[68] What of the case of *Gribben*, founded on by Mr Mitchell? As Dr Johnston noted, Mr Mitchell did not contend that that case was wrongly decided. Rather, Mr Mitchell argued that *Gribben* justified a broadening of the rule requiring the Lord Advocate's concurrence to non—interdict contempt of court cases. In my view, this involves a misreading of the issues discussed in, and the clear import of, *Gribben*. *Gribben* is a case of the highest authority, being a decision of the First Division chaired by Lord President Emslie. The case concerned the defender's alleged breach of an *interim* interdict granted in divorce proceedings against his molestation of the pursuer. The matter was brought before the court by a minute in the ongoing proceedings, in reliance on section 6 (4) of the 1933 Act. The concurrence of the Lord Advocate had not been obtained. The defender argued that the Lord Advocate's concurrence was necessary and the Lord Ordinary reported the case to the Inner House.

[69] The Inner House confirmed the common law rule requiring the concurrence of the Lord Advocate in proceedings for breach of interdict and found that this rule was not affected by section 6 (4) of the 1933 Act. In addressing that matter, the court took the opportunity to consider the basis for the rule and whether it should be maintained. This is clear from the question it posed, namely "whether and to what extent, the rule ought now to be followed": see top of p 269. It answered that question as follows:

> "There is no doubt that for almost 200 years the competency of a petition and complaint for breach of interdict of any kind has depended upon the concurrence of the Lord Advocate. This common law rule is stated in unequivocal terms in all the text-books including MacLaren, Court of Session Practice where the matter is dealt with at p. 131. The debate to which we have listened however has cast considerable doubt upon the soundness of this general rule **which has never been applied to any other types of contempt of court which may also lead to punishment of the offender**. ***Most of the cases cited by the text-book writers in support of the rule were concerned with attempts to deprive public officials or trustees of office on the ground of malversation of office or breach of trust. In such cases it is easy to see that the Lord Advocate's responsibility for the public interest made his concurrence***

> ***necessary***. In only one case cited, viz., *Duke of Northumberland v Harris* (1832) 10 S. 366 was a complaint of breach of interdict involved. In that case the Lord Justice-Clerk expressed the opinion obiter that the prayer of the petition was 'highly penal' and that the concourse of the Lord Advocate was necessary to make it competent. Upon this somewhat flimsy foundation the rule of general application appears to rest and the usual justification given for it is (a) that a breach of interdict is a criminal offence, and (b) that proceedings by way of petition and complaint are of the nature of a criminal proceeding or prosecution. Since the case of *HMA v Airs 1975 S.L.T 177*, neither of these propositions can be maintained. A complaint of breach of interdict is a complaint of disobedience of a competent order of the court. Such disobedience constitutes contempt of court. It is an offence sui generis and where the court is invited to entertain a complaint of disobedience of one of its orders no question of criminal prosecution or quasi-criminal proceedings is involved.
>
> In spite, however, of the considerable doubt which we entertain of the soundness of the reasons commonly given for the application of the common law rule to all cases of breach of interdict, the rule itself has been followed in practice for almost 200 years. That by itself might be a sufficient reason for not interfering with it, but there are other reasons which **lead us to hold that it ought to remain as a rule of general application in all cases where complaint of breach of any interdict is made**. *It is undoubtedly the case that the facts relied on to demonstrate breach of certain interdicts would, if proved, also constitute a criminal offence. In such cases the Lord Advocate as the public prosecutor has a clear interest and the necessity for his concurrence is justified upon the view that no action should be taken by the court for contempt which might prejudice the fairness of a prosecution or put the person alleged to be in breach of interdict in what would in effect be double jeopardy.* Although in many cases the facts alleged in complaints of breach of interdict would not, if proved, constitute any criminal offence, the advantage of the rule of general application **to all complaints of breach of interdict** is that it absolves the complainer and the court from the responsibility of deciding in doubtful cases whether the Lord Advocate, as public prosecutor, may have a legitimate interest. In the circumstances of principle and expediency, and since, through counsel, the Lord Advocate has informed us that he desires that the long-standing general rule should continue to be applied **we approve of its survival** and declare that it must also be applied henceforward in all cases in which the procedure of s.6 (4) of the 1933 Act is invoked." (Emphasis added by bold and italics.)

[70] I have set out the whole discussion because it is important to note that the court was stepping back and undertaking a fundamental reappraisal of the rule requiring concurrence in cases of breach of interdict. Upon a review of the cases, it noted that the rule had a "flimsy" basis and that the conventional bases were unsound. The court might, therefore, have dispensed with the rule as a relic. It didn't. Notwithstanding these deficiencies, the court nonetheless determined to confirm the rule requiring concurrence of the Lord

Advocate in cases where a breach of interdict was alleged (see the passages in bold). The principled basis for maintaining the rule was that set out in the italicised sentences in the passage quoted above: to avoid prejudicing any subsequent criminal proceedings and double jeopardy for the contemnor. To the extent that the court's decision was based on expediency, this was to apply the rule requiring concurrence to all breaches of interdict even though not all breaches of interdict would constitute criminal conduct. A clear rule applicable to all breaches of interdict was preferable rather than requiring parties to speculate in advance whether a breach of interdict was likely to constitute criminal conduct.

[71] The difficulty with Mr Mitchell's reading of and reliance on the case of *Gribben* is that it is, in my view, fundamentally inconsistent with the discussion and decision in that case. Given that the court had contemplated dispensing with the rule in its entirety, this case could hardly provide the foundation for an extension of the rule, as Mr Mitchell sought to do. Furthermore, the court expressly rejected the same basis for the argument (that the "penal" character of contempt of court proceedings necessitated the concurrence of the Lord Advocate) as advanced by Mr Mitchell. Having regard to the principled basis the court identified as one reason for retaining the rule (see the italicised sentence in the passage quoted at para [69], above), this did not arise in other forms of contempt of court. Such a risk (of prejudicing criminal proceedings or exposing the contemnor to the risk of double jeopardy) could arise only from a breach of interdict and not breach of any other form of court order. Accordingly, in my view the case of *Gribben*, properly understood, is inimical to Mr Mitchell's principal position. In that case, the court undertook a fundamental reappraisal of the rule. It affirmed the rule and did so only in respect of contempt arising from breach of interdict. It identified a principled rationale for retaining the rule (of limited application) and, for the sake of expediency, applied it to contempt proceedings for all

breaches of interdict even though not all of these would constitute criminal conduct. The court affirmed the survival of the rule in clearly circumscribed circumstances. The present case does not fall within those circumstances.

The older authorities

[72] I did not find the passages from the text books on Scottish procedure to assist. They confirmed the conventional attributes of contempt of court, identified by the parties. Beyond recording some of these features, these passages afforded no support for Mr Mitchell's arguments in favour of the concurrence challenge. Nor did I find the older cases Mr Mitchell cited to be of any assistance. They certainly did not support a proposition that the courts routinely required the Lord Advocate's concurrence for breaches of court orders other than interdicts. The cases of *Bell* v *Gow* and *Paterson* v *Robson* sought to bring to the attention of the court conduct by trustees in sequestration in the discharge of that public office. In *Bell* v *Gow* the sanction sought was a fine and censure. In *Paterson* v *Robson* the petitioner sought censure as well as an order directing the trustee's intromissions with the fund. In other words, both of these cases sought to bring the trustees' conduct before the court. Notwithstanding passing reference to the "penal" consequence of censure, in my view these cases are squarely within a different jurisdiction recognised by the courts. This was for malversation in public office and for which the Lord Advocate's concurrence was required to any petition and complaint. As identified by Lord President Emslie in *Gribben*, the policy rationale was not as a consequence of the "penal" character of whatever sanction the court might impose for such malversation; rather, the policy rationale for requiring the Lord Advocate's concurrence in *this* situation was because of the Lord Advocate's responsibility for the public interest: see the passage (in bold and italics) quoted at para [69],

above. The second ground on which Lord President Inglis dismissed the petition in *Paterson* v *Robson* (the first concerned certain failures to comply with the bankruptcy statute) was because such petitions required the concurrence of the Lord Advocate (ie because of his responsibility for the public interest) had nothing to do with the "penal" character of the proceedings. Essentially the same approach was taken by the court a decade earlier in *Bell* v *Gow*. In that case the Second Division of the Inner House, including Lord Inglis as Lord Justice Clerk, expressed itself in general terms about the function of a petition and complaint being the formal process by which a civil court was asked to inflict punishment and in which, at common law, the concurrence of the Lord Advocate was required. However, it is in my view important to note the context for those observations, namely, misconduct by a person holding a public office (i.e. a trustee in bankruptcy). Classically, petitions and complaints presented to bring the misconduct or malversation of a public office-holder before the court required the concurrence of the Lord Advocate. The observations of the court in *Bell* v *Gow*, even if expressed in general terms, afford no basis for an argument that concurrence was required in respect of a broader range of court orders than interdicts; there was no court order said to have been breached in those cases. Rather, the focus of the petitions were the misconduct by a person holding a public position or office (as trustees in sequestration do) or their breach of duty in that office. On these authorities, this was not treated as a contempt of court at all but, rather, was clearly a distinct class of proceedings by way of petition and complaint for which the Lord Advocate's concurrence was required because of his responsibility for the public interest.

[73] In the light of these authorities I find that there is no merit in Mr Mitchell's argument. While breach of interdict is a species of contempt of court, it is clear on the authorities that the courts have consistently distinguished that form of contempt from others

(e.g. arising from breach of a positive order or in the face of the court). Mr Mitchell's proposed conflation of positive and negative court orders cannot overcome the treatment of breaches of interdict as a distinct class of contempt with a special rule. No case was cited in which the Lord Advocate's concurrence was required to a contempt of court involving an order which was not an interdict. The policy rationale, identified in *Gribben*, has nothing to do with the "penal" character of contempt of court proceedings generally. There is, in my view, no justification for extending the rule, as Mr Mitchell invited me to do. In any event, as noted above, a like argument was soundly, and for this court authoritatively, rejected in *Robb*. For these reasons the respondent's concurrence challenge fails.

Procedural argument

[74] As noted above, Mr Mitchell did not advance the procedural argument as a discrete or free-standing challenge. Accordingly, any comments I make are strictly *obiter.*

[75] In relation to Mr Mitchell's reliance on section 47(1) of the 1988 Act, as I understood his argument he contended (for policy reasons) for a broad reading of this provision. Whatever the underlying policy, it is in my view clear that this provision (and it statutory predecessor in subsection 6(4) of the 1933 Act) is only concerned with *interim* interdicts. The underlying order in these proceedings (ie the Interlocutor) is not an interdict, much less an *interim* one. Accordingly, this affords no assistance in resolving the procedural argument. The same may also be said of Mr Mitchell's reliance on rules 14.2 and 14.3 of the Rules. These rules do not provide an exhaustive code for all contempts of court. In terms, these rules do not apply to the kind of underlying order on which this Minute is predicated. Rule 14.2 (d) makes provision for a petition and complaint "for breach of interdict". That is not the form of applications here, nor the kind of order said to have been breached;

therefore, rule 14.2 has no application. Furthermore, rule 14.3, which makes provision for applications by petition to the Inner House, includes within its scope (in rule 14.3 (a)) a "petition and complaint other than for breach of interdict". The present proceedings are not in the form of a petition and complaint. In any event, it is clear from the commentary at paragraph 14.3.3 in the annotations to the Rules, that this rule is directed to that "rare" circumstance involving misconduct in public office *inter alia* by officers of court and which include trustees in sequestration. In other words, it is the means by which a complaint against one holding public office or as an officer of court (such as a trustee in sequestration) for malversation or misconduct is brought before the court. The seriousness of the allegation is commensurate with it being made to the Inner House. This class of case reflects the old cases of *Bell* v *Gow* and *Paterson and Robson*, which I have already addressed, above. Properly construed, rule 14.3(a) does not require that all contempts of court proceed by petition and complaint. Such a reading would in any event be inconsistent with the modern practice that contempt for an alleged breach is brought to the notice of the court which pronounced the original order.

[76] In my view, these provisions are not exhaustive as to the means for bringing contempts of court committed outwith the court to its notice. I accept Dr Johnston's submission that, while these provisions might identify a means to bring certain forms of contempt of court to the notice of the court (and while it may be prescriptive in those cases), these procedures are not the only or prescribed means to do so for all other classes of contempt.

[77] The court in *Robb* observed that the court has an inherent jurisdiction to deal with cases of contempt in the exercise of its power "to maintain authority its authority and the speedy and effectual advancement of justice". On the cases, it is plain that the courts have

dealt flexibly with many forms of contempt, e.g. in the face of the court, so long as the procedure adopted was fair. (*AB and CD* v AT and *CM* v *SM* are recent examples dealing particularly with what is and is not a fair procedure.) It respectfully seems to me that, in the absence of a prescribed procedure in rule, statute or established practice, the court should adopt a similar flexibility to deal with contempts of court committed outwith the court, so long as the procedure adopted is fair and has the usual safeguards. This is consistent with the court's inherent jurisdiction and furthers the very purpose (including the "speedy and effectual advancement of justice") for which this power is exercised. In the instant proceedings, a very full procedure has been adopted: the respondent has had due notice of the alleged contempt (in the form of the minute) and has had opportunity to respond (in the form of answers). Further, the proof to follow will be indistinguishable from a full proof in a commercial action and all of the procedures, safeguards and formalities that that entails. In my view, the procedural argument is without merit.

[78] For completeness, I should record that, as I understood Mr Mitchell, at one point he appeared to accept that proceedings could be brought in the Outer House, so long as they proceeded by petition and complaint. It should be noted that the distinction between different forms of proceedings (in particular between petition procedure and ordinary actions) is soon to be abolished. These forms of proceeding are indistinguishable in terms of the procedural safeguards they afford and the mode for proof of the alleged conduct. To uphold this argument would impose a formalism which has not, hitherto, been applied to contempt of court proceedings not concerned with breach of interdicts.

Decision

[79] The respondent's plea to the competency falls to be repelled. I shall reserve meantime all question of expenses.