OUTER HOUSE, COURT OF SESSION

[2018] CSOH 93

A295/16

OPINION OF LORD MALCOLM

in the cause

DAVID JOHN WHITEHOUSE

Pursuer

against

PHILIP GORMLEY QPM AND OTHERS

Defenders

Pursuer: Currie QC, Duthie; Urquharts LLP
First Defender: Maguire QC, Watts, Lawrie; Ledingham Chalmers LLP
Second and Third Defenders: Moynihan QC, Ross QC, Charteris; SGLD

6 September 2018

[1] David John Whitehouse (the pursuer) is one of the former administrators of Rangers Football Club Plc. He has raised an action against first, the Chief Constable of Police Scotland, second, the Procurator Fiscal For Specialist Casework in the Crown Office, and third, the Lord Advocate. He seeks payment by the defenders, jointly and severally or severally, of £9 million by way of damages for alleged wrongful detention, arrest and prosecution based on common law fault and breaches of articles 5 and 8 of the European Convention on Human Rights (ECHR). A similar action has been raised by Mr Whitehouse's co-administrator, Mr Paul Clark. This opinion follows upon a joint

procedure roll debate in both actions when various issues of law were discussed. The main topics were the nature and extent of the Lord Advocate's immunity from civil suit at common law, and whether, in respect of complaints concerning the conduct of police officers, it is necessary to demonstrate that they acted maliciously and without probable cause.

The circumstances and the parties' contentions as set out in the pleadings

[2] At the outset it is necessary to describe the background to and the circumstances of the present action. The pleadings extend to over 250 pages, therefore what follows should be understood as a summary of what is a detailed and complicated picture. In late 2010 a Scottish businessman, Craig Whyte, expressed interest in acquiring Rangers Football Club. In March 2011 he engaged David Grier of MCR, a corporate restructuring advisory firm of which the pursuer was a partner (prior to MCR's acquisition by Duff & Phelps in October 2011), to assist in negotiations with the club's lenders, Lloyds Banking Group. In May 2011 Craig Whyte, through an acquisition vehicle, Wavetower Limited, entered into an agreement for the purchase of a controlling shareholding in the club and was appointed as a director. The club struggled to meet its liabilities. In February 2012 it entered administration. The pursuer and his colleague were appointed joint administrators. Later that month the pursuer met with senior officers from Strathclyde Police and informed them that preliminary investigations suggested that the acquisition of the club by Wavetower may have involved illegal financial assistance. The administrators initiated proceedings at the Royal Courts of Justice in London seeking payment of sums due to the club held by Collyer Bristow, a firm of solicitors acting for Wavetower. Subsequently the administrators raised proceedings for payment claiming an unlawful means conspiracy, on the basis that Craig

Whyte and Gary Withey (Mr Whyte's legal advisor and a partner at Collyer Bristow) had made false representations to the previous owners as to the availability of funds to finance the acquisition, and had acquired the controlling shareholding by fraud. The police were notified of these allegations.

[3] On 25 June 2012 the Crown Office issued a press statement in the following terms:

> "The Crown Office has today instructed Strathclyde Police to conduct a criminal investigation into the acquisition of Rangers Football Club in May 2011 and the subsequent financial management of the Club. The investigation into alleged criminality follows a preliminary police examination of information passed to them in February this year by the Club administrators. The Procurator Fiscal for the west of Scotland will now work with Strathclyde Police to fully investigate the acquisition and financial management of Rangers Football Club and any related reports of alleged criminality during that process."

At the hearing it was confirmed that the press release was issued on the instructions of and with the authority of the then Lord Advocate.

[4] The club was marketed for sale by the administrators. In May 2012 a consortium led by Charles Green entered into an agreement with the administrators. It obliged him to pursue a company voluntary arrangement, with funding of £8.5 million, which failing to purchase the business and assets of the club for £5.5 million. In June 2012 the creditors rejected the CVA proposal. Mr Green's acquisition vehicle, Sevco (Scotland) Limited, acquired the business and assets of the club and paid £5.5 million to the administrators. In October 2012 Jane Stephen and Malcolm Cohen of BDO were appointed joint liquidators, with the pursuer and his colleague vacating office.

[5] During the police inquiry officers recovered materials by executing search warrants at a range of locations, including the premises of banks and professional advisors involved in the transaction. It is averred that the second defender, through his deputes, and the Lord Advocate at all times directed the police investigation. They were made aware of all

evidence recovered and approved all lines of inquiry. In August 2013 officers from Police Scotland attended at the London and Manchester premises of Duff & Phelps, the pursuer's employers, and executed search warrants previously granted by a sheriff at Glasgow Sheriff Court. Many documents were seized, including material over which privilege was claimed, and material which was said to be beyond the scope of the warrant. Duff & Phelps instructed their solicitors to liaise with the police in relation to this matter. It is averred that in February 2014 the Crown assured Duff & Phelps that the police had not reviewed or intromitted with material subject to the privilege claim, however officers had carried out a preliminary sift of all such material. The fact of that sift was not revealed at the time. In November 2014 Duff & Phelps' solicitor attended a meeting at Crown Office in Edinburgh with a procurator fiscal depute and James Keegan QC, the allocated depute of the Lord Advocate. The solicitor was informed that his clients were to be treated as suspects and would be detained. It is averred that the advocate depute asked him whether that would change his position on privilege. It is stated that it was erroneously believed that the privilege dispute would be resolved by the appearance of the pursuer and his colleague on petition.

[6] At dawn on Friday 14 November 2014 the pursuer was detained at his home in Cheshire by officers from Police Scotland. This was said to be in terms of section 14 of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act). The pursuer was informed that the basis for his detention was "fraudulent scheme and attempt to pervert the course of justice". He was taken to Helen Street Police Office in Glasgow where he was interviewed, arrested and charged. He was held in police custody until Monday 17 November 2014 when he appeared in Glasgow Sheriff Court. Requests for him to be released or liberated on an undertaking were declined, the police citing direction by the Crown. On 17 November he

was committed for further examination and admitted to bail. It is averred that there were no reasonable grounds to suspect that the pursuer had committed an offence. In any event the detention was unnecessary.

[7] The pleadings set out lengthy averments and counter-averments in connection with the proposition that there was no reasonable foundation for what occurred. For example, averments are made as to the basis upon which the reporting officer, DCI Robertson, was of the opinion that there was a sufficiency of evidence available to give rise to a reasonable suspicion that Mr Whyte's allegedly fraudulent transaction could not have been completed without the involvement, knowledge or advice of the pursuer and his colleagues, and that the pursuer had misled the police about his knowledge of and advice as to the financing of the transaction (sometimes referred to as the "Ticketus deal"). It is stated that DCI Robertson suspected that crimes of fraud and attempting to pervert the course of justice had been committed by the pursuer. He provided a briefing to the detaining, interviewing and arresting officers prior to the executive action being taken, which included reference to the matters which informed his suspicion. It is averred on behalf of the chief constable that the totality of material available was sufficient to give rise to a reasonable suspicion such as to justify interviewing the pursuer and others under caution and in detention. It was not appropriate to seek to make arrangements for voluntary attendance at a police station by multiple accused in which the offences suspected included an attempt to pervert the course of justice. It should be understood that the intention was to detain the pursuer, Mr Clark, and others as part of executive action to detain a number of suspects at the same time.

[8] At 7.15 pm on 14 November 2014 the pursuer was informed by the arresting officer that he was charged with a fraudulent scheme and an attempt to pervert the course of justice. The fraudulent scheme arose because of the false pretence which had been

proffered, namely that Craig Whyte was a wealthy man who was investing his own capital in the acquisition of the club, when in fact he was using funds advanced by Ticketus. The practical result of the fraudulent pretence was that Mr Whyte was able to gain control of the club, and then force an administration, to the financial benefit of the pursuer whose firm was appointed administrators. Without the false pretence, Sir David Murray, the controlling shareholder of the club, would not have been willing to sell his shares to Mr Whyte. It was suspected that the pursuer had known of the criminal nature of this enterprise and had actively joined in it. It was further suspected that he had attempted to pervert the course of justice in providing statements to police in which he had deliberately omitted key information which he knew to be relevant to their inquiry. The arresting officer was satisfied that there were reasonable grounds for this course of action and sufficient evidence to charge the pursuer on the basis of information provided to her in the interview pack prepared by the reporting officer, the detailed briefing from him, and the interview of the pursuer and his responses.

[9] The decision for the pursuer to remain in custody pending court appearance on the next court day was taken by the custody sergeant in the police station whose function it was to make such decisions in respect of all arrestees at that station at that time. She had regard to the Lord Advocate's guidelines, the Crown Office decision that he would be appearing on petition, and the nature and gravity of the offences with which the pursuer was charged. It is averred that the police officers acted in good faith. While the pursuer no doubt disagreed and disagrees with the decisions taken, that does not render them unlawful or unreasonable or actionable. Reliance is placed upon the terms of section 22 of the 1995 Act.

[10] These averments are answered in detail by the pursuer in support of the proposition that there was no basis for any suspicion that he had engaged in criminal activity. For

example, it is averred that Ticketus were known to be an existing provider of working capital to Rangers. The existing owners of the club had suggested that the purchaser should continue to use Ticketus. A key issue for the club's board was that there should be sufficient working capital to finance the club's operations post-acquisition. An email exchange relied upon by the first defender did not suggest knowledge of the actual arrangement entered into between the club (under the control of Whyte/Wavetower) and Ticketus. This gives a flavour of the issues which would be addressed in any evidential hearing. In general it is the pursuer's position that he had no knowledge of any intention on Mr Whyte's part to use Ticketus funds in the purchase of the club or to misrepresent the true position as to the funding of the acquisition.

[11] In the course of the hearing it was explained that the critical part of the alleged fraud was not the use of the Ticketus funds, but the misrepresentation as to the financing of the acquisition. The pursuer avers that if Craig Whyte claimed that "Duff & Phelps knew everything", which is denied, that claim provided no basis for suspicion or arrest of the pursuer as an individual. In any event such a claim was wholly at odds with the available documentary evidence which clearly demonstrated deliberate concealment of information from MCR. When in November 2014 the pursuer appeared on petition in respect of charges of fraud (relating to the acquisition and subsequent management of the club) and attempting to pervert the course of justice, he was served with a summary of evidence by the Crown, which it is said made no reference to any evidence supporting his involvement in fraud. It is claimed that there was insufficient evidence to support the decision to place the pursuer on petition.

[12] In June 2015 the Crown informed the defence that the focus of the inquiry had changed, and that any subsequent indictment was likely to include charges relating to the

administration and disposal of the assets of the club. On 12 August 2015 DCI Robertson delivered a letter to the pursuer's solicitor indicating, amongst other things, that the inquiry concerning the administration period and sale to Mr Green was a live police investigation. On 26 August 2015 the Crown applied to the sheriff at Glasgow for an extension of the time limit set out in section 65 of the 1995 Act.

[13] At dawn on Tuesday 1 September 2015 the pursuer was again detained at his home in Cheshire by officers of Police Scotland. He was conveyed to Helen Street Police Office in Glasgow where he was interviewed, arrested and charged. He was told that he would be held pending a court appearance the following day. It is averred that the Crown directed the police to keep the pursuer in custody. He appeared on petition at Glasgow Sheriff Court on 2 September when he was committed for further examination and admitted to bail. It is stated that at no point were there any reasonable grounds to suspect that the pursuer had committed an offence and that his detention was in any event unnecessary. There was insufficient evidence to justify a charge. Other suspects, specifically Craig Whyte and Charles Green, were permitted to attend police stations by arrangement.

[14] On behalf of the chief constable it is averred that there was an investigation into the acquisition of the club by Charles Green and the possible involvement of Craig Whyte in that transaction. Police inquiries established a reasonable suspicion that the pursuer, along with Mr Clark, Mr Whyte, Mr Green and a Mr Ahmad, had formed a fraudulent scheme or conspired to enable Mr Whyte to acquire the club from the administrators. The pleadings set out the alleged circumstances relied upon, for example it is said that when DCI Robertson asked the pursuer about his knowledge of Charles Green and any links he had to Craig Whyte, the officer formed the view that the pursuer was evasive. The fee for the exclusivity agreement with Sevco 5088 Limited signed by the administrators was partly

funded by Mr Whyte. In April 2013 Mr Whyte was quoted in a newspaper saying, amongst other things, that Mr Green acted as a "frontman" for him in connection with the purchase of the club. It is averred that Mr Whyte had introduced Mr Green to the administrators. These are but examples of the various factors said to have been relied upon at this time. The pursuer was charged with involvement in a fraudulent scheme in terms of which the club had been acquired by Craig Whyte at an undervalue as a result of a false pretence, namely the concealment of the connection between Mr Whyte and Mr Green. Again reference is made to section 22 of the 1995 Act and to the decision of the custody sergeant on duty.

[15] In answer, amongst other things, the pursuer avers that in respect of the offer from Sevco 5088 Limited, there was nothing to suggest any involvement of Craig Whyte. The pursuer provided three witness statements to the police, all in 2012. He was not asked about Charles Green, other than in relation to proof of funds checks carried out by the administrators, nor about any links Green may have had to Whyte. The subject report submitted by DCI Robertson to the Crown in on or about 20 August 2015 made no reference to him having formed the view that the pursuer had been evasive in interview or that he had regarded the pursuer's responses as suspicious. Again these are but examples of the counter-averments made on behalf of the pursuer, all of which will form the context of any evidential hearing. It is said that the totality of the evidence ingathered by the police prior to the second detention clearly demonstrated that Whyte's claim to ownership of Sevco 5088 Limited was false. In any event, there was no evidence to suggest that the pursuer was aware of any involvement by Whyte in the Green bid; rather the evidence available to the police suggested the reverse. In any event there was no evidence that the true market value of the club at the point of the sale of the business and assets to Green was greater than had been represented.

[16] On Wednesday 2 September 2015 the pursuer appeared on a petition at Glasgow Sheriff Court containing charges of conspiracy to defraud and a contravention of section 28 of the 2010 Act. The procurator fiscal's motion for committal was opposed on the basis that the charges did not represent new allegations, but were reformulations of those which had appeared in the November 2014 petition. The procurator fiscal insisted that the charges were distinct and had arisen from a separate police investigation. In the result the sheriff granted the Crown motion, and admitted the pursuer to bail. It is stated that there was insufficient evidence to place the pursuer on petition. On behalf of the second and third defenders it is averred that the service of the second petition was a considered and appropriate response to the further information being uncovered in relation to the acquisition of the club, its management, the conduct of its administration, and the disposal to Charles Green. Its service at this point avoided the risk of having two trials on related issues involving the same parties. The decision to include the pursuer was taken by experienced fiscals in good faith and in light of the evidence available against him. They had a reasonable suspicion that the pursuer had participated in the alleged crimes.

[17] The above summarises the first 100 pages of the pleadings. The next chapter concentrates, in the main, on the conduct of the second and third defenders. From time to time these defenders are referred to in a composite manner as "the Crown". It is averred that on 3 September 2015 the court considered a Crown application for an extension of statutory time limits in which it was asserted that Duff & Phelps had recently produced a large quantity of material to the police which ought to have been made available during the August 2013 searches. At a continued hearing the advocate depute intimated that, having checked matters, there had been no such late production of material by Duff & Phelps. Instead it was asserted that Clyde & Co, a firm of solicitors who had acted for Collyer

Bristow, had recently produced 39 boxes of material that ought to have been produced in response to a warrant executed in August 2013. The sheriff granted the Crown's application, but restricted the extension to a period of three months. The defence then sought further information about the 39 boxes, the existence of which had not previously been disclosed. In answer it is averred that the reference to the 39 boxes was made in error on the basis of internal misunderstandings within Crown Office and in communications with the police. The court was advised of this at the preliminary hearing on 16 October 2015 and an apology was tendered. At an appeal against the extension the appeal court was provided with a full explanation as to the mistaken reference to 39 boxes. Relying upon other factors the appeal court considered that the extension was justified. In response the pursuer avers that it is believed that the second petition was brought in order to influence the outcome of the contested section 65 application.

[18] On 16 September 2015, within the original time limits, the Crown issued an indictment (the first indictment) charging the pursuer with conspiracy to defraud and attempting to pervert the course of justice, and citing him to appear at a preliminary hearing on 16 October 2015. Several of the charges related to the matters dealt with in the second petition. The pursuer lodged a range of preliminary minutes, including an objection to the relevancy and competency of the charges, and a plea in bar of trial on the grounds of oppression and abuse of process. The judge continued the preliminary hearing to 11 January 2016 and fixed a debate on the preliminary minutes for the week commencing 7 December 2015. On behalf of the Lord Advocate it is averred that the decision to serve the first indictment was made because it was reasonably anticipated that the pursuer, Mr Clark, or both, might appeal the grant of the section 65 extension and, if the appeal was successful, there would be a real risk that the matters covered in the first petition would have become

time barred. The Crown had recovered relevant evidence in relation to the period of administration. The indictment was drafted on the basis of this and other relevant evidence by experienced indicters acting in good faith. The pursuer avers that until the preliminary hearing the Crown adhered to the representations as to the 39 boxes.

[19] On 2 December 2015, which was the day before the appeal hearing in respect of the extension of time limits, the Crown served another indictment. At the hearing the advocate depute explained that it was to supersede the first indictment. He submitted that if the appeal was allowed, it would cause the new indictment to fall, meaning that the new charges would no longer be before the court. It is averred that no prior notice of this indictment was given. It replicated the charges on the first indictment and included additional charges. The pursuer faced a total of seven charges. The Crown states that including all charges on the second indictment was designed to ensure that the accused faced only one trial.

[20] At a preliminary hearing on 5 January 2016 the court assigned a debate on all preliminary pleas for the week commencing 1 February. After submissions were made on the pursuer's behalf the Crown sought leave to make substantial amendments to the indictment. It was accepted that the first charge did not clearly set out the alleged criminality. In the result five of the seven charges directed against the pursuer were deleted, including all of those derived from the November 2014 petition. The advocate depute unequivocally renounced the Crown's right to prosecute the pursuer on those charges, and the remaining charges were the subject of further debate. On 22 February the court upheld the pursuer's plea to the relevancy and dismissed the remaining charges against him. The advocate depute informed the court that the Crown would consider whether to bring a further indictment against the pursuer. Later that day Crown Office issued a press

statement, carried in the national and business press, that further proceedings would be brought against the pursuer. On 3 June 2016 the Crown confirmed that all proceedings against the pursuer were at an end. It is averred that at no point was there any justification for the detention, committal, prosecution or indictment of the pursuer. The second and third defenders never had a sufficient evidential basis for any of the charges directed against him. The Crown avers that the press statement was corrected the day after its publication to reflect the terms of the advocate depute's advice to the court.

[21] The pursuer pleads that throughout the course of the prosecution, the conduct of the second defender's deputes and of the third defender was marked by a disregard for their obligations. This is denied and it is explained that at all times the third defender's predecessor in office, his deputes and procurators fiscal were aware of their obligations and sought to discharge them in good faith. In response to certain averments concerning the Crown's disclosure obligations it is stated that the prosecution of the pursuer and his co-accused was an exceptional case involving quantities of documents and issues of legal and practical complexity not encountered in an ordinary case. The pursuer complains that disclosure was limited and sporadic. By the end of May 2015 only a third of all available productions had been disclosed to the defence. By the time of the debate in February 2016 approximately 1,000 Crown productions remained undisclosed. Certain undertakings were given in this regard on 19 April 2016, however by the time of the conclusion of the criminal proceedings several key witness statements and labels remained undisclosed, including recordings of police interviews of Charles Green, emails and other documents relating to the actions of Mr Whyte's associate Aidan Earley, and statements of solicitors involved in the sale of the clubs assets out of administration, all of which, it is said, the pursuer reasonably anticipated would be supportive of his defence. The defence was never made aware of the

total number of productions held by the Crown; such disclosure schedules as were provided were incomplete. The Crown contends that at all times it endeavoured to meet its disclosure obligations. At no point was any material wrongfully withheld. Various issues with the disclosure process made it unusually lengthy and complex, including competing claims of legal professional privilege and existing and anticipated civil actions in England. The number of documents involved necessitated the purchase of industrial scanners and the employment of additional staff members.

[22] The next chapter concerns non-disclosure of what are described as the "Charlotte Fakes" recordings. They are said to be part of a wider group of recordings made by Craig Whyte, and include conversations involving Craig Whyte and Charles Green. For the Crown it is averred that there were technical difficulties in opening and listening to the recordings which impeded assessment. Transcripts were disclosed on 29 January 2016. The pursuer avers that no audio recordings were provided nor any information as to provenance. The recordings had been in the possession of the police from at least July 2014, several months before the pursuer's first appearance on petition. Transcripts had been available to the defenders by 2 December 2015, which was before the first preliminary hearing, and were put to Charles Green in his police interview on that date. On behalf of the first defender it is admitted that the recordings had been in the possession of the police. The Crown states that there were issues of admissibility in respect of the recordings. The pursuer avers that the recordings of conversations between alleged conspirators at the time of the alleged offences were material. They were exculpatory of the pursuer. They demonstrate that essential information, including Mr Whyte's proposed participation in the Green bid, was withheld from the administrators; that Whyte was anxious about whether the administrators would accept the Green bid; and that third parties were to be

encouraged to put financial pressure on the Club to encourage the administrators to accept the Green proposals. It is said that the recordings cannot be reconciled with the Crown's claim that the pursuer was party to a conspiracy. The allegations in the second petition were entirely predicated upon a claim by Craig Whyte that he had acquired the business and assets of the club out of administration under the proxy of Green. It is also averred that on 4 May 2018 the pursuer's agents recovered a series of subject sheets – communications from the police to the Crown – relating to the criminal investigation. These revealed that by June 2014 the police had recovered – as part of the Charlotte Fakes materials and from other sources – the contents of email accounts belonging to Craig Whyte. The police estimated the accounts to contain approximately 100,000 emails. On 19 June 2014 the reporting officer advised the Crown of the recovery of the emails, and as to their extent. On 4 August 2014 he advised the Crown that the emails related, inter alia, to the periods around the acquisition and administration of the Club. On 9 February 2015 the reporting officer advised the Crown as to the terms of certain emails which were assessed as being incriminatory of Craig Whyte. It is said that these emails were of central relevance to the allegations against the pursuer, and in particular his knowledge of and participation in any criminal conduct by Craig Whyte. On behalf of the Crown it is claimed that much of the Charlotte Fakes material did not impact upon the pursuer but, to the extent that it did, it included incriminating material. In response it is averred that the discussions involving the pursuer were in no way incriminatory, but were indicative of nothing more than the pursuer discharging his obligations as administrator.

[23] The pleadings continue by reference to disclosure issues surrounding a report by Pinsent Masons solicitors and the evidence of Aidan Earley, a business associate of Craig Whyte. For example it is averred that in July 2015 the defence asked the Crown for

disclosure of various witness statements provided by Mr Earley. On 28 April 2016, after the dismissal of the remaining charges against the pursuer, the Crown disclosed a transcript of a series of text messages taken from Earley's phone. These included a number of communications between himself and Craig Whyte at the time of the administration of the Club, which are said to be entirely exculpatory of the pursuer. The source material for the transcripts had been in the possession of the police since at least 13 April 2015, well before the September 2015 petition and the service of the first indictment. The text messages were put to Charles Green in his police interview on 1 September 2015, details of which were never disclosed to the pursuer.

[24] The pursuer then sets out various issues concerning what is described as the Crown's obligation to pursue all reasonable lines of inquiry. For example, it is said that before indicting the pursuer, the Crown failed to interview staff of the pursuer and his co-administrator who had worked on the administration, the preparation of valuations, and the sale negotiations with other parties. It is averred that at no time did the Crown have an evidential basis for the claim that the assets of the club had been sold at an undervalue.

[25] The pursuer avers that the Crown failed to respond to requests for information and other correspondence from his agents. On several occasions the Crown was careless as to the accuracy of information given to the pursuer and to the court. Statements were made to the court which were misleading and lacked candour. DCI Robertson acted recklessly and without reasonable cause at various stages during the investigation and the criminal prosecution. He made unwarranted accusations to solicitors. He told Duff & Phelps that he would "shut down the Shard" (a reference to their headquarters in London) if they did not produce required material. Again by way of example of the complaints in this section of the pleadings, it is averred that the court was invited to grant a warrant on the basis of one-

sided information. The exercise of the warrant in London involved officers wearing bulletproof vests and tasers interrupting a client reception. An emergency injunction was then granted to the firm of solicitors concerned by the High Court in London. On 5 February 2016 the High Court of Justiciary granted suspension of the warrant on grounds of oppression. On 6 October 2016 the Queen's Bench division of the High Court of Justice ordered the first and third defenders to pay the firm of solicitors' costs on an indemnity basis, the court noting that the actions of the first and third defenders were "an abuse of state power".

[26] It is averred that DCI Robertson sought to interfere with legitimate defence investigations. For example, it is stated that he threatened witnesses with imprisonment unless they changed their accounts. He amended draft statements provided by witnesses. In response, amongst other things it is said that DCI Robertson did not consider that he received full cooperation from a number of witnesses. In order to progress the investigation applications were made properly by the Crown for warrants to recover documentation. The warrant relating to the solicitors' premises had been drafted by the Crown. It was granted by a sheriff in Glasgow. Steps were taken to minimise disruption. DCI Robertson and his officers were not in uniform, and he had not requested uniform presence, but this is what was provided by the local police. At all times he acted in good faith. He was required to investigate matters robustly, probe inconsistencies, require truthful answers from witnesses, recover evidence, and be authoritative when executing court orders.

[27] It is averred that the Crown instructed forensic accountants to prepare reports in the hope that they would provide an evidential basis for the charges against the pursuer, however they were not given all of the relevant factual material, in particular material which

did not support the Crown case. The experts were invited to reach conclusions on the basis of "one sided information".

[28] In addition to the common law claim, the pursuer avers infringements of his rights under articles 5 and 8 of ECHR. So far as article 5 is concerned, it is stated that the actings of the defenders and each of them was a disproportionate interference with the pursuer's liberty. A time bar plea is taken in respect of the events in November 2014.

[29] The pursuer's pleadings then revert to general averments as to wrongful conduct, for example that the detentions were "outwith the competence of the officers" and accordingly unlawful; that they lacked probable cause; that the instructions from the Crown were actuated by an ulterior motive, namely the desire to allow evidence over which privilege had been asserted to be relied upon in the erroneous belief that detention would allow the criminal purpose exception to be invoked; and that the absence of reasonable grounds for suspicion demonstrated a degree of recklessness on the part of the Crown amounting to malice. It is averred that the timing of instructions was related to concerns about the whereabouts of Craig Whyte. Similar averments as to lack of probable cause and ulterior motives are made in respect of the second detention, for example a desire to maintain a purported justification for the proceedings against the pursuer. Similar averments are made in relation to the alleged wrongful prosecution in terms of petitions, committals, and the service of indictments. For example it is averred that in the first petition, the only matter directed against the pursuer on charge one, relating to fraud in respect of the acquisition and management of the club, was that he, together with two colleagues, had prepared a letter in the knowledge that it would be used to induce Ticketus to pay out a sum in excess of £18 million. However there was no evidence to show that the pursuer had been involved in the preparation of that letter, nor that it was in any way inaccurate or misleading, and nor

that it had been relied upon by Ticketus. The evidence showed that Ticketus had already paid out the sum by the time the letter was issued, and that they had taken advice on all relevant matters from their solicitors. Again by way of example, charge six stated that the pursuer had made false statements in a report to the Court of Session; however the charge materially misrepresented the wording of the report. On various occasions the pursuer's agents wrote to the Crown detailing errors in the charges, referring to the absence of supporting evidence, and pointing to exculpatory material which had been disclosed, however no substantive response was received.

[30] In response to the Crown's plea of absolute privilege, the pursuer avers that if any such privilege is enjoyed (which is denied) it extends only to the actions of the third defender in prosecuting crimes on indictment and to the actions of the second defender in conducting a prosecution on indictment in the name of the third defender. Any such privilege does not extend to events prior to the service of an indictment. In any event, the second and third defenders have "surrendered" any right to claim absolute privilege by virtue of their conduct. In the event that their actings do not attract absolute immunity (which is denied) the second and third defenders plead that there can be no liability at common law unless acts were done maliciously and without probable cause. It is averred that at all times the second and third defenders, and those acting on their behalf, acted in good faith on the evidence available to them.

[31] As to the article 8 claim, the pursuer avers that his private life was interfered with by his detention and subsequent bail conditions. In the whole circumstances the interference was neither necessary nor in accordance with the law. As a result of the defenders' actions he was unable to practice as an insolvency practitioner. He has suffered financial and reputational loss. In response it is averred that if article 8 is engaged (which is denied) any

interference was necessary, in accordance with the law, and proportionate. Again a time bar plea is taken in relation to the earlier events. For present purposes it is not necessary to refer to the averments concerning the pursuer's alleged loss, injury and damage.

The submissions on behalf of the Crown (the second and third defenders)

[32] In the light of an undertaking given by the Lord Advocate, the second and third defenders are jointly represented. On their behalf, Mr Moynihan QC challenged the relevancy of the case regarding the second defender, both in terms of whether the correct individual had been sued and more generally. He submitted that the Crown is a *unum quid*, and is standing behind the conduct of everyone who acted on its behalf. Specifically an undertaking had been made by the Lord Advocate which, it was submitted, rendered the inclusion of the second defender in the action as wholly unnecessary. It was stressed that as a minister of the Crown the Lord Advocate had directed matters throughout, and individuals acted upon his instructions. The parties reassured the court that the position of the second defender would be "tidied up" in due course, though from time to time it seemed to generate confusion and disagreement. There was a suggestion that the current record has not taken into account a minute of amendment on behalf of the pursuer removing the currently named individual and substituting another. I consider that such differences as there are between the parties in respect of the second defender's involvement in the process, including the parties in the other action, should be amenable to an agreed resolution and I propose to say no more about what is essentially a procedural or technical issue divorced from the substantive issues. However, in case I am wrong about this, I will put the case out by order before pronouncing a final interlocutor in respect of the debate.

[33] The main matter addressed by Mr Moynihan concerned the plea that the Lord Advocate, and all acting on his behalf, enjoy absolute immunity from civil suit at common law. This was said to cover all acts done in the investigation, preparation and conduct of criminal proceedings: *Hester* v *MacDonald* 1961 SC 370. "It is a rule of the law of Scotland, founded on the public interest, that the Lord Advocate cannot be sued for damages in a civil action for any act done by him or on his behalf as public prosecutor." (Lord Guthrie at page 387) It was accepted that the Human Rights Act 1998 sets out statutory exceptions to this general privilege, but so far as common law fault is concerned, the submission was that issues of malice or lack of probable cause do not arise given the absolute nature of the Lord Advocate's immunity. The Lord Advocate was involved at the earliest stages. The Crown Office initiated the police inquiry. The Lord Advocate directed and instructed proceedings both at the petition and indictment stages. Reference was made to section 12 of the Criminal Procedure (Scotland) Act 1995 which gives the Lord Advocate power to issue directions to the police. The advocate deputes and the fiscal deputes acted under the direction and control of the Lord Advocate, including with regard to search warrants. Both detentions were directed by the second and third defenders. The petitions and motions to commit occurred under the control and direction of the Lord Advocate. Fiscals and their deputes enjoy absolute immunity in relation to pre-indictment proceedings, at least where they were acting as "the hand of the Lord Advocate" (*Hester*, Lord President Clyde at page 379), which was the case here. It followed that the averments as to malice and lack of probable cause were irrelevant.

[34] Mr Moynihan noted that the procurator fiscal has responsibility for summary proceedings in respect of which the degree of immunity is set out in statute: section 170 of the 1995 Act, providing for extensive but nonetheless qualified privilege. Mr Moynihan

submitted that cases based on pleas of "outwith competence" have arisen in the context of summary proceedings. Here it was clear on the averments that the actions of placing the pursuer on petition and indictment were ex facie regular and competent. At most the pursuer avers malice and lack of probable cause, but this does not translate to actions outwith competence: *Graham* v *Strathern*, 1924 SC 699, Lord Justice Clerk Alness at pages 717/19. *Hester* v *MacDonald* 1961 SC 370 laid down absolute immunity for both the Lord Advocate and procurator fiscal deputes with regard to solemn proceedings on indictment. Counsel noted that a procurator fiscal can at his own instance place an accused person on petition, and there may be some uncertainty as to the position in such a case; however here, as it was put, the Lord Advocate's hands were "on the tiller" throughout. All who acted on his behalf enjoy his privilege of absolute immunity.

[35] The thinking behind the privilege is a concern to avoid defensive prosecution or non-prosecution. Decisions require to be made free of inhibition in the public interest. Reference was made to the cases of *Lin* v *HM Advocate* [2014] SLT 173 and *Wright* v *Paton Farrell* 2006 SC 404. It was noted that a sheriff can refuse a motion for committal in the absence of a prima facie case. The court has an important role to play, and here charges were dismissed by the court. A bill of suspension can be granted with regard to a search warrant, as happened in February 2016. Counsel spoke of a "self-contained system of checks and balances". The role of the court included dealing with any requests for extension of time limits, and, so far as solemn proceedings are concerned, through the preliminary hearing system the court can address issues such as oppression and irrelevant material. The court also plays a part in respect of the recovery of documents. Mention was made of *HM Advocate* v *Millar* 2017 JC 1. Under reference to paragraphs 22 and 25 of the decision in *Lin*,

it was noted that the Lord Advocate cannot simply do as he pleases; the court is involved from the earliest stages and performs a supervisory role.

[36] Counsel then addressed the statutory context, and in particular the terms of the Scotland Act 1998. The Lord Advocate is a member of the Scottish Government and, under exception of section 27(3), is answerable to Parliament. Reference was also made to sections 44 and 48. The Lord Advocate is head of the system of criminal prosecution and the investigation of deaths, and acts wholly independently of any other person or organisation. He has more or less exclusive title to raise proceedings on indictment. His absolute immunity has been established for centuries. Reference was made to various passages in the judges' opinions in *Hester*. The absolute immunity is expressed in general terms regarding the Lord Advocate's overall functions as a prosecutor. As in *Hester*, in the present case subordinates acted upon his authority and, it is averred, on his direction. By contrast summary procedure has always been a creature of statute; the current provision on immunity being section 170 of the 1995 Act. It provides absolute immunity to a substantial extent, subject to certain limitations. *McLaren* v *Procurator Fiscal for the Lothians and Borders* 1992 SLT 844 proceeded upon an assumption that only qualified privilege applied. So far as the position of the Lord Advocate is concerned, any change or reform is a matter for Parliament, not the courts. Reference was made to Renton & Brown, Criminal Procedure, paragraph 27-06. Under reference to *Hester* at page 379 it was submitted that Parliament has assumed that the petition stage of proceedings is covered by the Lord Advocate's immunity. It was noted that in *Stewart* v *Payne* 2017 JC 155, the court adhered to the decision in *McBain* v *Crichton* 1961 JC 25, especially at paragraph 91.

[37] Mr Moynihan accepted that the article 5 case is not subject to the immunity defence and that it, along with the time bar plea, is suitable for proof. (It can be noted that at times

Mr Moynihan made reference to these defenders' plea to the relevancy, however he did not make any submissions on relevancy and specification.)

[38] So far as the article 8 claim is concerned, again there is no immunity, but it was submitted that it is not engaged. Reference was made to the UK Supreme Court decision in *SXH* v *Crown Prosecution Service* [2017] 1 WLR 1401, particularly at paragraphs 32 and 36. If criminalisation of conduct is not a breach of article 8, then article 8 is not engaged. Were it otherwise any acquitted person could make a claim for an infringement of his rights under article 8. It was noted that south of the border prosecution authorities enjoy, at most, qualified privilege. In Scotland the Crown enjoys absolute immunity; and article 8 does not fill any alleged gap – see paragraph 32 of *SXH*. Furthermore, article 8 does not extend to protection of a person's public standing. It is designed to protect personal integrity: *Karako* v *Hungary* (Application no 39311/05, 28 April 2009).

[39] In conclusion the court was asked to dismiss the action so far as directed against the second defender; sustain the plea of immunity from suit, under exception of the article 5 claim and associated time bar issue; in terms of the sixth plea refuse to remit the article 8 claim to probation; and then, subject to a discussion at any by order hearing, and so far as the action is directed against the Lord Advocate, allow a proof before answer in relation to the article 5 claim and time bar defence.

Submissions for the pursuer in response to those made on behalf of the Crown

[40] Mr Currie QC adopted his note of argument on the subject of Crown immunity. It was submitted that, at its highest, *Hester* is authority for the proposition that the Lord Advocate enjoys absolute privilege in relation to the prosecution of crimes on indictment. It cannot be regarded as authority for the extension of absolute privilege to the

investigatory or preparatory stages of the prosecution process, and in particular to decisions to place someone on petition and seek his committal. The effect of absolute privilege would be to create an irrebuttable presumption that the Lord Advocate cannot be actuated by malice. In any event absolute privilege can only protect acts carried out within competence.

[41] It was noted that the principles enunciated in *Hester* have been superseded by legislative provisions concerned with ECHR. The underlying public interest in maintaining public confidence in the role of the Lord Advocate as public prosecutor is now achieved by different means from those relied upon in 1961. In the note of argument extensive reference is made to the opinions in *Hester*. The court was dealing with a case which focused on the way in which an indictment was prosecuted. Reference was made to section 60(2) of the Criminal Justice and Licensing (Scotland) Act 2010 which provides for indictments to be brought "at the instance of Her Majesty's Advocate", as opposed to the previous position whereby prosecutions on indictment were brought "in the name of Her Majesty's Advocate". Provision is made for indictments to be libelled at the instance of the Solicitor General. In a briefing paper it was explained that the amendments were to ensure that there is no impact on the raising of new indictments or the continuity of solemn proceedings when the offices of either or both law officers are vacant for any reason. The 1995 Act treats petitions separately from solemn proceedings. In practice petitions are raised in the name and at the instance of the procurator fiscal. Absolute privilege was extended to the fiscal in *Hester* only because he was acting in the name of the Lord Advocate by prosecuting the accused on indictment. There is no authority for the proposition that a fiscal acting at a much earlier stage in proceedings is similarly protected. In most cases there is a clear distinction between the investigation phase and the indictment phase, however there was no such separation in the prosecution of the pursuer. Police investigations were continuing

until the Crown gave notice that it would not be bringing any further proceedings. The *Hester* approach confers absolute privilege upon the actions of fiscals directly related to the prosecution of the indictment, but no further. It could not extend to matters such as investigations or disclosure. The proposition that absolute privilege extends to pre-indictment proceedings would represent a dramatic extension of what had previously been regarded as the scope of the immunity. In *Hester* much was made of the trust placed in the high office of Lord Advocate: "a constitutional trust is reposed in that high officer, selected by His Majesty from among the most eminent at the Bar…" Yet it is now suggested that this personal trust should be regarded as institutional in nature. There is no support for this in the authorities.

[42] Absolute privilege creates an irrebuttable presumption that the defender was not actuated by malice. In other words a claim which ordinarily requires malice to be proved cannot succeed. In terms of *Robertson* v *Keith* 1936 SC 29, however, there is no need to prove malice where a public authority has caused harm by acting outwith its competence. In such circumstances absolute privilege has no effect. To the extent that the second and third defenders acted outwith competence (as is averred by the pursuer) absolute privilege (to the extent that it exists) offers no protection.

[43] The Human Rights Act 1998 introduced remedies for breaches of convention rights into our domestic law. The Lord Advocate is a public authority within the meaning of the Act. Article 5.5 provides, in the context of the right against arbitrary detention: "everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation". There is no qualification to that right. In these circumstances, it cannot be contended that absolute privilege remains an essential element in the structure of criminal administration in Scotland – Parliament has

decided otherwise. The position adopted by the Crown is illogical and lacking in any proper justification.

[44] Since the time of the institutional writers, and even since the decision in *Hester*, the Lord Advocate's role has changed. Formerly the Lord Advocate was entirely independent of both the police and the procurator fiscal. There were clear dividing lines: the police investigated crime; the procurator fiscal initiated a legal investigation; and the Lord Advocate brought indictments. In recent years, the lines have become blurred and, in some instances, have all but disappeared. The fiscals' service has merged with the Crown Office. Fiscals and police officers work alongside each other in complex cases; the Scottish Crime Campus at Gartcosh is a physical manifestation of the new approach. In the pursuer's case, the Lord Advocate (through an advocate depute) was involved at various stages in the police investigation, and directed the fiscal in the pre-indictment phase. Reference was made to the Lord President's rationale for the special status of the Lord Advocate in *Hester* at page 377. The observations included reference to Baron Hume (Crimes vol ii, page 155); "by custom, the process by indictment is the exclusive privilege of the Lord Advocate, or public prosecutor, who alone is possessed of that notorious and public character which entitles him similarly, and of his own authority, to state himself to the Court as accuser, and call on the Judges for trial of his charge, without any previous licence obtained." That rationale cannot be reconciled with current practice, and in particular the changes (both statutory and operational) which have occurred in the last 50 years, including the delegation of all but the most important cases to deputes. Deputes are involved in matters well before reports for indictment are submitted, even as far back as police investigations, with direct contact and communication between police officers and deputes. The institutional writers, and the court in *Hester*, would have had no reason to

contemplate the Lord Advocate's involvement in the investigative or pre-indictment stages of a criminal case. Any "looseness of language" in the *Hester* judgment should be seen in that context.

[45] Parliament now recognises that indictments can be brought even when the office of Lord Advocate is vacant. Section 3E of the Victims and Witnesses (Scotland) Act 2014 gives victims of offences certain rights in relation to their dealings with, amongst others, the Lord Advocate. The Act treats the Lord Advocate as a "competent authority" alongside the Scottish Ministers, the Chief Constable of the Police Service of Scotland, and others. Section 4 of the Act obliges the Lord Advocate to "make and publish rules about the process for reviewing, on the request of a person who is or appears to be a victim in relation to an offence or alleged offence, a decision of the prosecutor not to prosecute a person…" Decisions to prosecute are accordingly subject to review.

[46] The role of the Lord Advocate changed with the coming into force of the Scotland Act 1998. Section 44 provided that the Lord Advocate is a member of the Scottish Executive, now Scottish Government. Section 57 provided that no member of the government has power to act in a manner incompatible with, amongst other things, convention rights. The limited exceptions to the original section were substantially amended by the Scotland Act 2012, which now stipulates that the foregoing "does not apply to an act of the Lord Advocate (a) in prosecuting any offence or (b) in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland". Such acts, in so far as they infringe convention rights, are not ultra vires in terms of the Scotland Act 1998, but are subject to consideration by the courts in the context of compatibility issues. The Scotland Act makes no reference to the Lord Advocate enjoying absolute privilege in any area; the

section 57 exception (in both original and amended terms) does not reflect the *Hester* formulation.

[47] In 1961 it may have been thought that public confidence was best achieved by preventing challenges to the Lord Advocate's decisions and authority. However, in the present day confidence in a public body is usually achieved by transparency and accountability. Reference was made to a number of recent decisions of the House of Lords, UK Supreme Court and Privy Council, and in particular *Darker* v *Chief Constable of West Midlands Police* [2001] 1 AC 435; *Jones* v *Kaney* [2011] UKSC 13; *Crawford & others* v *Sagicor* [2013] UKPC 17; and *Willers* v *Joyce & another* [2016] UKSC 43. *McCaffer* v *The Lord Advocate* 2015 SLT (Sheriff Court) 44 is an example of the Lord Advocate facing civil proceedings under the Human Rights Act. Previously it was believed that the administration of justice required the Lord Advocate to be above any form of inquiry, investigation or challenge; however Parliament has now imposed exactly that upon the Lord Advocate, including the need to justify decisions. All of this has swept aside the basic premise underlying the decision in *Hester*. There can be no public policy justification for allowing the Lord Advocate to face claims under the convention, but not at common law. The common law already recognises that claims against public officials can succeed only where the official acts beyond competence, or maliciously and without probable cause. These are high thresholds. Removing absolute privilege from the Lord Advocate would not open any floodgates. The pursuer invites the court to hold that *Hester* is not binding authority. The underlying justification for absolute privilege no longer exists. If that is wrong, at most *Hester* provides for absolute privilege in the context of a prosecution on indictment. Even then it has no relevance to a claim based on conduct which falls "outwith competence".

[48] So far as the various protections, safeguards, or "checks and balances" relied upon by the Crown are concerned, these were never conceived of as a counter balance to absolute immunity. They ensure compliance with a fair trial, and now article 6. South of the border there are similar protections, but no absolute immunity for the Crown Prosecution Service. Reference was made to *Clerk & Lindsell on Tort* 22nd ed, paragraph 16-60. In any event the ability of the court to discharge any supervisory role was undermined by misrepresentations and misconduct on the part of the Crown. For example, see the findings of the court in London regarding "an abuse of state power". With regard to committal for further examination, the sheriff required to rely upon the accuracy of the summaries of evidence provided by the Crown. The pursuer offers to prove various inaccuracies, inconsistencies of representations, and ulterior motives. Even in the week before the debate, there was the revelation of 100,000 emails from what was said to be the apex of the alleged conspiracy. The Crown actively sought to prevent disclosure of statements which referred to the emails. The various protections relied upon by the Crown mean nothing if they can be undermined by misconduct on the part of the prosecution.

[49] A large part of the pleadings concern events prior to the service of an indictment, and so fall outside the scope of the decision in *Hester*. In any event circumstances have changed sufficiently to justify the court re-visiting the whole question of Crown immunity. In recent times courts have shown that they are willing to reappraise whether an immunity or privilege should continue in modern day circumstances. It was accepted that the court might consider itself bound by *Hester*, however a decision by this court rather than a report to the Inner House would be preferred by all parties.

[50] Counsel suggested that it is questionable whether the comments in *Hester* regarding public confidence in the office of Lord Advocate can be taken for granted in present times.

The petitions were in the name of the procurator fiscal, not the Lord Advocate. That named procurator fiscal was the responsible person, whether or not under direction of the Crown Office or the Lord Advocate. It was a significant factor in the decision in *Hester* that the procurator fiscal issued an indictment in the name of the Lord Advocate. Reference was made to the opinion of Lord Carmont at page 384. The decision is *Hester* is confined to things done on indictment in the name of the Lord Advocate. Any submission that the immunity should be extended to an earlier stage should be balanced against the competing consideration that for every legal wrong there should be a remedy. Absolute immunity is itself anomalous; qualified privilege in the traditional sense is more than sufficient to meet concerns about disincentives to decisions taken purely in the public interest. A clear separation should be marked between the investigative and the indictment stage of any solemn prosecution.

[51] In support of the submission that in any event officials acted "outwith competence"; reference was made to *Robertson* v *Keith* at paragraphs 53 and 57. The pleadings in the present case go well beyond allegations of errors of judgement. A case based upon abuse of process does not require averments as to malice and lack of probable cause. The allegation is of a deliberate abuse of process, not mere recklessness. If the Lord Advocate deliberately and for an ulterior motive instructed an unfounded prosecution, that would be an abuse; an act outwith his competence. The interface between, on the one hand, malice and lack of probable cause, and on the other hand, a case of acting outwith competence, may be a matter of fact and degree. Perhaps oral evidence is required. It was noted that in answer 56 it is "admitted that an indictment without any evidential basis is an abuse of process". This chimes with Lord Anderson in *Robertson* v *Keith*.

[52] So far as the Human Rights Act is concerned, it was wrong to describe it as introducing limited statutory exceptions to Crown immunity. Rather it cuts across all the justifications advanced on behalf of the Crown for absolute immunity, including the alleged "chilling effect" of potential civil liability. It was accepted that article 5 covers only questions of deprivation of liberty, whereas the common law claim comprehends what was described as "the whole saga". However if the article 8 claim is relevant for probation, it would encompass the whole pleadings. There would be no logic in an outcome whereby the Crown was subject to scrutiny up to the second detention, but not thereafter. The article 5 issue concerns whether detention and arrest was based upon a reasonable suspicion of having committed an offence. The position of the Crown creates an anomaly.

[53] Under reference to Lord Hope in *Darker* v *Chief Constable of West Midlands Police* [2001] 1 AC 435 at pages 445/6, it was noted that in *Hester* the court did not balance the immunity in issue against the public interest and the principle that any wrong should have a remedy. In short, "the world has changed since *Hester*". Today our courts keep immunities of this kind under review – *Jones* v *Kaney* [2011] UKSC 13, Lord Phillips at paragraph 11. In this regard the onus lies on the Crown. It was suggested that Hester is "a case from a different age", with the judges finding it inconceivable that the Lord Advocate would behave maliciously and without probable cause. Undue deference was paid to an individual. Reference was made to *Jones* at paragraph 108 ff; to *Crawford*, Lady Hale at paragraph 81 ff; and *Willers*, Lord Toulson at paragraph 43. The motion was that the Crown's plea of absolute immunity should be repelled.

[54] Turning to the submission that the pursuer's article 8 claim should be dismissed, the discussion focussed on the decision of the UK Supreme Court in *SXH*. The leading judgment was given by Lord Toulson. He framed the issue for the court as follows:

> "Does a decision by a public prosecutor to bring criminal proceedings against a person fall potentially within the scope of article 8 of the European Convention on Human Rights in circumstances where (a) the prosecutor has reasonable cause to believe the person to be guilty of the offence with which they are charged and (b) the law relating to the offence is compatible with article 8?"

In the present case it is alleged that there was never any evidential basis for what was done, and that there was a deliberate abuse of process based upon ulterior motives. Lord Toulson might have reached a different conclusion if the prosecution had been without foundation – "trumped up false charges", as he put it. He recognised that domestic law may provide a remedy in such cases, "to which article 8 would add nothing". North of the border, whether article 8 would add nothing depends upon the extent to which the Crown is able to elide common law liability by way of a claim of absolute privilege. In *SXH* there was no assertion of absolute privilege. Reference was also made to the judgment of Lord Kerr at paragraphs 44/45.

[55] Prosecutions supported by probable cause and conducted without malice do not infringe article 8, as they are in accordance with the law and necessary. Actions by the prosecution which are beyond competence, or which lack probable cause and are actuated by malice, are capable of infringing article 8. They are not in accordance with the law and cannot be described as necessary. The Lord Advocate's pleas-in-law concerning absolute immunity and dismissal of the article 8 claim should be repelled. Any remaining issues as to relevancy could be more profitably considered after a decision was taken on absolute immunity. It was recognised that one possibility is that the court might consider that evidence was required and the facts established before a decision is made on absolute immunity, in which event it would be best simply to allow a proof before answer at large. The article 5(5) claim in itself involved everything from the Crown Office press release in

June 2012 to the second detention in September 2015. Everything would be under scrutiny in respect of the article 8 claim.

The submissions on behalf of Mr Clark

[56] As already mentioned Mr Whitehouse's action is paralleled by a similar claim brought by his former co-administrator, Mr Paul Clark. Both administrators were the subject of detention, arrests and prosecutions of broadly similar timing and nature. The correspondence between the respective pleadings far outweighs the differences. Mr Clark has offered a proof before answer with all pleas outstanding. That offer was accepted by the chief constable, however the Crown insists upon its plea of absolute immunity and dismissal of the article 8 claim. Accordingly Mr Clark was represented at the debate by Mr Fairley QC. Although this opinion is primarily concerned with the action at the instance of Mr Whitehouse, it is convenient to record the submissions made on behalf of Mr Clark on what are common issues. The Crown submissions were aimed at the pleadings in both actions.

[57] Mr Fairley adopted the submissions made by Mr Currie. He summarised Mr Clark's case as follows. The decision to place him on the first petition was made at a time when there was no proper basis to do so, and in the erroneous belief that it would serve the ulterior purpose of resolving the (then) disputed issue of legal privilege. In relation to the second petition, again it had no proper basis, and was served for the purpose of initiating a further statutory time period of 12 months for the indictment and thereby improving the Crown's prospects of successfully securing an extension of time for indictment of the matters set out in the first petition. As to the first indictment, it was served when there was no proper basis to bring charges against Mr Clark. Its principal purpose was to elide the

need to defend an extension of time which had been procured by the advocate depute on the basis of material misrepresentations to the sheriff who granted the extension. There was no proper basis for the second indictment. Its principal purpose was to seek to influence the outcome of the appeal hearing of 3 December 2015. In February 2016 five of the seven charges were withdrawn without any attempt being made to justify why they had been brought in the first place. The remaining two charges (as amended) were then dismissed by the court "without any difficulty". Another indictment could not be served because of the absence of a factual basis on which it could be done. Nevertheless the Crown Office issued a press statement to the effect that a further indictment would be served. In support of its averments of malice Mr Clark also offers to prove that, without justification, the Crown withheld exculpatory material from the defence team.

[58] The issue concerning "competence/outwith competence" may be fact sensitive and require evidence. It had been accepted that the plea of immunity had no impact upon the article 5 claim; a claim which involves most of the lengthy factual averments. The bulk of Mr Fairley's submissions concentrated upon the relevancy of the article 8 claim. It was submitted that *SXH* does not apply if there was never any proper basis for a prosecution. Reference was made to *Juman* v *Attorney General of Trinidad and Tobago* [2017] UKPC 3 at paragraphs 17 and 19. A deliberate misuse of the court process would be a highly relevant consideration. Attention was drawn to the decision of the Court of Appeal in *SXH*, and in particular Pitchford LJ at paragraphs 69/71. His Lordship discussed two separate concepts, first, whether the domestic criminal law engages article 8, and second, and separately, if the criminal law is article 8 compliant, does any further issue arise from the decision to prosecute in the particular circumstances of the case? While Lord Toulson had telescoped the two concepts, if the answer to either question is yes, article 8 is engaged. In the absence

of any argument as to the evidential basis for a prosecution, in the UK Supreme Court only the first issue arose for decision. If the article 8 claim is remitted to proof, while material differences might arise in relation to quantum of damages, the scope of inquiry would mirror the common law claim.

[59] Various principles can be derived from the jurisprudence of the Strasbourg Court regarding article 8, including that the protection of the right to life under article 8 encompasses the protection of reputation (*Chauvy & Others* v *France* 2005 (41) EHRR 610 paragraph 70.) The making of an accusation of criminal conduct without a proper factual/legal basis interferes with that right (*Cemalettin Canli* v *Turkey* 18/2/2009 (App no 22427/04) at paragraphs 3, 12 and 31-36). The notion of "private life" does not exclude activities of a professional or business nature. Reference was made to *C* v *Belgium* 2001 (32) EHRR 2 at paragraph 25, and *Volkov* v *Ukraine* 27/5/13 (App no 21794/03) at paragraphs 3, 160 and 165/167. Restrictions upon access to a profession can effect private life (*Sidabres & another* v *Lithuania* 27/10/2004 (App nos 55480/00 and 59330/00) at paragraphs 12, 33ff and 43ff). Reference was also made to *Bigaeva* v *Greece* 28/8/2009 (26713/05)at paragraphs 22/25, and again to *Volkov*. Article 8 may be engaged by the way in which a person is portrayed in official communications or public documents. The article 8 averments are suitable for inquiry. It cannot be concluded that the article 8 claim must necessarily fail even if everything is proved. As to the submissions concerning the second defender, the court was invited not to take any action in the absence of a discussion at a by order hearing.

Further Crown submissions on immunity and article 8

[60] The oral submissions made on behalf of the pursuers drew a substantial reply from Mr Moynihan on behalf of the Crown. On the subject of immunity, it was noted that the

phrase "outwith competence" appears only in Mr Whitehouse's pleadings. However, given that the point is one of law it was accepted that the issue arises in both actions. Counsel categorised it as a perceived "means of escape" from absolute immunity. There have been cases where it was argued that the statutory immunity arising in summary proceedings should be set aside because the nature of the conduct was beyond the competence of the office holder. However the same argument is not available in relation to the Lord Advocate's absolute immunity. The argument was advanced in *Hester* and failed. The key word is "absolute".

[61] Mr Moynihan did not wish to engage with the discussion on the meaning of lack of probable cause and malice in recent Supreme Court and Privy Council decisions. Whatever malice and lack of probable cause may mean, the plea of "outwith competence" is a wholly separate matter. If an act is outwith competence there is strict liability, thus there is no need to prove malice and lack of probable cause. The ruling in *Hester* was laid down even though there was an irregularity in the proceedings. It follows from *Hester* that no civil liability can flow from an abuse by the Lord Advocate of his statutory power. A similar privilege is enjoyed by a judge – it is a step up from qualified privilege. The notion of absolute immunity is only of relevance where there is both malice and lack of probable cause. Wrongful conduct is not free of consequences; for example both the Lord Advocate and a procurator fiscal can be prosecuted for wilful neglect of duty. In *Darker* Lord Cooke and Loyd Clyde referred to *Imbler* v *Pachtman* (1976) 424 US 409 (a decision of the US Supreme Court), which provides a strong affirmation of absolute immunity from civil suit for prosecutors. While criminal law sanctions are available, collateral interference by the civil courts is excluded. Were it otherwise, no purpose would be served by absolute immunity.

Under reference to page 381 in *Hester*, it was submitted that "outwith competence" is a "somewhat slippery concept".

[62] It is not suggested that the Lord Advocate is above the law. He is answerable for capricious or malicious acts. This is not contrary to the rule of law. Specific reliance was placed upon various passages in *Imbler*. The whole point of absolute immunity is to provide privilege against actions for malicious prosecution. In respect of his public duties, the Lord Advocate can never be vulnerable to civil liability. The outwith competence argument in *Graham* v *Strathern* did not succeed (page 716). The officer was discharging his function but in the absence of a proper basis to do so. All of the judges set out policy justifications for the degree of immunity afforded to the officer – for example, see Lord Justice Clerk Alness at page 718.

[63] In respect of the invitation to reconsider the law, one cannot escape the terms of section 170 of the 1995 Act. It is derived from the historical position of the Lord Advocate, but opens a limited window of liability. This has been the legislative position in summary proceedings since the 1860s, and is the legislature's decision as to where the balance of the public interest lies. If section 170 applied to the present case, there would be an immunity in that neither pursuer served a sentence of imprisonment. There would be no sense in imposing a more liberal outcome than would apply in summary proceedings. In summary, only Parliament can alter the Lord Advocate's immunity at common law as determined in *Hester.* The court was told that there has never been a successful civil action against the Lord Advocate in respect of his functions as head of the criminal prosecution system. If the balance is to be changed, that is a matter for Parliament, not least because of the implications for the terms of section 170 of the 1995 Act.

[64] As to the constitutional underpinning, in *Hester* reference was made to the institutional writers, and again in *McBain* v *Crichton* and *Stewart* v *Payne*. The system south of the border has been heavily influenced by its history of reliance on private prosecutions. The tort of malicious prosecution was developed in this context. Scotland has never had that tradition. Reference was made to *Clerk & Lindsell* 22nd ed at paragraph 16-60 and to footnote 281 in *Nelles* v *Attorney General of Ontario* [1989] 2 RCS 170 (a decision of the Supreme Court of Canada). While Canada has not followed *Imbler* in terms of the scope of the immunity enjoyed by prosecutors, lack of probable cause and malice are understood to set a high threshold. A good explanation of the immunity is to be found in *Graham* v *Strathern* 1924 SC 699 at 722/4.

[65] The suggested approach whereby lack of probable cause and malice applies to reckless conduct falling below the category of abuse of process, the latter being outwith competence, cannot be reconciled with the decision in *Juman* (see paragraphs 17/19). Recklessness short of abuse of process does not qualify on the modern English understanding as malice and lack of probable cause. Deliberate abuse is not outwith competence. It is not something separate, it is an example of a malicious prosecution.

[66] Under reference to the decisions in *Darker, Imbler* and *Nelles* counsel then discussed various policy issues. He commended the discussion in *Imbler* as a modern formulation which resonated with the reasoning in *Graham* and *Hester*. The decision in the Canadian Supreme Court provides the counter argument. Even in present times, jurisdictions have taken different positions. Recently in *Stewart* v *Payne* the Appeal Court upheld the constitutional role of the Lord Advocate. Negligence in the criminal context was considered in *Wright* v *Paton Farrell* 2006 SC 404: reference was made to paragraph 32 and the justifications for defence immunity. It would detrimental to the public interest if the

Lord Advocate might be fearful of the potential consequences of bringing a prosecution. Even if the court thought it appropriate to review the merits of the decision in *Hester*, powerful policy considerations continue to support it. The immunity is institutional in nature. It is integral to the constitutional role of the Lord Advocate. It is not based upon any particular personal qualities or background of the incumbent.

[67] It was recognised that the Human Rights Act made important changes in our legal system. In some instances convention rights have encouraged developments in the common law. However the logic of the pursuer's argument is that no judge has immunity given the passage of the Human Rights Act. The better view is that, where Parliament qualifies an immunity, it does so expressly, for example see section 9 dealing with the potential impact of the statute on the judiciary. The article 5 exception is not of major scope, being within the narrow compass of periods of detention. Reference was made to the decision in *McCaffer* v *The Lord Advocate* 2015 SLT (Sh Ct) 44. It was accepted that if article 8 is traversed at proof, this is likely to involve most of the material set out in the respective pleadings. Counsel suggested that, given the potential implications for quantum of damages and the respective likelihoods of a negotiated settlement, the court should not be over-influenced by the argument that since evidence is to be allowed in the context of ECHR, a proof before answer at large, including the common law claim, should be granted. If the focus is appropriately narrowed, a proof is not an inevitability.

[68] Mr Moynihan's submissions continued with a detailed discussion as to the correct meaning of Lord Toulson's judgment in *SXH*. This included consideration of an earlier divisional court decision in *R(E)* v *Director of Public Prosecutions* [2011] EWHC 1465 (Admin), which it was said "provides the clue". Lord Toulson endorsed a passage in the judgment of Munby LJ in *R(E)* to the effect that there is no article 8 case in support of its engagement in

the context of criminal prosecution. In *R(E)* a decision to prosecute was quashed because of the inadequacy of the reasoning of the Crown Prosecution Service. Also in issue was whether the decision to prosecute was in breach of article 8. The divisional court expressed doubts as to whether there was any basis for an article 8 claim, however in the event it was not necessary to decide the point. If one considers the Court of Appeal decision in *SXH*, Pitchford LJ draws an inference that if the decision of the CPS was capable of judicial review, it ought to follow that it was within the reach of article 8. However, in Scotland, a decision by the Lord Advocate to prosecute is not amenable to judicial review, thus the stepping stone contemplated in *SXH* is absent.

[69] Counsel contrasted articles 5 and 8. The former is directly related to the criminal process. If article 8 had the broad scope contended for, it would negate the purpose of article 5. In section 9 of the Human Rights Act, article 5 is carved out because of its high importance. There is no corresponding treatment in respect of article 8 or other articles. Ultimately counsel's submission was that, unless the relevant criminal law is non-compliant, the proper interpretation of the decision of the UK Supreme Court in *SHX* is that article 8 can never be engaged, no matter how egregious the prosecutor's conduct. If this is wrong, it was conceded that evidence will be required before the article 8 claim can be answered.

[70] Counsel for the Crown again referred to the undertaking given in the note of argument; confirmed that the presence or absence of the second defender does not affect the submissions in relation to immunity; and stated that the Lord Advocate takes no relevancy point regarding the absence of the names of those who took the prosecutorial decisions. It was expected that in due course the second defender would be removed from the instance in Mr Whitehouse's summons. As at that time there was no corresponding agreement between the parties in respect of Mr Clark's case.

Further submissions for the pursuers

[71] In a response on article 8, Mr Fairley stressed that the question of a prosecution lacking a factual basis or tainted by an improper motive was not before the court in *SXH*. For that reason, and notwithstanding the content of Lord Kerr's contribution at paragraphs 44/45, his Lordship is not recorded as having dissented from the majority view. His analysis fits with that of Pitchford LJ in the Court of Appeal. Reference was made to *R* v *G* [2009] 1 AC 92 and to paragraph 74 of *R/E*. *R(G)* was an attack on prosecutorial discretion, or "prosecutorial choice" as put by Lord Hope. The question of infringement of article 8 overlapped with factual issues in the common law case concerning within/outwith competence. A proof before answer would be appropriate on all of these issues.

[72] For Mr Whitehouse, Mr Currie accepted that a proof before answer would be appropriate in relation to the questions of article 8 and the outwith competence plea. Reference was made to *Graham* v *Strathern*. The decision did not deal with the *Robertson* v *Keith* "outwith competence" argument presented on behalf of the pursuer. The case of *Hester* did not deal "head on" with that issue. The decision was based upon the facts not the law, as confirmed at pages 381/2. For the distinction between malice and outwith competence, counsel relied upon Lord Anderson in *Robertson*.

[73] On the policy issues the Crown's submissions were mere assertions. There was no evidence that any Lord Advocate or advocate depute would be deterred simply by the possibility of civil proceedings. In recent times and in different contexts the highest courts in the country have scrutinised and rejected such concerns. The court's role is to carry out a balancing exercise between the competing considerations; an exercise which is singularly lacking in *Hester*. In any event the possibility of civil liability is inherent in ECHR. The

decision of the Canadian Supreme Court demonstrates that the justifications now put forward are not self-evident truths. Reference was made to the mention of *Hester* in *Nelles* at paragraphs 34/35. As to the position in England, while there was no single public prosecutor before 1984, before then prosecutions were conducted by the police, with a small number under the aegis of the Director of Public Prosecution. Police prosecutors did not enjoy absolute immunity. The creation of the Crown Prosecution Service in 1984 was not accompanied by absolute immunity. It was accepted that constitutionally the Lord Advocate is independent, but it does not follow that he should enjoy absolute immunity from civil suit. Furthermore, rather than this being a matter for Parliament, *Hester* was judge-made law. The courts should address the issue. It would then be for Parliament to consider whether the restricted immunity in section 170 is compatible with the approach adopted by the courts, including the need to balance the extent of any immunity against the rule of law. In conclusion it was stressed that any potential criminal liability of the prosecutor was no comfort to Mr Whitehouse, who had this prosecution looming over him for some 18 months, with significant adverse consequences for him, his reputation and his ability to earn a living.

The nature and extent of the Lord Advocate's immunity from civil suit at common law

Hester* v *MacDonald

[74] The starting point for consideration of the nature and extent of the Lord Advocate's common law immunity from civil suit in respect of his role as public prosecutor is the decision of the First Division in *Hester* v *MacDonald and others* 1961 SC 370. The pursuer claimed that he had suffered loss, injury and damage by the wrongous actings of the defenders and was therefore entitled to reparation. The first defender was the procurator

fiscal for the lower ward of Lanarkshire; the third defender one of his deputes. The second defender was the Lord Advocate at the time of the relevant events. The sheriff substitute dismissed the action as laid against the first and second defenders and allowed a proof before answer in the action as laid against the third defender. The sheriff refused his appeal, repelling his pleas on the merits. The third defender appealed to the Court of Session and moved that the action against him be dismissed.

[75] Lord Guthrie summarised the circumstances as follows. In April 1959 the defenders caused the pursuer to be tried before a sheriff and jury in Glasgow on a charge of theft. The prosecution was conducted by the third defender authorised and instructed by the first defender. The indictment and prosecution were at the instance of, in name of, and by authority of the second defender, the Lord Advocate. The pursuer was convicted of reset, and sentenced to six months imprisonment. He lodged an application for leave to appeal against conviction and was released on bail on 25 April. On 5 May, when the application was heard by the Court of Criminal Appeal, the Lord Advocate intimated that he did not support the conviction, which was quashed. The reason was that the indictment had been wrongly served at the sheriff clerk's' office. It was thought that the pursuer was on bail at the time and that the office was his domicile of citation. In fact, although a warrant for his liberation on bail of £20 had been granted, he had not been liberated.

[76] The pursuer averred that no indictment was served on him prior to the trial, that he received no notice of a pleading diet, and that he did not attend such diet. He was thus deprived of the opportunity of legal representation and of preparing his defence. He was never lawfully required to compear in court to answer to the indictment, and in the circumstances the proceedings lacked the character and status of judicial proceedings. When pleading not guilty he informed the court publicly of these irregularities, but the third

defender, the fiscal depute, nevertheless proceeded with the trial. On several occasions he informed the court publicly of these irregularities, but the fiscal depute still proceeded with the trial, and, after the verdict, moved for sentence. As a result the pursuer was subjected to a pretended trial and to the conviction, sentence and imprisonment following thereon, all of which were said to be unlawful and wrongful, so that he suffered loss, injury and damage. The pretended proceedings were wholly illegal and without the authority of any law or statute. In any event, they were said to have been taken maliciously and without probable cause. The defenders knew, or ought to have known, as the result of such enquiries as it was their duty to make, of the circumstances complained of, and that in consequence any proceedings against him were unlawful and lacked the character and status of judicial proceedings. Additional averments were directed particularly against the third defender. In the circumstances there was a duty upon him to refrain from proceeding with the trial and moving for sentence. These were all the more his duties since he was expressly and repeatedly informed of the irregularities. He could easily have confirmed the truth, as was his duty in the circumstances.

[77] The third defender stated two preliminary pleas, the first being that the action against him was incompetent and should be dismissed: the second being that the pursuer's averments were irrelevant. Lord Guthrie expressed the view that the arguments addressed in support of these pleas raised "questions of importance in constitutional law and in the law of reparation. It is, perhaps, unnecessary to add that, although the pursuer admittedly comes before the court with his scutcheon liberally blotted, and invokes the aid of the law which he has frequently broken, his case must be considered as raising questions of principle, and as if it were presented by an innocent citizen who had been unwarrantably imprisoned following upon proceedings which were a nullity." (page 386)

[78] The sheriff substitute (Norman Walker) had dismissed the action against the first and second defenders on the basis that the first named defender had nothing to do with the case except that he signed the indictment, and that the second defender, although he authorised the proceedings, did not authorise an illegality. At appeal before the sheriff (Sherwood Calver) it was noted that the pursuer acquiesced in the dismissal of the action against the first and second defenders. The sheriff expressed the view that "the fundamental dispute between the parties was whether or not the third defender could be liable for the illegal proceedings if he had no knowledge of the illegality, and whether he would only be answerable in damages if he acted maliciously and without probable cause." The sheriff continued "Had then the requirement of proof that the third defender had acted maliciously and without probable cause been a protection given to him in the circumstances, I should have sustained his plea to the relevancy. But what the pursuer complains of here is a fundamental illegality which resulted in a nullity." The sheriff relied on a passage in Glegg, Law of Reparation (4th edition) page 187 to the effect that a departure from regular procedure which amounts to illegality and which vitiates proceedings bars a prosecutor from pleading privilege. In the sheriff's view this distinction was "warranted by authority and I should say by common sense." So far as the pursuer was concerned "The ill effects upon him of the prosecution did not depend upon whether the prosecutor was acting innocently or in bad faith." The effect of the sheriff's decision was to allow a proof on quantum of damages.

[79] In the Inner House it was argued on behalf of the appellant (the fiscal depute) that in respect of prosecutions in the sheriff court on indictment the Lord Advocate had complete control, and in their conduct he enjoyed absolute privilege. Reference was made to various authorities including *Henderson* v *Robertson* (1853) 15 D 292 and *McMurchy* v *Campbell* (1887)

14 R 725. Since the introduction, by section 2 of the Criminal Procedure (Scotland) Act 1887, of prosecution on indictment in the sheriff court, a procurator fiscal conducting such a prosecution had enjoyed exactly the same privilege as the Lord Advocate, as whose agent and representative he was alone acting. For the purposes of the Act, the term procurator fiscal included a procurator fiscal depute – see section 1. The prosecution was at the instance and by the authority of the Lord Advocate. Since the third defender was covered by the absolute privilege of the Lord Advocate, the action should be dismissed as incompetent. If however the privilege of the third defender was of a qualified nature, civil liability for acts done in the course of his duty could attach only if he acted maliciously and without probable cause, or outwith the true scope of his official duties: *Robertson* v *Keith* 1936 SC 29, LJC Aitchison at page 45; *Malonie* v *Walker* (1841) 3 D 418. The present case could be distinguished from *Henderson* v *Robertson* where the defender was the person actually responsible for the wrong done. A mistake or error of judgement was not enough, nor even the fact that the proceedings were subsequently found to have been a fundamental nullity, so long as they were prima facie regular.

[80] For the pursuer (respondent) it was submitted that the Lord Advocate was not above the law, nor was there any authority for the view that he possessed the absolute privilege which attached, for example, to a judge. The opinions of even the most learned writers and judicial opinions expressed *obiter* were not enough. In any event, the privilege of the Lord Advocate, even if absolute, did not attach to his procurators fiscal, even in those proceedings where they acted in his name and by his authority. The procurator fiscal was not a mere delegate of the Lord Advocate, and could not shelter behind his privilege. In none of the cases cited was there any warrant for the view that a procurator fiscal could enjoy absolute immunity. In the conduct even of prosecutions on indictment he retained a

considerable degree of discretion. The respective positions of the Lord Advocate and procurators fiscal had been contrasted in both *Henderson* and *McMurchy*. In the circumstances of the case detailed averments inferring malice and want of probable cause were unnecessary, although they might well have been necessary had the form of the proceedings been regular. Here the proceedings were irregular thus the procurator fiscal proceeded at his peril. There was no need to aver that he had acted maliciously or without probable cause. This was so wherever a public officer acted illegally (see *Shields* v *Shearer* 1914 SC (HL) 33) or outwith his authority (*McCrone* v *Sawers* (1835) 13 S 443; *Bell* v *Black and Morrison* (1865) 3 McPherson 1026). The official would be liable in damages even if the wrong done was unwitting. *Beaton* v *Ivory* (1887) 14 R 1057 could be distinguished, since there the defender's actings had been lawful and regular. This distinction was stressed in *Robertson* v *Keith*. In the present case, if malice was material, it had been sufficiently averred. The third defender received ample warning of the irregularity and yet took no action. That in itself was sufficient to infer malice in law.

[81] It can be seen from the above summary of the parties' submissions that the First Division was faced with many of the submissions made by the parties in the present action. It is appropriate to refer to the judges' opinions in some detail. The leading opinion was delivered by Lord President Clyde. First he dealt with the competency of the action, describing the issue as raising "a matter of quite fundamental importance in our unique Scottish system relating to indictable offences." His Lordship considered (page 377) that to appreciate its significance, it was necessary to consider the position of the Lord Advocate in this system.

> "Under our constitution, the Lord Advocate has a universal and exclusive title to prosecute on indictment … As Baron Hume says (Crimes, vol. ii, p.155): 'By custom, the process by indictment is the exclusive privilege of the Lord Advocate, or public

> prosecutor, who alone is possessed of that notorious and public character, which entitles him summarily, and of his own authority, to state himself to the court as accuser, and call on the Judges for trial of his charge, without any previous licence obtained.' … His responsibilities and privileges are quite unique, and they depend for their continuance on the confidence of the public in the utter impartiality with which he has always administered his onerous duties regarding crime. From time immemorial it has, therefore, been recognised, as Baron Hume puts it – Crimes, vol. ii, p.135 – that 'A constitutional trust is reposed in that high officer, selected by His Majesty from among the most eminent at the Bar; and it will not be supposed of him, that he can be actuated by unworthy motives in commencing a prosecution, or fall into such irregularities or blunders in conducting his process, as ought properly to make him liable in … amends.' As Alison says (vol.ii, p.93) he is absolutely exempt from penalties and expenses. It is, therefore, an essential element in the very structure of our criminal administration in Scotland that the Lord Advocate is protected by an absolute privilege in respect of matters in connexion with proceedings brought before a Scottish Criminal Court by way of indictment. … Never in our history has a Lord Advocate been sued for damages in connexion with such proceedings. On the contrary, our Courts have consistently affirmed the existence of such immunity on his part. For instance, in *Henderson v Robertson* Lord Justice-Clerk Hope said (at p.295): 'It is impossible to disguise the great importance of this question, one of the most important that can be raised in reference to the office of public prosecutor. The public prosecutor has by law great and most important protection. As against the Lord Advocate, I do not think that a case of liability to damages could even be stated.' (compare Lord Young in *McMurchy* v *Campbell*, at p.728.) … in connexion with his administration of crime he is in this special position. He is subject, of course, in regard to criminal matters, to the constitutional safeguards of Parliamentary action but there is no remedy against him by way of action at law."

[82] His Lordship noted (page 378) that the position of the procurator fiscal was not precisely the same. In "the old days" he could be liable in damages if he acted maliciously and without probable cause, and this under reference to Alison's Criminal Law, vol ii, p 93. However the position changed with the coming into operation of the 1887 Act. This resulted in "a much closer and more substantial control by the Lord Advocate over the procurator fiscal so far as cases tried by jury are concerned". All prosecutions in the sheriff court where the sheriff was sitting with a jury were to proceed on indictment in the name of Her Majesty's Advocate. Where signed by a procurator fiscal the words "by authority of Her Majesty's Advocate" should be prefixed; and furthermore, for the purposes of the Act,

"procurator fiscal" included a depute procurator fiscal. The statutory provisions assimilated criminal trials by jury in the sheriff court on indictment to trials in the High Court of Justiciary, with the Lord Advocate in complete control in both cases. The result was that the immunity from a claim of damages enjoyed by the Lord Advocate was enjoyed also by the procurator fiscal and the depute, who were acting on his authority, and carrying out his instructions, as his direct representatives.

[83] The statutory provisions relating to summary proceedings were noted; however Parliament had never made any such provision with regard to solemn procedure by way of indictment, where the procurator fiscal was acting on the authority and instructions and in name of the Lord Advocate.

> "The reason is that, in connexion with proceedings by indictment, our law does not recognise any right to damages against the Lord Advocate or against those acting on his instructions. Moreover, it would be astonishing indeed, if a procurator fiscal depute, when conducting a summary case, should only be liable in damages if malice is proved, but (as the pursuer here claims) that he should be liable in damages, even without proof of malice in a prosecution on indictment where he is acting, not on his own, but on the express instructions of the Lord Advocate." (page 379)

[84] In the Lord President's opinion the pursuer's claim was incompetent and must fail. If the Lord Advocate, as the responsible criminal prosecutor is immune, "it necessarily must follow that his immunity covers those, such as the third named defender, who are acting on the instructions and under the responsibility of the procurator fiscal who in turn was the hand of the Lord Advocate."

[85] Lord Carmont (page 383) stated:

> "This action is, in my opinion, incompetent in as much as it violates the principle of our law that the Lord Advocate and his subordinates are absolutely immune from attack in our courts in actions of reparation by parties alleging injury done them through the exercise of the Lord Advocate's functions as prosecutor in respect of alleged crimes."

It seemed to his Lordship that the depute procurator fiscal conducting the prosecution at the instance of the Lord Advocate, in name of, and by authority of the Lord Advocate, could not be subject to attack for doing what he was authorised to do by the Lord Advocate who "is not liable to be blamed in our courts for what the pursuer puts forward as a civil injury…".

[86] Lord Guthrie noted that in his submission on behalf of the pursuer, Mr Stott QC stated that the argument for the third defender was that the Lord Advocate was above the law. This was incorrect. The scope of the argument was "much more limited, that the Lord Advocate cannot be sued for damages in a civil court by a person claiming to have sustained *iniuria* and damage by the act of the Lord Advocate as prosecutor. Reference was made (page 386) to Hume on Crimes, vol ii, p 130, where the Lord Advocate is described as "the public accuser, who insists in the name of the King, and for His Majesty's interest and the execution of his laws, and in the tranquillity and welfare of his people." Lord Guthrie continued:

> "The results of this high authority are thus stated by Hume (p.134): 'The great confidence reposed in the Lord Advocate appears in these articles also of established practice. That he finds no caution for reporting or insisting on his criminal letter; nor can he be called on to take his oath of calumny; nor, in case of a verdict of acquittal, is he liable in the statutory penalties, as a rash or calumnious accuser.'"

His Lordship mentioned a further passage in Hume, cited also by the Lord President, referring to the constitutional trust reposed in the Lord Advocate. His Lordship inferred from the institutional writer "that the Lord Advocate cannot be made liable in damages in respect of a prosecution in his name." At page 387 reference was made to *McMurchy* v *Campbell* and Lord Young at page 728, who said, after referring to the absolute privilege of judges:

> "Again, with respect to public prosecutors, I do not know that the law stands on any decision, but rather on generally received opinion. For example, no action will lie against the Lord Advocate for averments made by him in the discharge of his duty,

> even though they are said to be malicious. The public interest will not allow such actions."

After referring to the repetition of this "generally received opinion" in Renton & Brown and the Encyclopaedia of the Laws of Scotland, Lord Guthrie continued "In my opinion, it is a rule of the law of Scotland, founded on the public interest, that the Lord Advocate cannot be sued for damages in a civil action for any act done by him or on his behalf as public prosecutor." The view was taken "as a matter of principle" that since had the Lord Advocate been present at the trial he could not have been sued for damages for what he did, the same must apply for those who acted in his place and on his behalf. "It is a good reason for this conclusion that the opposite result would be patently unjust." Given the circumstances of the case before him it was not necessary for Lord Guthrie to consider the scope of the privilege of a procurator fiscal when, for example, applying for a warrant to search a house. It was also noted that the case dealt with the actions of a procurator fiscal under solemn procedure, and not under summary procedure, to which special statutory provisions applied.

[87] In due course it will be necessary to consider the judges' observations on the submissions based upon an irregularity leading to a fundamental nullity (an "outwith competence" type argument), failing which that there were relevant averments of malice and want of probable cause. However in the meantime I shall dwell upon the issue of absolute immunity.

Absolute immunity

[88] The pursuer submits that *Hester* should not be followed because it was wrongly decided, or at least is out of date and unsupportable by reference to modern legal thinking.

Failing that the decision should be confined to the particular circumstances of the case, and in particular should not be extended to conduct occurring before the service of an indictment. In any event, it does not apply where the conduct complained of is "outwith competence". (In the main, this last point will be addressed later in this opinion.)

[89] The decision is now almost 60 years old and in the meantime much has changed both in respect of the general law, including a frequently expressed willingness to scrutinise immunities and privileges, and in the position and role of the Lord Advocate, for example the changes brought about by the Scotland Act and internal reorganisations within the prosecuting authorities. However it remains an authoritative decision on the matters covered by it. Barring something which clearly renders it obsolete or superseded, I consider that its merits can only be reviewed by a higher court than a judge sitting alone in the Outer House. It is true that in *Hester* the court required to adjudicate only upon the position of the procurator fiscal depute who conducted the trial. However, given that the outcome was so heavily dependent upon the court's observations as to the absolute immunity of the Lord Advocate, they cannot be categorised as mere *obiter dicta*. They were at the heart of the case and crucial to the decision. Furthermore they were rooted in institutional authority and earlier judicial statements. Their Lordships of the First Division recognised it as a decision of major constitutional importance, and addressed the issues accordingly.

[90] Dealing first with the temporal (or functional) scope of the decision, I am not persuaded that it can be restricted to the service of an indictment and subsequent events. The essence is that the actions of the Lord Advocate as public prosecutor, and of those acting on his behalf or instructions, are immune from challenge in the civil courts. A clear statement to that effect can be found at the outset of Lord Carmont's judgment. References to the position of the Lord Advocate in the specific context of proceedings on indictment are

understandable given the circumstances of the case; however it does not follow that absolute immunity only arises once an indictment is served. Given the powers of the Lord Advocate to take action before then, it would be somewhat arbitrary to adopt such a boundary. The passages in the institutional writing quoted in *Hester* are not so limited. The Lord Advocate can issue instructions to the police regarding the investigation and prosecution of criminal offences (now set out in section 12 of the 1995 Act).

Lord President Clyde said that it is an "essential element" that the Lord Advocate enjoys an absolute privilege in respect of matters "in connexion" with proceedings brought on indictment – a phrase which is habile to cover conduct taken before the commencement of such proceedings. The real contrast is with summary criminal procedure, in respect of which the position has always been statutory – see now section 170 of the 1995 Act.

[91] The width of the immunity can be and has been criticised, but, assuming that it is absolute, there is little logic in a narrow approach to when it applies. If a Lord Advocate maliciously instructed steps which in due course led to an indictment which had no probable cause, how would one separate out the consequences of the different regimes? It is not difficult to see how incoherence could be introduced into our law. At least in part, the justification for an immunity, whether absolute or qualified, is to remove a deterrent against decisions being taken solely in the public interest: this militates against different regimes at different stages. A decision not to prosecute can be just as egregious as a decision to proceed.

[92] The general sense of the discussion in *Hester* is that the Lord Advocate and those acting "as his hands", as opposed to on their own authority, enjoy the same protection as superior judges in respect of any matter which properly falls within the scope of the Lord Advocate's official duties as head of the system of criminal prosecution in Scotland.

Lord Guthrie stated that no action will lie against the Lord Advocate for averments made by him in the discharge of his duties even though they are said to be malicious. The reference to "averments" is clearly only an example of something done in the discharge of his duties. The touchstone is whether the acts or statements of the Lord Advocate – or those acting on his behalf – take place in the context of public prosecutorial duties. Hence Lord Guthrie said that the immunity covers "any act done by him or on his behalf as public prosecutor."

[93] It was suggested that prior to the service of an indictment, the Lord Advocate is not acting as a prosecutor, but rather as an investigator or some equivalent. No importance was attached to any such functional analysis in *McBain* v *Crichton* 1961 JC 25. At page 29 Lord Justice General Clyde expressly recognised the role of the Lord Advocate and his department in the investigatory and preparatory phase:

> "In this country (the Lord Advocate) is the recognised prosecutor in the public interest. It is for him, in the exercise of his responsible office, to decide whether he will prosecute in the public interest and at the public expense, and under our constitutional practice this decision is a matter for him, and for him alone. No one can compel him to give his reasons, nor order him to concur in a private prosecution. The basic principle of our system of criminal administration in Scotland is to submit the question of whether there is to be a public prosecution to the impartial and skilled investigation of the Lord Advocate and his department, and the decision whether or not to prosecute is exclusively within his discretion. This system has operated in Scotland for centuries and – see Alison on Criminal Law, vol.II, p.88 – the result has completely proved the justice of these principles, for such has become the public confidence in the decision of the Lord Advocate and his deputes on the grounds of prosecution, that private prosecutions have almost gone into disuse. It is utterly inconsistent with such a system that the courts should examine, as it was suggested it would be proper or competent for us to do, the reasons which have affected the Lord Advocate in deciding how to exercise his discretion, and it would be still more absurd for this court to proceed to review their soundness. Any dicta indicating that such a course is open to any court are, in my view, quite unsound."

The above observations were recently endorsed in *Stewart* v *Payne* 2017 JC 155 at paragraph 86. In paragraph 96 the Lord Justice Clerk, Lady Dorrian, stressed that the court "must be very conscious of the constitutional arrangements under which the role of

prosecutor is given to the Lord Advocate and take care not to confuse the functions of the court with those of the Lord Advocate."

[94] If it is the case that the Lord Advocate now plays a greater role than before in the pre-indictment stage, at least in the more serious cases, I have difficulty in identifying why this should be regarded as sufficiently divorced from his role and function post-indictment as to justify any difference in respect of the nature and extent of his immunity. It is clear from the court's discussion in *Stewart* v *Payne* that in modern times the Lord Advocate will be involved in the investigation of suspected crime and the assessment of the evidence. The pursuer's real complaint is as to the width of the immunity, not the circumstances when it will apply. Reference can also be made to the, to my mind, persuasive rebuttal of a functional analysis in the decision of the Supreme Court of Canada in *Nelles* (see below).

[95] Broadening the discussion, it is not difficult to conceive of cogent arguments against an absolute immunity. Many will think that the system south of the border, namely protection unless the prosecutor acts maliciously and without probable cause, is more than sufficient. Professor J D B Mitchell clearly had doubts on the matter – Constitutional Law (1964) footnote 17 at page 172: "The view expressed (in *Hester*) seems to go beyond what is necessary for the decision in the case or for the proper protection of the Lord Advocate."

[96] It may be helpful to reflect on the position of the Lord Advocate in respect of the prosecution of serious crime in Scotland. Juries are told that prosecutions on indictment are brought by the Crown, and in particular by the Lord Advocate as Her Majesty's Advocate. For these purposes the Lord Advocate is the embodiment of the Crown. As with superior judges, the Lord Advocate is not a public official or servant, but is answerable to the Queen in Parliament, now in the Scottish Parliament. The absolute immunity of superior judges for

acts and statements made in connection with their judicial duties has been explained as follows in the five judge decision in *McCreadie* v *Thomson* 1907 SC 1176 at 1182:

> "Upon the question of immunity of the judges of the Supreme Court there can be no doubt. The principle is clear and the decisions are emphatic. The principle is that such judges are the King's judges directly bound to administer the law between his subjects and even between his subjects and himself. To make them amenable to actions of damages for things done in their judicial capacity, to be dealt with by judges only their equals in authority and by juries, would be to make them not responsible to the King, but subject to other considerations than their duty to him in giving their decisions, and to expose them to be dealt with as servants not of him but of the public. Accordingly the remedy in this case, if they flagrantly offend against duty, is not by proceedings in any court, but only by addresses to the Crown from the Houses of Parliament. Between their position and that of judges appointed not by the King but by the community or some authority in the community not having the kingly prerogative, but only acting by a delegated authority for local administration, as in the case of justices of the peace appointed by the Lord Chancellor, there is no analogy. Therefore any claim for immunity for acts done in local summary courts cannot be based on the fact of the immunity of the Supreme Court judges. That the highest courts of justice are designated 'Supreme Courts' of itself indicates the distinction. The Supreme Courts have power to right wrongs done in the inferior courts, their jurisdiction being universal, and their duty being to see justice done throughout the land. The other courts have no jurisdiction beyond their own border, and cannot review the conduct of any other judge within their own border."

[97] While not exact, an analogy can be drawn with the position of the Lord Advocate, in contrast to a procurator fiscal in summary proceedings exercising an inferior and local jurisdiction. Professor Mitchell (work cited at page 224) is not attracted to the notion that judges' absolute immunity can be explained as per *McCreadie*, preferring "the simple fact" that it is "necessary for the administration of justice" and giving the further example found in section 2(5) of the Crown Proceedings Act 1947. Be that as it may, if there is merit in the above explanation, it is not difficult to see how a similar constitutional underpinning can be extended to the immunities enjoyed by the Lord Advocate, and no doubt also the Solicitor General for Scotland, see the Law Officers Act 1944 section 2. The Lord Advocate is appointed by the Queen, and, if not already one, is invariably sworn as a Privy Councillor.

Reflecting his early position as one of the judges, he is given a special place within the bar when pleading in court. It can still be said that a significant "constitutional trust" is reposed in the Lord Advocate of the day. His role as public prosecutor has been described as quasi-judicial; and writing extra-judicially, the then Lord Justice General, Lord Normand, described even a procurator fiscal's functions as "essentially judicial" (1938 54 LQR at 351). Reference can also be made to the discussion in *Noon* v *HM Advocate* 1960 SLT (N) 51. The independence of the Lord Advocate, as the Queen's advocate, can be seen as deserving of the same protection as that of the Queen's judges. In *Imbler* it is noted that courts which have extended the judges' immunity to the prosecutor have sometimes remarked that all three officials, judge, grand juror, and prosecutor, exercise a discretionary judgement on the basis of evidence presented to them. "It is the functional comparability of their judgements to those of the judge that has resulted in both grand jurors and prosecutors being referred to as 'quasi-judicial' officers, and their immunity as being termed 'quasi-judicial' as well." (footnote 20)

[98] In *Nelles*, what was described as the "functional approach" adopted in *Imbler* was criticised – see paragraphs 22/3 and 31. Mention was made of the problem of drawing a line between functions that are quasi-judicial and those that are administrative or investigative. There is a conceptual difficulty in justifying differential treatment of malicious acts based on the criterion of function. "If a prosecutor acts maliciously in the course of the prosecution of an accused, does it really matter whether the function being carried out is characterised as 'quasi-judicial' or 'administrative'?" Lower courts in the United States have disagreed as to whether quasi-judicial absolute immunity extends to the investigative functions of a prosecutor, "…these disagreements demonstrate the futility of attempting to differentiate between functions of a prosecutor in a principled way."

Imbler* v *Pachtman

[99] On behalf of Mr Whitehouse it was submitted that absolute immunity strikes the wrong balance having regard to the competing interest of providing a remedy for wrongful conduct. A reasoned justification for granting the widest immunity from civil suit, even in respect of alleged deprivations of constitutional rights, can be found in the decision of the US Supreme Court in *Imbler* v *Pachtman* (1976) 424 US 409. The court noted (section IIIA) that the common law immunity of a prosecutor is based on the same considerations that underlie the immunities of judges and jurors. "These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgement required by his public trust." A defendant will often transform his resentment at being prosecuted into the ascription of improper and malicious actions to the state's advocate. To require the prosecutor to answer in court would be a diversion from the primary duty of enforcing the criminal law. Suits that survive the pleadings would "pose substantial danger of liability even to the honest prosecutor." Often a virtual re-trial of the issues would be required. Inevitably a prosecutor makes decisions which could engender colourable claims of constitutional deprivation. Justice Powell observed (section IIIB):

> "To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious and dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Moreover, it often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice. With the issue thus framed, we find ourselves in

agreement with Judge Learned Hand, who wrote of the prosecutor's immunity from actions for malicious prosecution:

> 'As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.'"

[100] The US Supreme Court emphasised that the immunity of prosecutors from liability at common law and for deprivation of constitutional rights did not leave the public powerless to deter misconduct or to inflict punishment. "Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for wilful deprivations of constitutional rights… The prosecutor would fair no better for his wilful acts. Moreover a prosecutor stands perhaps unique among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to ensure that prosecutors are mindful of the constitutional rights of persons accused of crime."

Nelles* v *The Attorney General for Ontario

[101] That a different view can be taken is clearly demonstrated in the decision of the Supreme Court of Canada in *Nelles* v *The Attorney General for Ontario* [1989] 2 SCR 170. Plainly there is no obviously right and wrong answer to the difficult balancing exercise involved in weighing the various factors; those in favour of absolute immunity as against those for a civil remedy in respect of malicious and unfounded prosecutions. The judgment of the majority was delivered by Lamer J. At paragraphs 49/56 one finds the following:

> "It is said by those in favour of absolute immunity that the rule encourages public trust and confidence in the impartiality of prosecutors. However, it seems to me that

> public confidence in the office of a public prosecutor suffers greatly when the person who is in a position of knowledge in respect of the constitutional and legal impact of his conduct is shielded from civil liability when he abuses the process through a malicious prosecution. The existence of an absolute immunity strikes at the very principle of equality under the law and is especially alarming when the wrong has been committed by a person who should be held to the highest standards of conduct in exercising a public trust. … Regard must be had for the victim of the malicious prosecution. The fundamental flaw with an absolute immunity for prosecutors is that the wrongdoer cannot be held accountable by the victim through the legal process. As I have stated earlier, the plaintiff in a malicious prosecution suit bears a formidable burden of proof and in those cases where a case can be made out, the plaintiffs Charter rights may have been infringed as well. … It is also said in favour of absolute immunity that anything less would act as a 'chilling effect' on the Crown Attorney's exercise of discretion. …in cases of malicious prosecution we are dealing with allegations of misuse and abuse of the criminal process and of the office of the Crown Attorney. We are not dealing with merely second-guessing a Crown Attorney's judgement in the prosecution of a case but rather with the deliberate and malicious use of the office for ends that are improper and inconsistent with the traditional prosecutorial function. Therefore it seems to me that the 'chilling effect' argument is largely speculative … ample mechanisms exist within the system to ensure that frivolous claims are not brought. In fact the difficulty in proving a claim for malicious prosecution itself acts as a deterrent. … As for alternative remedies available to persons who have been maliciously prosecuted, none seem to adequately redress the wrong done to the plaintiff. …we are not dealing with errors in judgement or discretion or even professional negligence. By contrast the tort of malicious prosecution requires proof of an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve and as such incorporates an abuse of the office of the Attorney General and his agents the Crown Attorneys. There is no doubt that the policy considerations in favour of absolute immunity have some merit. But in my view those considerations must give way to the right of a private citizen to seek a remedy when the prosecutor acts maliciously in fraud of his duties with the result that he causes damage to the victim. … Attempts to qualify prosecutorial immunity in the United States by the so-called functional approach and its many variations have proven to be unsuccessful and unprincipled… I conclude that the Attorney General and Crown Attorneys do not enjoy an absolute immunity in respect of suits for malicious prosecution."

[102] The scope for differing views was again clearly demonstrated in the dissenting judgment delivered by L'Heureux-Dubé J. The justice proceeded on the premise that the decisions complained of were performed within the scope of the respondents' authority. It was noted that the appellant chose to proceed against the Attorney General in his official, rather than personal capacity. It was maintained that all of the respondents were acting at

all material times as agents of the Attorney General for Ontario, who acted as an agent of Her Majesty the Queen in right of Ontario. His answer to the question before the court was that the immunity from civil suit enjoyed by Attorneys General and Crown Attorneys is absolute when they are acting within the bounds of their authority. He recognised the concept as a troubling one, quoting a judgment from the court below: "That it confronts thoughtful and fair minded persons with the need to make what cannot be other than a difficult choice, is obvious." The answer was to be found in a balance between the evils inevitable in either alternative. L'Heureux-Dubé J continued (paragraph 92):

> "While there are significant differences between the role of prosecutors in the American legal system and the role of Crown Attorneys in Canada, it is my view that the basic principles underlying the grant of immunity to these agents are the same. These principles have been clearly elucidated in American case law. For example, in *Gregoire*, supra, Learned Hand J expanded on the underlying rationale for the immunity of officials at p581:
>
> > 'The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardour of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors.'"

The justice noted that the role of absolute immunity was not to protect the interests of the individual holding the office, but rather to advance the greater public good. At paragraph 94 he quoted another judge who wrote:

> "The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important public functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors, to say nothing of the witnesses who testify in a case."

Some general observations

[103] The above discussion shows that any court seeking to review and assess prosecutorial immunity in Scotland, even if starting with a blank canvas, would face a difficult and delicate task; all the more reason for a single judge sitting on his own to be doubtful as to his jurisdiction to review and interfere with settled common law. The pursuer suggests that statutory intervention could be a justification. It is true that the landscape has been changed by the introduction of domestic remedies for breaches of convention rights by public authorities, a category which includes the Lord Advocate and other prosecutors. It is not self-evident that this should have specific relevance to or implications for the nature and extent of prosecutorial immunities, and in particular whether the Lord Advocate should enjoy an absolute or a qualified immunity (the latter requiring proof of at least malice and want of probable cause). It was not argued that the common law should be put on a par with strict illegality and compensation remedies for infringements of engaged convention rights. I prefer the approach of the Crown, namely that the Human Rights Act has introduced a limited and separate regime where it applies, and has no direct relevance to the debate as to whether absolute as opposed to qualified privilege should be regarded as reflecting the current common law of Scotland.

[104] Still in the context of statutory intervention, section 170 of the 1995 Act is the current manifestation of a long-standing extensive, if not absolute, immunity given to those involved in summary criminal proceedings. This is not limited to prosecutors, but includes judges and clerks of court. If the legislative history is traced, initially damages were capped at a low level, hence the epithet "The Twopenny Act", and even if malice and want of probable cause can be proved, there have always been and remain significant restrictions on

liability under the statute, including that the pursuer must have been imprisoned, and that the sentence of imprisonment has been quashed. Any proceedings must be commenced within two months, and it is a defence if it can be established that the claimant was guilty of the offence concerned. Furthermore "judge" does not include a sheriff, the provisions of the section being without prejudice to the privileges and immunities possessed by sheriffs, which accordingly must be assumed to be no less than those set down in the statute. Having regard to the well-established privileges enjoyed by superior judges, a term generally comprehending sheriffs, it is implicit in the terms of section 170 that a sheriff, when acting within his jurisdiction, whether solemn or summary, enjoys absolute immunity. Of course the same will apply to High Court judges in the context of solemn proceedings, and it is a short step to extending this to Her Majesty's Advocate when discharging functions as public prosecutor.

[105] The submission for the pursuer does not address the anomaly created by its logical end point. He contends that the Lord Advocate should be liable for any malicious and unfounded prosecution on indictment. This would result in a wider immunity for procurators fiscal in respect of summary complaints as compared with that of the Lord Advocate and his deputes in solemn proceedings. As matters stand, and speaking somewhat generally, the common law envisages absolute immunity for matters in connection with the prosecution of serious crime on indictment, and, in terms of the relevant statute, very wide, though not absolute immunity, in respect of summary proceedings, which will withstand even proof of malice and lack of probable cause unless other considerations are satisfied. (As counsel for the Crown noted, it is not easy to fit a petition served solely on the initiative of a procurator fiscal into this framework, but again it would be odd if the protection was less than that afforded in respect of summary proceedings; thus

it might be inferred that the legislature assumed that the wider immunity extends to all procedures in connection with solemn proceedings or potential solemn proceedings.) Since 1998 public authorities, including courts and prosecutors, have been subject to a strict liability regime for the infringement of convention rights, with its own framework regarding remedies, including the question of quantum of damages, and in respect of judicial acts as per section 9 of the Human Rights Act. In so far as the pursuer seeks to inject an additional and wholly different regime in respect of, for example, the investigation of crime by prosecutors, the placing of persons on petition, and the issuing of warrants for committal, the proposition seems to me to be difficult to place within any coherent framework. In short, there is force in the proposition that if *Hester* is to be revisited, it should be in the context of a wider consideration of prosecutorial immunities in Scotland and the extent to which, if at all, reform or clarification is needed. As mentioned earlier, I will address the *Hester* "outwith competence" submission at a later stage in this opinion.

The article 8 claim

[106] The submission on behalf of the Crown in respect of article 8 was that it cannot be engaged in respect of a decision to prosecute unless the criminalisation of the conduct concerned is itself a breach of article 8. Were it otherwise any acquitted person could make a claim for infringement of article 8 rights. The proposition gains support from Lord Hoffman's speech in *R* v *G (Secretary of State for the Home Department intervening)* [2009] 1 AC 92 at paragraphs 9/10. His Lordship considered that it "would be remarkable if article 8 gave Strasbourg jurisdiction over sentencing for all offences which happen to have been committed at home." The case was "another example of the regrettable tendency to try to convert the whole system of justice into questions of human rights." Baroness Hale

agreed that article 8 was not engaged, though for reasons connected with the circumstances of the case. Lords Hope and Carswell considered that article 8 was engaged. Lord Hope said at paragraph 34:

> "It is unlawful for a prosecutor to act in a way which is inconsistent with a Convention right. So I cannot accept Lord Hoffman's proposition that the convention rights have nothing to do with prosecutorial policy. How an offence is described and the range of sentences that apply to it are matters for the contracting state. But where choices are left to the prosecutor they must be exercised compatibly with the Convention rights. The questions then are whether the defendant's continued prosecution for rape under section 5 was necessary in a democratic society for the protection of any of the interests referred to in article 8(2), and whether it was proportionate."

Lord Mance did not express a view on the question of engagement, contenting himself with the opinion that what was done could be justified in terms of article 8.2.

[107] In *R (E)* v *Director of Public Prosecutions* [2011] EWHC 1465 (Admin) a divisional court returned to the subject. In the leading judgment Munby LJ noted the parties' competing submissions as to whether articles 3 and 8 were engaged in respect of a decision to prosecute, and if so, in what circumstances there might be a breach. The case was resolved in favour of the claimants on other grounds, thus it was not necessary to reach a decision on the matter; but it is clear from the judgment at paragraph 78 that his Lordship was more than doubtful as to the relevance of article 8. He noted that there was no precedent for a claim such as this succeeding; indeed much authority pointing in the other direction. In the context of criminal proceedings, articles 3 and 8 were more likely to be engaged, and potentially breached, in matters of sentence rather than prosecution.

[108] The key decision is *SXH* v *Crown Prosecution Service (United Nations High Commissioner for Refugees intervening)* [2017] 1 WLR 1401 (UKSC). The claimant, a Somali national, came to the United Kingdom using false travel documents and, when apprehended, claimed asylum. She was charged with possessing a false identity document,

contrary to section 25 of the Identity Cards Act 2006, and remanded in custody. Nearly six months later she was granted asylum. The following day the Crown offered no evidence on the section 25 charge, on the basis that the claimant would have succeeded in establishing a defence under section 31(1) of the Immigration and Asylum Act 1999, namely, that she had come to the United Kingdom as a refugee, presented herself to the authorities without delay, shown good cause for her illegal entry, and claimed asylum as soon as was reasonably practicable.

[109] The claimant sought damages against the Crown Prosecution Service (CPS) under section 7 of the Human Rights Act 1998, contending that its decision to prosecute her and her resulting detention in custody awaiting trial was an unlawful interference with her right to respect for her private life guaranteed by article 8 of ECHR. The judge dismissed the claim, holding that article 8 was not engaged. That decision was appealed. It is appropriate to consider the decision of the Court of Appeal [2014] 1 WLR 3238. The leading judgment was delivered by Pitchford LJ. His Lordship noted that the claimant did not argue that section 25 of the 2006 Act, of itself, created an interference with the private life of the citizen. Her case was that the application of the provision to a Somali asylum seeker in her position was an interference with her private life. She was fleeing from persecution in Somalia and seeking asylum by the only means available to her. Hers was an attempt to protect and advance her moral, physical and psychological integrity, her sexual autonomy, and her personal and psychological space. Secondly it was argued that the judge was wrong to discount from the analysis the risk that the consequences of the prosecution would engage article 8. Remand in custody was an obvious possibility which of itself engaged article 8.1. Other adverse consequences were likely to follow on conviction including a sentence of

imprisonment, a more uncertain immigration status, and an adverse effect on her ability to obtain citizenship.

[110] The CPS identified a striking lack of Strasbourg authority for the propositions being advanced. It was contended that the reach of article 8 is only to those aspects of a claimant's private life that are worthy of respect or in respect of which she had a reasonable expectation of privacy. Her attempt to circumvent immigration control by the use of a false travel document was self-evidently not the performance of any aspect of her private life. Once conduct was criminalised by a statutory provision which is compliant with article 8, that conduct is undeserving of respect and the decision to prosecute in respect of it will not attract the protection of article 8.

[111] Pitchford LJ observed: "Conceptually, there is a gulf between the parties on the question whether the decision to prosecute engaged the claimant's right to respect for her private life." The foundation for the argument of the CPS was to be seen in Lord Hoffman's reasoning. If the offence does not constitute an interference with the individual's private life or, if it does, it is a legitimate interference with private life, the requirements of article 8 are met. At paragraph 58 the judge said: "There is no supplementary issue under article 8 as to whether the prosecution of the individual is proportionate to the legitimate aim."

His Lordship noted that *G* made a subsequent application to the European Court of Human Rights: *G* v *United Kingdom* [2011] 53 EHRR SE25, relying on articles 6 and 8. As to the challenge under article 8, the Fourth Section said, at paragraph 34:

> "The court must first determine whether article 8 is applicable. It recalls that the concept of 'private life' is a broad one and includes an individual's sexual life … although the court has observed that not every sexual activity carried out behind closed doors would necessarily fall within the scope of article 8 … the concept of private life also covers the physical and moral integrity of the person, respect for which the state may be required to secure through its domestic law…"

The court was prepared to accept that the sexual activities at issue in the case fell within the meaning of "private life", accordingly the criminal proceedings against the applicant constituted an interference with his right to respect for private life. However, given the public interest in the protection of the young, the UK enjoyed a wide margin of appreciation in the "continued prosecution, conviction and sentencing of the applicant". That margin was not exceeded by the creation of the offence; nor did the court consider that the authorities exceeded their margin of appreciation by deciding to prosecute the applicant.

> "Thus, while the prosecution was an interference with the applicant's right to respect for his private life, the decision to prosecute to conviction for the 'rape' offence was, by reason of the features identified, a proportionate interference necessary in a democratic society." (paragraph 66 of *SXH* in the Court of Appeal)

[112] Pitchford LJ considered the decision in *R (E)*. While the court appeared to adopt the reasoning of Lord Hoffman in *R* v *G*, it had decided to quash the prosecutor's decision on other grounds. The judgment was handed down before the Strasbourg court issued its decision in *G* v *UK*. In forming his own opinion on the matter, his Lordship began"with the conviction that the reluctance of the domestic courts to interfere with the prosecutor's decision to prosecute at common law is not a basis for concluding that the prosecutor's decision is not amenable to challenge under article 8." (paragraph 68) The view was taken that the offence itself, a breach of section 25 of the 2006 Act, was not an interference with the claimant's private life. The judge turned to whether any further issue of compliance arose from the decision to prosecute this particular individual. The view was expressed (paragraph 71) "diffidently" having regard to Lord Hoffman's contrary finding in *R* v *G*,

> "that there will be circumstances in which a decision to prosecute engages article 8 even when the offence with which the defendant is charged does not itself constitute interference with private life. For example, if the prosecutor is aware of facts that provide the suspect with an unanswerable statutory defence to the charge it seems to me that a decision to prosecute would not only be perverse but it might also constitute an interference with the suspect's right of respect for her private life.

> Secondly, a decision to prosecute a dying woman may constitute a disproportionate interference with her private life. The first example may arise on an assessment of the evidence; the second may arise on an assessment of the public interest … I see no reason in principle why the decision to prosecute should attract the public law requirement of reasonableness (under reference to *R(E)*) but not engage the article 8 rights of the defendant. These considerations were not in issue in *R* v *G* because it was not contended by the claimant that there should have been no prosecution at all, only that he had been over-prosecuted and, to that extent, his article 8 right had been infringed. However, short of extremes such as those to which I have referred, it is difficult to imagine circumstances in which a decision to prosecute for a convention-compliant offence could be undermined on article 8 grounds. I see no such circumstances in the present case and I conclude that on the facts article 8 was not engaged."

If he was wrong in this, the judge's view was that the decision to prosecute was in accordance with the law and necessary in a democratic society.

[113] Beatson and Gloster LJJ agreed with the judgment. The latter added: "In particular I concur in the view that there may be circumstances in which a decision to prosecute engages article 8, even when the offence with which the defendant is charged does not itself constitute interference with private life."

[114] When *SXH* reached the UK Supreme Court, the leading judgment was delivered by Lord Toulson. It was noted that the appellant accepted that the CPS was reasonably entitled to consider that the evidential test was satisfied at the time when the decision to prosecute was taken. It had been argued that article 8 applied to the decision to prosecute for two reasons: it targeted conduct which was itself protected by article 8, and its consequences interfered with the enjoyment of the appellant's private life. His Lordship considered that the consequentialist argument was "far too broad" (paragraph 30/32). The reasoning of the Strasbourg court was significant.

> "It focused on the nature of G's conduct. The court was prepared to accept that uncoerced sexual behaviour of a 15-year old boy with a girl whom he believed to be the same age could fairly be seen as falling within the meaning of private life. Perhaps because it was an admissibility decision and the court was satisfied that the complaint of a breach of article 8 was manifestly ill-founded, it did not directly

> address Lord Hoffman's and Baroness Hale's reasons for holding that the article did not apply. There is no support in the Strasbourg authorities for the argument that even if the conduct for which a person is prosecuted was not within the range of article 8, the article may apply to a decision to prosecute because of the attendant consequences … there is a striking absence of any reported case in which it has been held that the institution of criminal proceedings for a matter which is properly the subject of the criminal law may be open to challenge on article 8 grounds… It would be illogical; for if the matter is properly the subject of the criminal law, it is a matter for the processes of the criminal law. The criminalisation of conduct may amount to interference with article 8 rights; and that will depend on the nature of the conduct. If the criminalisation does not amount to an unjustifiable interference with respect for an activity protected by article 8, no more does a decision to prosecute for that conduct. The consequences will be matters for the determination of the court."

[115] Lord Toulson then addressed the argument that the prosecution targeted conduct which was protected by article 8. The submission was that a proper investigation should have led the CPS to realise at an early stage that the claimant had a defence under section 31 and in any event that a prosecution was not in the public interest. It was noted that the decision challenged was the initial decision to prosecute. In the course of oral argument, and for the first time, there was an attempt by counsel to challenge the conduct of the CPS throughout the period from the decision to prosecute up to the decision to offer no evidence. Counsel for the CPS objected to the Supreme Court being asked to conduct its own factual examination of the CPS's alleged shortcomings during the course of the prosecution. The court did not hear argument on the question of whether article 8 may become applicable to the CPS in the continuation of a prosecution, if it was not applicable at the time of its commencement. The view was taken that it would not be appropriate to express a concluded view. The proper source for any such investigation may be article 6, but, without the benefit of considered argument, Lord Toulson considered it better to say no more on the matter.

[116] Reverting to the challenge to the initial decision Lord Toulson said:

> "The difficulty for the appellant in advancing the claim that the decision to prosecute her was a violation of her human rights is that it is accepted that the offence under section 25 is compliant with her Convention rights, and it was conceded in the courts below that the CPS was reasonably entitled to conclude at the time of the decision to prosecute that the evidential test was satisfied. It is difficult to envisage circumstances in which the initiation of a prosecution against a person reasonably suspected of committing a criminal offence could itself be a breach of that person's human rights. It is true that the CPS is not bound to prosecute in every case, depending on its view of the public interest, but I do not see that the fact that in this jurisdiction a prosecution is not obligatory makes a difference. Whether it is in the public interest to prosecute is not the same as whether a prosecution would unjustifiably interfere with a right protected by article 8. I agree with Irwin J and the Court of Appeal on the question of the applicability of article 8 to the decision to prosecute." (paragraphs 34/5)

It is striking that in this key passage it was considered significant that it was conceded that the CPS was reasonably entitled to conclude at the time of the decision to prosecute that the evidential test was satisfied. Plainly no such concession is made by the present pursuers in relation to the decisions to prosecute them.

[117] Lord Toulson then turned to the question of whether, if article 8 was applicable, there had been a breach. Things could have been done better and it was regrettable that a vulnerable young woman spent the time that she did in custody. The CPS could be criticised for how long it took to investigate and to conclude that the applicant was likely to succeed in the section 31 defence. However that was far from there being a breach of article 8 in the decision to prosecute.

> "Indeed, even if the original decision to prosecute was an error of judgement by the CPS, it would not in my view have involved a breach of article 8. It would be a different thing if the state deliberately trumped up false charges against someone as a form of harassment. In terms of domestic law, that would involve the torts of malicious prosecution or misfeasance in public office or both, to which article 8 would add nothing; but no duty of care is owed by the police towards a suspect (*Calveley* v *Chief Constable of the Merseyside Police* [1989] AC 1228), and the same applies to the CPS." (paragraph 36)

His Lordship noted that a citizen aggrieved by a prosecutor's decision has potentially extensive remedies for a deliberate abuse of power, however the duty of the CPS is to the

public. It does not owe a duty of care towards victims or suspects or both, as this would put it in a position of potential conflict, and would open the door to collateral interlocutory civil proceedings and trials, which would not be conducive to the best operation of the criminal justice system. "Similar considerations are relevant when considering the applicability of article 8 in the context of a decision to prosecute. A decision to prosecute does not of itself involve a lack of respect for the autonomy of the defendant but places the question of determining his or her guilt before the court, which will itself be responsible for deciding ancillary questions of bail or remand in custody and the like." (paragraph 38)

[118] Lords Mance, Reed and Hughes agreed with the judgment handed down by Lord Toulson. Lord Kerr did not dissent, but did deliver a short judgment of his own. He reached the decision that the appellant had to fail in her appeal with regret. It was sad that the appellant's "terrible circumstances" were compounded by her incarceration at a time when she was vulnerable and defenceless. Reference was made to the decision of the Court of Appeal in *Zenati* v *Commissioner of Police of the Metropolis* [2015] QB 758. It was suspected that the claimant's passport might be counterfeit and he was charged with offences under the Identity Cards Act 2006. Subsequently the officer in charge was informed that the passport was genuine. At a subsequent hearing this was not brought to the court's attention. As a consequence the claimant was detained for more than three weeks after the CPS should have been informed that the passport was genuine. It was held that this was capable of amounting to a breach of articles 5.1(c) and 5.3. If the investigating authorities failed to bring to the attention of the court material information of which the court should be made aware when reviewing a detention, this may have the effect of causing a decision by the court to refuse bail to be in breach of article 5.3. Lord Kerr said:

> "Although it did not feature in the case, there is therefore a real issue as to whether the appellant's detention beyond the time that it should have been recognised that she had an unanswerable defence under section 31, constituted a violation of her article 5 rights. If a decision to prosecute resulting in detention is capable of amounting to a breach of article 5, it is capable of interfering with article 8. In *Norris* v *Government of the United States of America (No 2)* [2010] 2 AC 487, para 52 Lord Phillips of Worth Matravers PSC said: 'It is instructive to consider the approach of the convention to dealing with criminals or suspected criminals in the domestic context. Article 5 includes in the exceptions to the right to liberty (i) the arrest of a suspect, (ii) his detention, where necessary, pending trial, and (iii) his detention while serving his sentence if convicted. Such detention will necessarily interfere drastically with family and private life. In theory a question of proportionality could arise under article 8.2. In practice it is only in the most exceptional circumstances that a defendant would consider even asserting his article 8 rights by way of challenge to remand in custody or imprisonment: see *R (P)* v *Secretary of State of the Home Department* [2001] 1 WLR 2002, para 79, for discussion of such circumstances. Normally it is treated as axiomatic that the interference with article 8 rights consequent upon detention is proportionate.'"

[119] Lord Kerr considered that this passage in *Norris* was important for its implicit acceptance that detention for the purpose of prosecuting a criminal offence is at least capable of engaging article 8.

> "That is not an extravagant proposition. If prosecuting authorities are aware – or ought to have become aware – that the basis for a proposed prosecution no longer obtains, or that there is a defence available to the defendant which will provide a complete answer to the crime charged, and if they fail to act on that information in order to secure the defendant's release, that is an obvious instance of a failure to have respect for the defendant's right to a private life. The responsibility of the prosecuting authorities cannot be shirked because the court has a duty to enquire into the basis on which someone continues to be held in custody pending trial. That is a relevant circumstance but it does not relieve the prosecution of its duty to act on a change in circumstances which makes detention no longer justified. This is particularly so where the court, as in this case, was dependent on information which it was the prosecution's obligation to supply which bore on the question of whether the appellant should continue to be detained.
>
> A decision to prosecute someone against whom there is evidence that they have committed a criminal offence does not automatically constitute a failure to have respect for that person's private life. Respect may be forfeit by engaging in criminal activity which justifies prosecution, although measures taken to identify an individual suspected of criminal activity may not involve forfeiture of the right: see *In re JR38* [2016] AC 1131. In that case there was disagreement between the members of the court as to whether steps taken to identify a minor by publishing photographs of him engaging in criminal behaviour engaged article 8. That debate is not relevant

> in the present case for it has been accepted that there was an evidential basis for prosecuting the appellant at the time that the prosecution was initiated.
>
> On that basis I agree that this appeal must be dismissed." (paragraphs 45/7)

[120] Lord Kerr agreed that it was too late to allow the appellant to argue that continuing to prosecute involved a violation of article 8. The respondents had not produced evidence germane to such a case and it would not have been fair, even if it had been feasible, to require them to do so.

[121] In the present case the Crown submitted that article 8 cannot be engaged in respect of a decision to prosecute unless the criminalisation of the conduct concerned is itself non-compliant with article 8. (Plainly no one suggested that the offences of which the pursuers were charged fell into that category.) Counsel accepted (in my view rightly) that if that submission was rejected, the article 8 claim, along with the article 5 claim, should be remitted for evidence at a proof before answer. The court was invited to conclude that the majority judgment in *SXH* handed down by Lord Toulson confirmed the Crown's submission. The difficulty for the argument is the significance given to the appellant's concession that there was an evidential basis for the decision to prosecute her under the 2006 Act. If the Crown's submission is correct, there would have been no need for this. The attendant potential consequences of any criminal prosecution, for example the risk of detention and broader reputational damage, were not, in themselves, sufficient to engage article 8. However, an investigation into the particular circumstances surrounding the decision might result in an infringement. This means that article 8 can, at least in certain circumstances, be engaged by a decision to prosecute someone, whatever the nature of the charge. The example was given of deliberately "trumped up false charges." The present

pursuers could reasonably claim this as a shorthand description of the case which they wish to pursue to a proof at which evidence will be led.

[122] In the Court of Appeal Pitchford LJ made similar comments, see paragraph 71 (quoted earlier). He noted that in *R* v *G* it was not suggested that there should never have been a prosecution in the first place. In *SXH* Lord Kerr clearly considered that circumstances could arise which engaged article 8, not least where a prosecution was maintained notwithstanding clear evidence that it should be stopped. Mr Whitehouse and Mr Clark contend as much in these actions, albeit they also say that the prosecutions should never have been started.

[123] Lord Toulson was anxious to exclude carelessness, errors of judgement, and the like from the scope of article 8; but he set the judgment in the context of a case where a person was "reasonably suspected of committing a criminal offence" (paragraph 34, emphasis added). No doubt it is difficult to envisage an infringement of article 8 in such a case, however the clear inference is that different considerations might arise if the conduct can be described as a deliberate abuse of process. It is true that south of the border an infringement of article 8 on such a basis may add nothing to the common law remedies mentioned by Lord Toulson (paragraph 36), but where the common law in Scotland is different, for example in respect of a Crown prosecutor's absolute immunity, article 8 may play a more significant role. For these reasons I reject the submission that the article 8 claim should be dismissed at this stage.

The case concerning the conduct of the police

Submissions of the parties

[124] In Mr Clark's action, the respective parties agreed to a proof before answer on the claim against the police. A similar offer was made to Mr Whitehouse, but was not accepted.

He presents the proposition that in detaining him without having reasonable cause to suspect him of having committed an offence, and in arresting him without sufficient evidence for a charge, the first defender's officers acted "outwith competence". Accordingly the detaining and arresting officers had no power to act as they did – they acted beyond competence. It follows that there is no requirement to aver and prove malice or an improper motive on their part. The court is asked to uphold this submission at this stage. If this is done, it has implications for the relevancy of the first defender's averments in defence. Reliance was placed on *Robertson* v *Keith* 1936 SC 29 at page 36 and *McKinney* v *Chief Constable, Strathclyde Police* 1998 SLT (Sh Ct) 80. Mention was also made of *Louden* v *Chief Constable of Police Scotland* 2014 SLT (Sh Ct) 97 and *Mouncher* v *Chief Constable of South Wales Police* [2016] EWHC 1367 (QB) paragraph 414.

[125] As for the similar propositions in respect of the decisions to arrest, it is recognised that there is no statutory test and that the law on the subject is relatively undeveloped. However, there having been no change in the information available to the police between each detention and each arrest, if the pursuer succeeds regarding detention, he should also succeed in respect of the arrests.

[126] Reference was made to various authorities on section 14 including *McKenzie* v *Murphy* [2014] HCJAC 132 and *O'Hara* v *Chief Constable of the RUC* [1997] AC 286. The following principles were derived from them:

1. The detaining officer must suspect that the individual has committed, or is committing, a crime.
2. The detaining officer must possess sufficient information to provide reasonable grounds for that suspicion.

3. That information may include intelligence and hearsay information from another officer.
4. A direction to detain by a superior officer does not, in itself, provide reasonable grounds for suspicion.
5. Whether grounds for suspicion are reasonable will depend upon the facts and circumstances of the individual case.
6. In deciding whether grounds are reasonable the court requires to examine the issue objectively.

There was no challenge to this summary, and I would endorse it.

[127] As to the correct test for an arrest, reference was made to *Lukstins* v *HM Advocate* 2013 JC 124 – there must be evidence against the arrested person which is "sufficient for a charge". This was said to be a more onerous test than the reasonable suspicion test for detention. It was noted that in *O'Hara* Lord Hope equiparated arrest under terrorism legislation with section 14 detention. The process for determining whether the test is met is the same as for detention. There being relevant averments of no grounds for reasonable suspicion, the onus was on the first defender who, at this stage, requires to make relevant and sufficiently specific averments to the effect that the detentions and arrests were consistent with the above principles, including that the arrests were supported by sufficient evidence. They had not done so. The detention and arrests were unlawful and in breach of Mr Whitehouse's convention rights.

[128] The parties' respective averments on reasonable suspicion (or the lack of it) are lengthy and detailed. The overall submission is that the first defender has failed to plead a relevant basis for a reasonable suspicion that the pursuer knew of and was involved in the alleged fraudulent scheme to purchase Rangers. (It is accepted that there was a basis for

suspicion of the scheme itself and of Mr Whyte's involvement in it.) There was no basis for suspecting that the pursuer knew of the use of Ticketus funds in the acquisition, or at any rate that it was part of a criminal enterprise. The bulk of the averments concern suspicions held by DCI Robertson, who was not a detaining officer. The first defender relies on briefings of the detaining officers, but gives no detail of any suspicions of those officers, nor of the basis for them. In any event there are insufficient averments to support the proposition that DCI Robertson's suspicions were reasonable. Similar submissions were made in respect of the second detention and arrest. The information available to the police required to point towards a fraudulent scheme to sell the club's assets, the pursuer's knowledge of the criminal nature of the enterprise, and of him having acted to further the scheme's objectives. The averments do not satisfy these requirements. For example, there is no averment that any false pretence was made to the club's creditors or to the court. The pursuer invited the court to repel the defences in so far as relating to the common law claim and the article 5 claims (under exception of the plea that the article 5 claim regarding the first detention is time barred) and sustain the pursuer's first plea-in-law.

[129] Turning to the position of the first defender, though some of the submissions tended towards an invitation to the court to dismiss the claims against him, counsel informed the court that a proof before answer had been offered, and that this had not changed. The court was asked to refuse the pursuer's motion and allow a proof before answer. Counsel for the chief constable stated that only a full evidential hearing could properly resolve the issues in fact and law separating the parties. Meantime it cannot be said that the first defender is bound to fail in any of his lines of defence. Reference was made to *Jamieson* v *Jamieson* 1952 SC (HL) 44 and *Henderson* v *3053775 Nova Scotia Ltd* 2006 SC (HL) 85.

[130] As to malice, the first defender noted that the pursuer sought to avoid proof of such on the plea that the detaining and arresting officers acted "outwith competence". It was submitted that this can only be resolved one way or the other after evidence from the relevant witnesses. Nonetheless, counsel mounted a positive submission to the effect that the officers were acting within their general powers under statute and at common law. Reference was made to the division of view as between the decisions in *Woodward* and *McKinney*. Lord Kingarth's decision in *Woodward* was correct. The proper distinction is between conduct which could never fall within the powers of the officers, and complaints as to how an officer has gone about exercising his powers. In the latter case, the officer enjoys a degree of protection from civil suit, namely that proof of both malice and want of probable cause are essential elements of any successful claim. Reference was made to a number of cases, including *Shields*, *Robertson*, *Ward*, *Willers* and *Juman*. Counsel analysed in detail the respective decisions in *Woodward* and *McKinney*, and the case law mentioned in each opinion. The court was invited to endorse the reasoning of Lord Kingarth in *Woodward*. Counsel submitted that the actions of the officers were clearly within their competence, but, as that appears to be a disputed matter, there should be a proof prior to its determination. It was stressed that malice and want of probable cause are separate requirements in the sense that proof of lack of reasonable probable cause alone does not remove the privilege. The first defender intended to lead evidence that the objective and subjective tests discussed in cases such as *O'Hara* and *McKenzie* were met in respect of each detention and arrest.

[131] Turning to the subject of malice, counsel for the first defender observed that, while their application in a particular case might be problematic, there is no real doubt as to the general principles applicable to cases of this kind. In common with other public officials, a police officer, if sued for damages for allegedly wrongful and harmful conduct, is entitled to

certain protections and privileges. In particular, so long as he was acting within the scope of his duties, the claimant must establish that he acted (a) without probable cause; in other words, when regard is had to the whole circumstances, without proper justification, and (b) he did so maliciously, which can include not only spite and ill will, but also a deliberate abuse of power, for example an act prompted by an ulterior motive divorced from the proper purpose of the authority given to the officer. The policy is that an officer acting in good faith should not be exposed to claims based upon errors of judgement, carelessness, overzealousness, incompetence, and the like. Were it otherwise, this could constrain and inhibit the fearless exercise of the officer's duties, something which would operate against the public interest.

[132] All of the above concepts were said to be fact sensitive and dependent upon the particular circumstances of the case. They are not hard-edged rules, which may in part explain why the decided cases and judicial observations are not always easy to reconcile. Often judges resort to inexact phrases with little explanation of what is meant. The problems of loose terminology are exacerbated in that an officer's conduct can be "unlawful" in the sense that, for example, there was no proper basis for a detention or for a search of premises, thus evidence derived therefrom cannot be used against the accused; however it does not follow that the same conduct necessarily attracts civil liability, otherwise the privileges would cease to exist. Where they apply the privileges protect an officer who has gone wrong, for example he has detained someone in the absence of grounds sufficient to support a reasonable suspicion that he had committed an offence.

[133] The submission for the police is that civil liability should not flow from an honest mistake made in the course of an officer's authorised duties. In this case, and in all others where the point arises, the key question is – is the officer entitled to the protection? The

answer may be no, because he was on a frolic of his own, wholly unrelated to his authorised duties. But where the officer was authorised to do what he purported to do, it would be illogical if a mistake made in good faith, for example as to whether there were grounds for reasonable suspicion, elided the protections. More would be needed, in particular that there was no proper basis for the detention/arrest, and that the officer either knew this, or was indifferent to the issue because of some unrelated motive for what happened.

[134] The pursuer says that he need not prove malice because the officers are not entitled to the protection spoken to above. The first defender is to the opposite effect. The issue is encapsulated by the parties' differing views as to the merits of Lord Kingarth's decision in *Woodward*.

Introductory remarks

[135] Before looking at the case of *Woodward*, the following introductory observations might be helpful. Our law aims to provide appropriate protection to public officials who, when exercising their public duties, do something which, in terms of the constraints on their powers, they are not entitled to do. In particular they will not be liable in civil damages unless they acted without probable cause and were actuated by malice or some other improper motive. If matters are explained by an honest mistake, overzealousness, or the like, the necessary bad faith or deliberate abuse of power is absent. The policy is that public officials should be able to act in the public interest free of a concern that if they err, or overstep the mark, they will be subject to a civil suit from anyone harmed by their conduct. Claimants have attempted to exclude the protection, or privilege as it is sometimes called, by a submission that the official acted outwith or beyond his powers, and thus is in the same position as a private wrongdoer. There is a substantial body of case law on the subject. It is

fair to say that over the years judges have not found it easy to draw the line between an alleged abuse of power and conduct beyond the powers vested in the officers. All of this is clearly demonstrated by Lord Kingarth's careful consideration of the case law in *Woodward*.

Woodward* v *Chief Constable, Fife Constabulary

[136] The facts of the case were as follows. Early one morning a woman was detained on suspicion of stealing money from her place of work. A sum of £500 could not be accounted for. Subsequently the inquiries extended to an earlier missing sum of just over £90. After two interviews she was arrested, cautioned and charged with theft of the lesser sum. Shortly thereafter she made a voluntary statement admitting the theft. She was then held in custody for almost four hours in what was described as a Victorian cell. Meanwhile her house was searched but nothing was found. She had been fingerprinted and photographed. In an action for damages at her instance against the chief constable, she claimed that there was no reasonable cause for the initial detention, and that the continued detention after her voluntary statement was wrongful and separately in breach of section 17 of the Police (Scotland) Act 1967 and section 295 of the Criminal Procedure (Scotland) Act 1975. There was no reasonable basis for suspecting her of taking the missing sum of £500. It was claimed that improper pressure had been put upon her and that her detention was used as a lever to try to make her reveal involvement in the thefts.

[137] Lord Kingarth heard evidence, including from the pursuer. Thereafter it was accepted by the pursuer's counsel that there was no substance in the two cases pled on record. The sole ground of complaint maintained by the pursuer was that the detaining officer, a WPC, had not been involved in the investigations and had simply been told by her colleagues that the pursuer was under suspicion. The WPC gave evidence that she was

acting on behalf of others who harboured these suspicions. It was submitted that the wrongful nature of the detention was enough to entitle the pursuer to damages. There was no need to prove malice and lack of probable cause.

[138] On the basis of the decision in *O'Hara*, the Lord Ordinary held that the initial detention was wrongful in that the detaining officer did not have any reasonable suspicion that the detainee had committed an offence. It was argued on behalf of the defender that the WPC acted bona fide and without malice, and that there was probable cause. That submission was upheld. The question was whether damages were available simply on the basis of the wrongful deprivation of liberty. Was the officer acting in excess of her jurisdiction or in discharge of her duties?

[139] Lord Kingarth did not find the decided cases easy to reconcile. He considered a large number in detail, including *Beaton* v *Ivory*, *Robertson* v *Keith*, and *Shields* v *Shearer*. In his Lordship's view (page 1349) the importance of the opinion of Lord Justice Clerk Aitchison in *Robertson* "lies in the emphasis upon a privilege attaching to all official acts done truly in the pursuance of an official public duty as opposed to acts which are only pretended to be but are not in fact so done." The opinion made it "abundantly plain" that the general law entirely encompasses cases of alleged wrongful apprehension, and that one should be cautious about concluding from any decision to the effect that enough had been averred to justify issues (a set of questions to be answered by a civil jury) that a successful claim did not require proof of malice and want of probable cause. In *Robertson* the opinions of Lord President Normand and Lord Anderson recognised the privilege given to police and other public officials "acting in the exercise of their duty." In some cases malice can be inferred from the mere wrongful act, in others it was necessary to aver facts and

circumstances from which malice may be inferred. *Beaton* v *Ivory* was an example of the latter type, while a case of unlawful arrest without warrant belonged to the former.

[140] Lord Kingarth noted that in *Ward* v *Chief Constable, Strathclyde Police* 1991 SLT 292, at page 294 Lord President Hope spoke of "the protection which the law rightly gives to public officers acting in the exercise of their duty", and further: "It is in the public interest that officials in that position should be free to discharge the duties of their office without being exposed to actions for damages for what Lord Justice Clerk Aitchison in *Robertson* v *Keith* described as 'mistakes or errors of judgement.'" Lord Sutherland indicated (page 297): "A police officer acting in the course of his duty is protected against an action of damages … unless it can be proved that he acted without probable cause and maliciously. There is a presumption that a police officer acts bona fide and this presumption has to be overcome by evidence." At page 298 Lord Clyde said:

> "It is the policy of the law to give a measure of protection against claims for damages to persons who in the discharge of some recognised duty cause injury or damage to another person. It is in the public interest that persons performing such duties should not be deterred from the performance of them by the fear of being subjected to a civil claim. Where the principle applies, the person enjoys a privilege appropriate to the occasion. Where the case concerns the actings of a police officer performing his official duties a high degree of protection is afforded. It is presumed that a police officer is doing no more than his duty and is acting bona fide and honestly. In order to succeed the pursuer must not only prove that he or she has sustained injury caused by a wrongful acting of the officer in question, but also that the acting was malicious and in addition to that that there was no probable cause for it. The law thus imposed a heavy burden on the pursuer in such a case."

[141] Mr Whitehouse's submission that malice is not required relies heavily upon the opinions delivered in *Shields* v *Shearer* 1914 SC (HL) 33. Lord Kingarth noted that the House of Lords held that a pursuer who had brought an action of damages for wrongful arrest was entitled to an issue which did not mention malice. It was true that the Lord Chancellor (Haldane) appeared to proceed on the basis that a pursuer claiming to have been arrested

wrongfully and illegally without reasonable grounds for suspicion, need not prove malice in fact (although the officer would be guilty of what was called malice in law). Lord Kingarth continued as follows (page 1349):

> "Lord Dunedin in his speech indicated … that these terms were 'not perfectly familiar terms in Scotland', and spoke of the Scots distinction between cases where 'malice may properly be inferred from the mere wrongful act that is done, and cases where it is necessary in the Scotch phraseology to aver facts and circumstances out of which malice may be inferred'. However he made it plain that in his view, he was dealing with a case in which according to the pursuer's averments there were no circumstances which could properly justify the arrest at all 'and, when that is so, I think it is absolutely clear upon the authorities that all that was necessary for the pursuer to put in issue were the words "wrongfully and illegally" without anything more, *leaving any question of privileged situation to be dealt with by the learned judge at the trial*' (my emphasis). No reference was made to the case of *Malcolm* or *Hill*.
> Lord Shaw of Dunfermline also said … 'And with regard to false or improper apprehension or imprisonment the law is also elementary that malice is implied from recklessness whether the citizen arrested is innocent or not. Accordingly when the statute in Glasgow says that it is no defence unless there is reasonable ground for suspicion, it appears to me that the act simply lays down in so many terms – in broad and popular terms – what might have been put in the old legal form by the words "maliciously and without probable cause."'"

It was noted that *Shields* was expressly referred to by Lord Justice Clerk Aitchison in *Robertson* as a decision upon relevancy with reference to the particular averments that were made and not one which was said to depart from the general rule.

[142] At page 1350 Lord Kingarth expressed his overall conclusions as follows:

> "Although it appears to me there was no dispute between the parties that wrongful actions within the competence of a police officer would need to be shown to have been taken without probable cause and with malice in order to found an action of damages, the question would appear to be whether for this purpose what is within the competence of an officer requires to be understood narrowly (as the pursuer would contend) or more broadly (as the defender contends). It seems to me that the weight of the authorities suggest that the actings of a police office in the course of or in discharge of his ordinary duty would attract the privilege referred to and that if he was doing that which he as an officer generally had power to do, it would not be enough for a pursuer who sought damages to prove that his or her actings in a particular case were wrongful (that is that they exceeded such constraints as might be imposed by common law or by statute on those powers) but that also proof of want of probable cause and malice would be necessary. There is, it seems to me, no warrant in the authorities properly read for the view that where an officer acts

> wrongfully to interfere with the liberty of the subject, the privilege can never apply. This view of the authorities would seem to me to be wholly consistent with the policy of the law behind the privilege. If by contrast the pursuer was right, wherever a constable arrested a citizen at common law without a warrant but was not, perhaps by reason of error of judgement within one of those circumstances entitling him so to act (an error of judgement which could be made in dangerous or difficult, fast moving circumstances), he would be exposed to an action of damages. Equally, the pursuer's argument would entitle anyone detained to claim damages if the constable who had a relevant suspicion nevertheless erroneously but honestly thought that that suspicion was based on reasonable grounds. That is not to say that there may not be many cases of wrongful arrest or detention where the circumstances clearly demonstrate (and where averments might clearly demonstrate) that the arrest or detention did not (to use Lord Justice Clerk Aitchison's words) relate to any duty arising on the particular occasion and which could not be said to be acts truly done in the exercise of an official duty but only pretended to be, or at least demonstrate actings from which malice might very readily be inferred (such as apparently in *Shields*)."

[143] To my mind, *Woodward* was correctly decided. There was no more than a mistake or misunderstanding as to whether it was enough simply to be told that the pursuer was under suspicion after an investigation carried out by others. There was probable cause in the sense that there were reasonable grounds for suspecting that the pursuer had committed an offence. In the present action Mr Whitehouse offers to prove that there were no such grounds for reasonable suspicion. Can proof of this alone be sufficient to elide the need for malice? The privilege applies unless both malice and an absence of probable cause are established. As has been acknowledged in the cases, the particular circumstances might be sufficient to allow malice to be inferred, but this is very different from the submission made on behalf of the pursuer. In effect the contention is that if the conduct can be categorised as unlawful or wrongful, then the officer has acted outwith his or her competence, or in excess of jurisdiction, and no question of malice arises. The contrary proposition is that something in the nature of a mere absence of reasonable grounds for suspicion is not in itself enough, so long as the circumstances are not so egregious as to demonstrate that the police have

stepped outside the scope of their authorised duties – in which event it would probably not be difficult to infer malice, at least in the sense of a deliberate abuse of their powers.

McKinney* v *Chief Constable, Strathclyde Police

[144] To counter the views of Lord Kingarth, the pursuer refers to the decision of Sheriff Principal Cox QC in *McKinney* v *Chief Constable, Strathclyde Police* 1998 SLT (Sh Ct) 80. The facts can be summarised as follows. A husband and wife separated. Two of their children remained with their mother, and one with the father. The mother obtained two interdicts against the father, first against molestation, to which a power of arrest was attached, and second, against removal of the two children in her care, to which no power of arrest was attached. The mother complained to the police that the father had removed one of the two children in her care. He was arrested and detained in custody for three days. He raised an action claiming damages based upon unlawful arrest. It was conceded that the arrest was unlawful but that, absent averments that the officers had acted maliciously, as opposed to being under an honest and reasonable mistake as to their powers, the action was irrelevant and should be dismissed. The sheriff allowed a proof before answer. Sheriff Principal Cox refused an appeal against that decision. After a review of Lord Kingarth's decision in *Woodward*, he held that it could be distinguished and that, in the circumstances of the case before him, there was no requirement for the pursuer to aver and prove malice.

[145] The sheriff principal divided the decided cases into two categories. First, he referred to cases of unlawful deprivation of liberty, in which case malice was not required. Second there were cases where there was a power of detention or arrest, but its exercise on the particular occasion was unwarranted, in which event malice must be averred and established. At page 83 the sheriff principal stated:

> "Where a constable is given power by statute to take into custody a person whom he reasonably suspects of having committed a penal offence and the pursuer avers and proves that no such reasonable suspicion existed, the arrest is unlawful and the pursuer is entitled to a favourable verdict. Malice is not an issue – cf *Shields*. If however at the proof it emerges that the constable did have reasonable suspicion, but that the reasonable performance of his duty did not warrant the exercise of the power of arrest on that particular occasion, the constable will be in a privileged position. The pursuer will not succeed unless he or she can prove that the constable acted maliciously, that is to say that he used the commission of the offence as an excuse rather than the reason for depriving the pursuer of his liberty and that the true reason for the arrest lay in the malice and ill will the constable bore. That is I think what Lord Aitchison was conveying in *Robertson* v *Keith* (which as noted was not an 'arrest' case) when he said … that the presumption that a public official acts within his authority when performing an act which is on the face of it within his ordinary duty 'may be rebutted by showing that the act was unrelated to any duty arising on the particular occasion, in which case the act ceases to be within the authority or competence of the public official and becomes unlawful.' This is to be contrasted with an action which is from the outset unlawful. If the pursuer merely succeeds in establishing that the arrest was unnecessary in the circumstances and was due to excessive zeal on the part of the constable, or an error of judgement on his part, or to the confusion or excitement of the moment the constable will be protected and the action will fail. Clearly malice will be more readily proved if there is evidence of previous ill will, but malice can be established from the constable's conduct on the occasion in question even if the parties were hitherto strangers to each other."

There was no power of arrest, thus issues of malice or ill will did not arise. Mr Whitehouse relies upon this analysis. He offers to prove that there were no reasonable grounds for suspicion that he had committed a crime, thus there was no power to detain and arrest him. This, in itself, is said to be sufficient to entitle him to recover damages for wrongful police conduct.

[146] The difficulty with the pursuer's analysis is that it is well-established that there will be occasions when an absence of probable cause for a detention will not, in the absence of additional proof of malicious conduct, allow recovery of damages. If an officer thinks, honestly and in good faith, albeit without legal justification, that he has power to act, there can be circumstances when he enjoys the privilege. The sheriff principal considers that this applies only where, objectively, there is power to do what he did, in which event it will be

rendered actionable if it was actuated not by a sense of public duty, but by malicious ill will on the part of the officer, in which event presumably it is implicit that a reasonable officer free of such a motivation would not have so acted. The sheriff principal was heavily influenced by the undoubted importance that the law places upon "the sanctity of liberty and the care which the law takes to ensure that the citizen will not lose his liberty unless lawfully apprehended." There can be no argument as to the importance of this, but it does not necessarily follow that all unlawful detentions or arrests will sound in damages. Indeed, as Lord Kingarth's review demonstrated, there are numerous examples to the contrary. And there are powerful policy reasons for not encouraging civil claims whenever a detention, arrest, or indeed a prosecution can be shown to be unjustified in the particular circumstances.

[147] Both Lord Kingarth and Sheriff Principal Cox discussed *Leask* v *Burt* (1893) 21 R 32. The police conduct in that case was described as "a very clear and indeed gross case", and its defence one of the most extravagant submissions heard for a long time. The conduct was "utterly and absolutely illegal". Lord Kingarth commented that it was plain that the police officers' actions were so extravagant that nothing further needed to be averred. Sheriff Principal Cox saw it as an example of a case where no averments of malice were made or required before the pursuer was entitled to an issue.

[148] Sheriff Principal Cox referred to *Beaton* v *Ivory* (1887) 14 R 1057 where Lord Shand spoke of a need to avoid paralysing those engaged in the execution of a public duty in a manner which might deter them from doing what they thought was right and proper in the vindication of the law. "I think there should be such a shield put round public officials in the performance of such duties as will prevent their feeling that they will be liable for actions of this kind (ie founded upon an injudicious, imprudent, even reckless, but

non-malicious order) or an error in judgement." Sheriff Principal Cox limited this decision, and these sentiments, to cases where the "imprudent" order was nonetheless a lawful one. At page 85 he said that Lord Shand's opinion was "not directed to orders given or actions taken which are outwith the law". *Robertson* v *Keith* was another example of an innocent citizen being harmed by lawful policy activity. The sheriff principal noted a concern expressed in that case that an action could lie without proof of malice if a public official, such as a chief constable, acted "outwith his competence – say, arrested someone without warrant for a statutory offence".

[149] The cases of *Malcolm* v *Duncan* (1897) 24 R 747 and *Hill* v *Campbell* (1905) 8 F 220 are not easy to reconcile with Sheriff Principal Cox's overall approach. His discussion of them is somewhat cursory, certainly in contrast to that of Lord Kingarth. He considered *Shields* v *Shearer* to be clear authority for the view that an unlawful arrest is per se actionable although no personal malice or ill will is involved, and that Lord Ross confirmed as much in the case of *Dahl* v *Chief Constable, Central Scotland Police* 1983 SLT 420. It was acknowledged that there could be exceptions, but it was for the defender to establish the necessary facts. Lord Ross (page 422) said that it is enough for the pursuer to aver that the arrest was "wrongful and illegal, ie that it was without a warrant and that there are no circumstances which would justify arrest at all." It was acknowledged that the defender could seek to lead evidence of facts and circumstances sufficient to justify arrest without a warrant. Sheriff Principal Cox explained *Ward* as a case where at most there had been an honest error of judgement. The conduct of the police was not unlawful. To succeed the pursuer had to show that the decision to disperse the crowd was prompted by malice. *Ward*, *Beaton*, and *Robertson* were all to be read in the context of conduct by the authority which was lawful.

Which decision is correct?

[150] Lord Kingarth and Sheriff Principal Cox have amply demonstrated that it is far from easy to reconcile all the cases and all judicial observations. There is much use of the term "unlawful" and similar epithets concerning the conduct of police officers and other public officials. It is a given of any successful civil claim that the conduct complained of was without legal warrant or justification. If a police officer honestly, but erroneously, thinks that there are sufficient grounds for entertaining a reasonable suspicion that X has committed an offence and that detention is appropriate, it is now clear that the detention is unlawful in that it occurred without proper legal justification – see *O'Hara* and the decisions based upon it. That illegality does have consequences, but the present question is whether it permits a claim for civil damages. It can be remembered that the officer would be directly and personally liable, though it would seem that the force will usually stand behind him or her. A similar question arises if it is mistakenly thought that it is sufficient to detain someone simply on the say so of a superior officer, or if there is a misapprehension that an interdict against removal of children carries a power of arrest, or that no such power requires to be attached. On the face of it, it would be surprising if illegality itself was the sole measure of when qualified privilege in respect of civil suit did or did not apply. If that was the case, issues of mere error of judgement, competence/outwith competence, and the like, would never arise.

[151] On Sheriff Principal Cox's analysis there is room for only two categories, namely lawful and unlawful conduct, with the latter including conduct which would otherwise be lawful but for it being unnecessary and prompted by malice. Thus, an alleged lack of probable cause will entitle a pursuer to an inquiry, with the onus then being on the defender to justify the conduct. Justification could not be achieved simply by proof of an honest

mistake; whatever else it would require proof that there was probable cause, that is, in the present context, proof that objectively there were reasonable grounds for suspicion. Failing that, on the *McKinney* analysis, the issue of malice or no malice would not arise; ex hypothesi it would be relevant only where there were good grounds for suspicion, but an officer acting reasonably, and in the absence of any ill will or other improper motive, would not have done what was done. In short, if there is no probable cause, for example in the *O'Hara* objective cause for suspicion sense, it follows that there is civil liability even though the officer is doing, in complete good faith, something which he is expected and authorised to do on a regular basis. He would in every case be acting at his peril if, as things turned out, he made an honest mistake.

[152] I am of the opinion that Sheriff Principal Cox's analysis is flawed, and that of Lord Kingarth is to be preferred. He was correct in his observations (see paragraph 142 above) to the effect that actions generally within the competence of a police officer would have to have been taken without probable cause and maliciously in order to found an action in damages. That said, even on Lord Kingarth's broad approach, in a particular case there may be room for debate and dispute as to whether an officer's conduct was outwith competence, but proof of mistake and consequential illegality would not, of itself, be sufficient for this purpose.

Outwith competence

[153] How should "outwith competence" in this context be defined? Many suggestions have been offered over the years. Sometimes the issue has arisen in respect of applications for a warrant to search premises. *Nelson* v *Black and Morrison* (1866) 4 M 328 was an action brought against procurators fiscal for an alleged slander in a petition to a sheriff upon which

a search warrant was granted. A question was asked as to whether the pursuer required to put malice and want of probable cause in issue. Lord President McNeill observed:

> "It is not disputed that procurators-fiscal, who have certain duties to discharge in reference to the ends of justice, are protected in the ordinary discharge of these duties, unless it can be shown that they acted maliciously and without probable cause. But it is said that in this case it is not necessary for the pursuer to take this burden of proof upon him, because the warrant which the defenders asked for and obtained was in itself an illegal warrant, and, being of that character, was not a thing which they as procurators-fiscal were entitled to ask; and so it is argued that they had no privilege in making the statements upon which they did ask it. That may lead to a question of great nicety, viz. how far a procurator-fiscal puts himself outwith that protection which he would otherwise have, by asking something which he is not entitled to have (*sic*); and that again may depend upon the nature of the illegality involved in the demand. If it is out of all law and reason that a man's repository should be searched, that is one form of illegality. If, on the other hand, the objection is merely that the premises ought not to have been searched in this particular form, that is another matter. The one relates to the substance of the proceedings; the other to the want of formality, or the want of caution in carrying them out. In regard to illegality of the first kind, I think the pursuer would be entitled to have an issue without malice and want of probable cause. In regard to the other, I am of a different opinion. It appears to me that this case falls under the latter class. I think it was competent for the sheriff, under this application, to grant a perfectly legal warrant. For example, if he had limited the search to particular documents, or appointed it to be carried out at the sight of the sheriff himself, I cannot say that there would have been any illegality in such a warrant. That has not been done. But it does not follow that the defenders' application was out and out, and in substance, contrary to law. I am therefore of opinion that in this case the pursuer must take upon him the burden of shewing that the defenders' statements were made maliciously and without probable cause." (pages 330/331)

The importance of these remarks is the elaboration as to the scope of a public official being protected in "the ordinary discharge" of his duties. In short, the conclusion was that the allegation, even if proved, did not take the conduct outwith the ordinary discharge of the procurators fiscals' duties, thus proof of both malice and want of probable cause was required to establish a liability in damages.

[154] In *Graham* v *Strathern* 1924 SC 699, another case concerning a prosecutor, it was accepted by the defender that the pursuer had been detained and charged with reset for an ulterior purpose, namely to recover coins so that the thief could be charged. The proper

course would have been to obtain a search warrant. The Lord Ordinary said that if a prosecutor acts "outwith his duty or makes a departure from regular procedure which amounts to illegality, his privilege will avail him nothing." At an appeal, the Dean of Faculty for the defender noted that the procurator fiscal may step outside the protection of the statute (then the Summary Jurisdiction (Scotland) Act 1908 section 59, the equivalent to section 170 of the 1995 Act) and become a mere wrongdoer. The Lord Justice Clerk, Lord Alness, cited an example of a complaint which did not set out any known statutory or common law offence, but rather some indifferent or ludicrous act inferring no legal consequences of any kind. After giving another example, the Lord Justice Clerk quoted Lord President Inglis in an earlier case: "People may go so absurdly and extravagantly wrong as to put themselves beyond the protection of the statute." Lord Ormidale noted that the argument was that the whole object of the prosecutor was to obtain *in terrorem* evidence for use in another prosecution. The judge observed that the whole affair was blundered, but the prosecutor did nothing of "so extravagant or fantastic in nature as to take him outside the statute" (page 722). The privilege had been provided to enable the performance of duties, often of a difficult and delicate nature, freely and fearlessly according to the best of their judgement. Criminal misconduct would fall to be dealt with by the criminal authorities, not the civil courts. It was held that, at most, the averments instructed that the proceedings, which ex facie were regular, had been brought maliciously by the defender. The statutory privilege (the then equivalent of section 170 of the 1995 Act) extended to malicious acts unless other conditions could be satisfied, which was not possible here. The necessary result was that the pursuer had not escaped "the trammels" of the statute. In short, an "outwith competence" submission was rejected notwithstanding that it was accepted that the prosecutor acted on the basis of an oblique and improper motive.

[155] *Beaton* v *Ivory* (1887) 14 R 1057 concerned a claim for damages where it was averred that the sheriff wrongfully arrested and detained the pursuer in prison. The Lord Ordinary, Lord Fraser said (page 1059):

> "It would be idle to send this case for trial in any view, seeing that malice must be proved. Now, to say that the action of the Sheriff was malicious is to contradict the statement upon the record to the effect that the pursuer was apprehended under 'general instructions'—unless, indeed, it meant to be averred that the Sheriff had malice against the whole population of crofters. In what he did in this case the Sheriff evinced firmness and resolution, and if he had not done so he would not have done his duty. If the chief magistrate of a county, responsible for its peace, were to lie under the threat of actions of damages for what he did in the bona fide execution of his duty, the result would be that his powers to quash tumult and insurrection would be altogether paralysed. It seems to be forgotten that the freedom from responsibility for damages—the absolute privilege that is given to the chief magistrate endeavouring to do his duty—is given to him not for his own sake, but for the sake of the public, whose servant he is, and for the advancement of justice. Upon this ground the Lord Ordinary is of opinion that no relevant case has been stated for the pursuer, and that the action must be dismissed."

Thus, there was no liability when the officer was, in good faith, trying to do his duty.

[156] In a reclaiming motion it was argued that the pursuer was detained simply because he was found in a particular locality. There was no need for malice, the order to arrest had been given wrongfully and illegally. A reckless disregard of the rights and liberties of others was enough. A general order to arrest everyone found in a particular area was illegal. In reply it was submitted that it was not sufficient to demonstrate insufficient grounds for suspecting everyone in a township as being art and part in the issue, namely deforcement of a sheriff officer. The Lord President said that the sheriff was responsible for keeping the peace of his county, and that "he will not be liable for anything that he does in the performance of that duty unless it can be shewn that he was actuated by a malicious motive of some kind." At pages 1061/2 his Lordship continued:

> "The presumption in favour of a public officer that he is doing no more than his duty, and doing it honestly and bona fide, is a very strong one, and certainly ought not to be overcome by the simple use of the word 'malice.' I think the duty of the

> pursuer in a case of this kind is to aver facts and circumstances, from which the Court or a jury may legitimately infer that the defender was not acting in the ordinary discharge of his duty, but from an improper or malicious motive. I must not be supposed as enouncing the proposition that in every case where malice requires to be libelled it is necessary to be so specific as I say the present pursuer must be. There are cases where I think an averment of malice in general terms may be sufficient as between private individuals; but I do not know of any case in which an action has been sustained against a public officer in the execution of his duty, where the presumption of a proper motive has been held to be displaced by a mere general averment of malice, and I should think it most unfortunate if any such rule were to be introduced into practice. It is for the benefit of the public, and for the interests of justice and good government that public officers acting in the execution of their duty should be surrounded by a very considerable protection. The circumstances brought out in the third article of the condescendence I need hardly say are not such as to warrant any inference of malicious motive, and therefore in that respect I conceive the record to be irrelevant."

According to Lord Shand (page 1063) it was

> "of the utmost importance for the public benefit that an official in the position in which the defender was should have the fullest protection in the discharge of his public duty… If we were to entertain actions of this kind, - founded upon the assumption that an order of apprehension was given which may have been injudicious or imprudent, and, in the opinion of some, even somewhat reckless, where there was no feeling of malice against the individual, - it would paralyse those who are engaged in the execution of a public duty, and deter them from doing what they thought was right and proper, and what might even be necessary for the vindication of the law in the circumstances. I think there should be such a shield put round public officials in the performance of such duties as will prevent their feeling that they will be liable for actions of this kind for an error in judgement."

[157] A number of the cases discussed above did not concern police officers, but police officers are but examples of public officials who enjoy "the fullest protection" in the bona fide discharge of their public duty. It is consistent with the general policy underlying this rule that it will no longer apply if it is proven that the official was not performing a public duty entrusted to him. That apart, the law accepts that an official can act without proper justification and thus unlawfully, and cause harm to another, for example loss of liberty, but escape civil liability in the absence of proof of deliberate wrongful motivation. Thus the touchstone is whether or not the official is genuinely and honestly trying to do something

which falls within the four corners of his authorisation. On this view, to succeed against the police Mr Whitehouse will require to prove that the present case falls on the wrong side of this boundary in respect of either or both of his detentions and arrests.

[158] To rebut that proposition, reliance was placed upon *Shields* v *Shearer* 1914 SC (HL) 33 and *Robertson* v *Keith* 1936 SC 29. Reference has already been made to Lord Kingarth's discussion of *Shields* in his judgment in *Woodward*. Lord Dunedin drew a distinction between cases where malice may properly be inferred from the mere wrongful act that is done, and those where it is necessary to aver additional facts and circumstances. The pursuer had averred that there were no circumstances which could have justified the arrest. That was sufficient to allow an issue to be presented to the jury which said no more than that the arrest was wrongful and illegal. Lord Dunedin added (page 35) that "any question of privileged situation" could be left to be dealt with by the judge at the trial. It is clear that Lord Dunedin was not casting doubt upon the decision in *Beaton* v *Ivory* – see the opening paragraph of his speech. His Lordship was of the view that enough had been averred to allow an inference of malice. If a pursuer offers to prove that there was no conceivable basis for an officer forming a reasonable suspicion of guilt, no real issue of principle as to the scope of the privilege arises. There was no need to be anxious as to the wording of the issue given that the trial judge could direct the jury as appropriate. Lord Shaw said that the case was as simple as an allegation that the owner of a watch was arrested for having it in his possession. His Lordship had difficulty in understanding what the appellant's real complaint was when "maliciously" would add nothing to the issue as it stood. More problematic is his comment (page 37) that if a constable has arrested a citizen without reasonable grounds of suspicion against him "the law would demand no further proof of malice". In the overall context of the case, I take this to mean no more than that such could

be habile to instruct malice. Much can depend upon the particular facts as they emerge after evidence, and if the picture is that there is no room for a bona fide mistake, it is a short step, if a step at all, to the necessary malice allied to a lack of probable cause. Lord Shaw made it clear that throughout the onus rests on the pursuer, and there was no objection to Lord Salvesen's reference to the protection given to police officers in the discharge of their duty. It would be for the judge to charge the jury that they must find the officer acted maliciously. The case concerned the wording of an issue, as opposed to fundamental principles of law. It does not have the critical importance suggested by counsel for the pursuer.

[159] The submission for Mr Whitehouse is that the police conduct was so irregular as to be removed from the common law protection. The irregularity is said to be the absence of any sound basis for the detentions and arrest, in other words that they were carried out in the absence of probable cause. That may be sufficient to render the conduct unlawful and trigger certain consequences, but not liability to civil suit. If that was sufficient to remove the privilege against civil damages for wrongful conduct, the requirement of malice would be set aside. The contention is that conduct short of malice or ill will, such as recklessness or extreme carelessness is sufficient – but the authorities suggest that the protection is so wide that, failing something as fundamental as a patently illegal warrant (though even then the defender may be able to establish facts and circumstances which elide liability), the allegation must be of conduct so extreme or extravagant as to make it clear that the officer has removed himself from the common law shield. In *Graham* (see above) the prosecutor had taken the wrong course of action and had failed to follow the proper procedure, but this was insufficient to bar reliance upon the statutory protection. It was regarded as a mere error of judgement, and there was no liability for such.

[160] *Robertson* v *Keith* 1936 SC 29 concerned the conduct of a chief constable. The pursuer's submission was that malice need not be proved. It was enough that there had been an unjustifiable, unreasonable and unwarranted use of the defender's powers in setting up a five day police watch on the pursuer's house, which caused her much loss, injury and damage. This was done in the hope of detecting a police inspector who was missing from duty. It was argued that "privilege could not be turned into an instrument of oppression." If it was necessary, and though malice had not been averred, it was submitted that the evidence showed such recklessness as to allow an inference of malice and want of probable cause.

[161] The leading judgment was delivered by Lord Justice Clerk Aitchison. Conduct was within the competence of an officer if "it was done truly in the pursuance of an official duty" (page 45). Amid the plethora of different phrases and epithets, this may be as helpful a general definition as one is likely to find. If it applies "a large measure of protection attaches to the act so as to confer upon the public officer a wide immunity from civil liability. …it is essential that the act should have been done maliciously and without probable cause before liability can attach to the defender as for a legal wrong." It follows from this that malice cannot, of itself, remove an act from the scope of within competence conduct, nor an absence of probable cause, nor even when both are established. What is recognised is that liability will attach if competent official powers are being deliberately abused. The only other potential category is where an officer's conduct does not fall within the scope of his normal authorised duties and powers. Reference was made to *Hill* v *Campbell* (1905) 8F 220 where it was held that if police constables made an arrest at a place where they enjoyed a right to make arrests, this would be protected even if the arrest and charge lacked probable cause, unless malice was established. A mistake or error of judgement was not enough.

[162] In *Robertson* at page 47 Lord Justice Clerk Aitchison stated that an act is prima facie within competence when it is the kind of act that is within the officer's ordinary duty to discharge. This creates a rebuttable presumption that the officer acted within his authority unless it is shown "that the act was unrelated to any duty arising on the particular occasion" in which event, according to the Lord Justice Clerk, it ceases to be within the authority or competence of the public official and becomes unlawful. Unfortunately this is another example of the somewhat loose and open to interpretation language sometimes employed by judges in this context, but it was stated that the onus of proof rests on the pursuer. If that onus is not met, proof of malice and absence of probable cause is necessary. Again it is clear that a want of probable cause alone (probable cause meaning "provable cause – that is excusable or just cause" (page 48)) cannot of itself remove the official's protection. In my respectful opinion matters are not assisted by Lord Anderson's observation (page 57) that official actings are incompetent "where powers have been grossly exceeded or abused." It may be that his Lordship was primarily concerned with when conduct is and is not privileged; however, as stated, the approach squeezes the scope of competent but unprivileged conduct almost to nothing, perhaps to Sheriff Principal Cox's thesis of lawful but unreasonable actions.

[163] I agree with Lord Kingarth that the question boils down to whether one defines "competent discharge of duty" broadly or narrowly. I also agree with his preference for the broad approach. The alternative runs counter to the many references in the cases to police and other public officials enjoying a high degree of protection, privilege, or immunity, however one wishes to express it, from civil liability, even when it involves depriving a citizen of his liberty. Lord Murray emphasised this in *Robertson* at pages 60/61. He attached the protection to all actings of a public official "which, in any reasonable sense, can be

referred to the rights and duties of the person holding that office." Later he described the issue as whether it can be said that the action taken "was manifestly outwith the ambit of the defender's official powers and duties." This connotes an objective test based on a comparison of the conduct involved with the ordinary duties of the official. Thus, by way of example, if a police constable detains someone, it will not cease to be within the general ambit of his powers if he did so for no good reason because of spite and ill will, though if those factors can be established the privilege flies off.

[164] In the present context the policy is that the police should be able to discharge the duties of their office without being exposed to civil damages claims unless want of probable cause and malice are proved. Anything less, such as error, incompetence, or overzealousness, is not enough to set aside the privilege. And this remains so even if the error renders the conduct unlawful. It may be that sometimes judges have conflated malice and a lack of probable cause with conduct beyond the competence of the officer, perhaps to avoid perceived injustices flowing from the statutory predecessors to what is now section 170 of the 1995 Act; but logically something more or different is required if the conduct is to be removed from the plea of privilege, perhaps conduct of a type which the law could never recognise as part of the officer's authorised duties, even if the officer honestly thought otherwise. If one is not in that territory, the law does not impose civil liability upon a public officer who is carelessly but honestly pursuing his public duties. A similar approach was applied in *Salmon* v *Chief Constable of the Police Service of Northern Ireland* [2013] NIQB 10, to the general effect that a negligent investigation which leads to an arrest does not sound in damages (paragraph 33). Reference can also be made to *Juman* v *Attorney General of Trinidad and Tobago* [2017] UKPC 3 at paragraph 17, where it is stated that

carelessness and recklessness are not to be taken as necessarily tantamount to malice in the context of an allegedly malicious prosecution.

[165] On this approach, if when detaining and arresting the pursuer the officers concerned were discharging the duties of their public offices, the pursuer will require to show that the particular circumstances in which the duties were exercised were such as to elide the privilege; in other words, that they demonstrate malice and a want of probable cause. The first defender has conceded a proof before answer and makes no contrary motion to the court. Thus the above comments arise only in the context of the pursuer's plea that he need not aver and prove that the officers acted maliciously and without probable cause, and that the defenders' averments are irrelevant. I hope that the above is sufficient to explain why I have decided not to repel any of the first defender's pleas in law at this stage, nor exclude any part of his defences from probation. As I understood it, the detailed criticisms of alleged gaps in the first defender's pleadings were primarily based on the proposition that the onus was on him to justify his officers' conduct. However, in so far as the pursuer sought to make any separate submission regarding lack of detail or inadequate specification, I am satisfied that enough has been averred to give sufficient and fair notice of the lines to be taken at any proof.

[166] Before concluding this chapter, it is appropriate to add a further reference to *Hester* v *MacDonald*, not least since the pursuer mentioned a similar "outwith competence" submission in respect of the conduct of the Crown, in particular the service of the petitions and indictments, and this to rebut the plea of absolute immunity. Much of what has been said above in respect of the case against the police applies also in this context, and there are passages in *Hester* to similar effect. The circumstances in *Hester* were described earlier. Amongst other things it was argued that the irregularity was such that the depute fiscal

conducting the trial could not be granted immunity. The whole proceedings were a nullity given the failure to serve the indictment upon Mr Hester. It was held that the depute fiscal was not responsible for the defect, therefore he could not be liable in damages (Lord President Clyde 380/1). In any event, he was entitled to the protection given to public officers acting in the execution of their duty. After reference to the opinion of Lord Justice Clerk Aitchison in *Robertson*, which has been discussed earlier, and on the premise of no absolute immunity, the Lord President continued:

> "It follows that if the act in question is within the authority or competence of the official and is not malicious, an innocent mistake will not render the official liable in damages…, nor will an error of judgement on his part…"

Once more the emphasis is upon the nature of the act in question – was it something within the four corners of the official's duties? To conduct the trial was part of his authorised activities, and to continue with it after the problem was pointed out was, at most, a mistake or error of judgement. That did "not mean that he had ceased to act within his competence, or that he was doing something unrelated to his duty on the occasion in question."

[167] Again on the hypothesis that there was no absolute immunity, Lord Guthrie addressed the argument that averments of malice were not required because the proceedings were unwarranted and unlawful, and that the third defender had participated in an illegal interference with the pursuer's liberty in circumstances where innocence and ignorance were no defence. At page 390 his Lordship observed that there were statements in judicial opinions, which, when read without the qualifications of their context and of their circumstances, supported the contention for the pursuer. He cited some of these to the general effect that proof of malice and want of probable cause is not needed in respect of injury caused by unwarranted and illegal proceedings by a public officer. However, it was still necessary to address whether the defender was liable in reparation for the injury. In the

context *culpa* required proof of intentional injury. If the act itself infers malice, intention can be presumed (*Shields* v *Shearer*, Lord Dunedin at page 35). In all the cases cited on behalf of the appellant the defender took part in the act which created the illegality "and was aware of the circumstances which rendered the proceedings illegal". (page 390) It was recognised that there could be cases where what was done was known to the defender and was so oppressive and "so palpably unjustifiable in legal principle that he must be responsible for the consequences, even if, in fact, though not in law, the wrongdoer acted with an innocent mind." All of this is far removed from the suggested approach whereby malice is rendered irrelevant simply because harm was caused by a wrongful and unlawful act or proceeding. In the circumstances of *Hester*, Lord Guthrie held that the depute fiscal "was acting within the scope of his duty as a public official". It followed that if the claim against him had not been struck down by the plea of absolute immunity, averments of malice and want of probable cause would have been needed.

[168] It is instructive to notice that the court considered that its decision on the third defender's absolute immunity, and hence the incompetency of the action, rendered it unnecessary to resolve the other arguments for the pursuer, though it did in fact address them. The implication is that counsel for the Lord Advocate was correct when he submitted that, in this context, "absolute" means "absolute". Where it applies the immunity means that there is no room for talk of civil liability, even if malice and want of probable cause can be demonstrated.

Other issues raised by the first defender

[169] The first defender relied upon the terms of section 22 of the 1995 Act, which excludes any claim in respect of the decisions of someone in the position of the custody sergeant at

Helen Street Police Station. Reference was made to *Beck* v *Chief Constable, Strathclyde Police* 2005 1 SC 149 in support of the submission that the majority of the pursuer's time in custody is covered by statutory immunity. This alone meant that the first defender's defences on the merits cannot be dismissed at this stage, and that a proof will be required. On behalf of the pursuer it was pointed out that he does not seek damages for the decisions of the officer in charge of the police station. The case is based on the harmful consequences of the wrongful conduct and decisions of others. Since I am allowing a proof before answer on all the averments of the pursuer and the first defender, it is appropriate to postpone consideration of the implications, if any, of section 22 until after the evidence has been heard.

[170] Counsel for the first defender also submitted that, if the pursuer is ultimately entitled to damages, the scope of the respective liabilities of the responsible parties will require to be allocated and apportioned. For example it is clear that the prosecutions were not mounted by the first defender, and the pursuer avers that his detention in 2014 was on the instructions of the second and third defenders. Questions concerning scope of duty and remoteness of damage can only be addressed after proof. An issue was raised as to whether article 5 of ECHR requires a detaining officer to hold a reasonable suspicion of guilt, or whether it is sufficient if information held by others would satisfy an objective observer that the person concerned may have committed an offence. I mention these points simply for completeness – they were raised principally in the context of rebutting any request by the pursuer for a decree in his favour against the chief constable at this stage.

Summary and decisions

[171] The pursuer, and separately his former co-administrator of Rangers Football Club, are claiming damages from those said to be responsible for allegedly wrongful detentions,

arrests, and prosecutions. The claims are brought at common law and in terms of articles 5 and 8 of ECHR. The Lord Advocate's submission that the article 8 claim should be dismissed in advance of proof is rejected. However his plea of absolute immunity in respect of the common law claims is upheld. It follows that the actions against him shall proceed in respect of only the ECHR claims.

[172] So far as Mr Whitehouse's claim against the police is concerned, the court is not prepared to uphold his submission that it can be decided on the pleadings that he need not prove malicious conduct on their part. The result is that the pursuer's claim against the chief constable, and the defences to it, shall proceed to a proof before answer (as was agreed by the respective parties in Mr Clark's action).

[173] Before issuing interlocutors in this and Mr Clark's action, I shall put both cases out by order for a discussion of the implications of the above for the pleas-in-law and the scope of the respective proofs; for clarification as to the position of the second defender; and for consideration of any other matters of further procedure arising.