OUTER HOUSE, COURT OF SESSION

[2022] CSOH 16

CA9/20

OPINION OF LORD TYRE

In Minute for

DUFF & PHELPS LIMITED

Minuter

In the action at the instance of

DAVID JOHN WHITEHOUSE

Pursuer and First Respondent

against

CHIEF CONSTABLE, POLICE SCOTLAND

First Defender and Second Respondent

and

THE LORD ADVOCATE

Third Defender and Third Respondent

Minuter: Dean of Faculty, McKinlay; A & WM Urquhart
Pursuer and First Respondent: No appearance
First Defender and Second Respondent: No appearance
Third Defender and Third Respondent: Moynihan QC, Hamilton; Scottish Government Legal Directorate

11 February 2022

Introduction

[1] The pursuer raised an action for damages against the Chief Constable and the Lord Advocate for unlawful detention and arrest and malicious prosecution. Proof before

answer was allowed and a proof was due to commence in January 2021. Before the action came to proof, the Lord Advocate admitted that from a particular stage of the proceedings there was a malicious prosecution in the technical sense of that term in the law of delict, and accordingly that the Lord Advocate was liable to make reparation to the pursuer. Both defenders settled the claims by the pursuer against them, and the action is effectively at an end.

[2] The minuter is and has at all material times been the employer of the pursuer and of Mr Paul Clark whose parallel claim for malicious prosecution was also admitted and settled. Following upon the admissions in those cases, the minuter has raised proceedings in this court for damages against the Lord Advocate on grounds of misfeasance in public office, or abuse of power in the exercise of a public office or function. The Lord Advocate has lodged defences in which, inter alia, it is denied that the prosecutions were at all times conducted maliciously.

[3] The minuter has lodged a Minute craving the court to authorise the provision of copies of the following documents from the present action to the minuter, on the condition that it may use and disclose the material so provided solely in the context of its existing proceedings against the Lord Advocate:

a. All witness statements or affidavits lodged by the defenders (the Chief Constable and the Lord Advocate);

b. All inventories of productions (including copies of the productions themselves) lodged by the defenders;

c. All commissioners' reports produced in relation to the recovery of material held by or on behalf of the defenders, the recoveries and inventories thereof referred to therein, and transcripts of evidence given; and

d. All documents produced by the defenders to the pursuer on a voluntary basis, whether under optional procedure or otherwise.

The Minute is opposed by the Lord Advocate.

[4] The minuter's claim is based upon the same factual grounds as those founded upon by the pursuer in his action. The minuter has instructed the same legal representatives as the pursuer. The documents of whose provision the minuter seeks authorisation are in the hands of those legal representatives.

The law

[5] The relevant law is as stated by Lord President Rodger in *Iomega Corporation* v *Myrica (UK) Ltd* 1998 SC 636. In *Whitehouse* v *Chief Constable & Anor* [2021] CSOH 33, I summarised it as follows:

1. A party who, as a result of commission and diligence, obtains possession of documents or other items is subject to an implied obligation or undertaking to the court not to use them nor to allow them to be used for any purpose other than the conduct of the actual or prospective proceedings in respect of which they have been recovered.

2. The Court of Session has power to permit items recovered for particular proceedings in this court to be used for other proceedings, where that would be in the interests of justice.

3. Since it is the court which has the power to give the necessary permission and the party can do nothing without that permission, the court can attach any conditions which it thinks fit to any permission that it grants. The attaching of

appropriate conditions gives rise to no issue of competency, and the framing of such conditions is a matter for the exercise of the court's discretion.

4. In deciding whether to grant permission and, if so, on what conditions, the court is exercising a discretion and the guiding principle in the exercise of that discretion will be the interests of justice in the circumstances of the particular case.

[6] The implied undertaking not to use documents for other proceedings, and the court's discretion to permit their use, applies to documents produced voluntarily in the same way as they do to documents recovered by commission and diligence. It applies not only to the documents themselves but also to the information that they contain (cf *Cobra Golf Inc* v *Rata* [1996] FSR 819, Laddie J at page 830).

[7] Lord President Rodger observed in *Iomega* at page 646 that English case law provided useful illustrations of factors for the court to take into consideration when exercising its discretion. In England and Wales the rule known as the collateral purpose rule has now been codified in a rule of court (CPR rule 31.22). In *Tchenguiz* v *Director of Serious Fraud Office* [2014] EWCA Civ 1409, Jackson LJ made the following observations in relation to the rule (paragraph 66):

> "(i) The collateral purpose rule now contained in CPR 31.22 exists for sound and long established policy reasons. The court will only grant permission under rule 31.22(1)(b) if there are special circumstances which constitute a cogent reason for permitting collateral use.
> …
>
> (iii) There is a strong public interest in facilitating the just resolution of civil litigation. Whether that public interest warrants releasing a party from the collateral purpose rule depends upon the particular circumstances of the case…
>
> (iv) There is a strong public interest in preserving the integrity of criminal investigations and protecting those who provide information to prosecuting authorities from any wider dissemination of that information, other than in the resultant prosecution."

[8] These observations appear to me to be consistent with the decision in *Iomega.* However, as regards information disclosed in criminal proceedings by a prosecutor to an accused, section 162 of the Criminal Justice and Licensing (Scotland) Act 2010 restricts use or disclosure of such information to the proper preparation and presentation of the accused's case in the proceedings in relation to which the information was disclosed, and any appeal in relation to those proceedings. Section 163 makes it an offence to contravene section 162.

Argument for the Lord Advocate

[9] On behalf of the Lord Advocate it was submitted that it would be contrary to principle to grant an order permitting blanket use by the minuter of documents lodged for the purposes of the pursuer's action. No cogent and persuasive reason had been advanced to use all of the documents. Merely to assert that documents had some relevance to the resolution of civil litigation was inadequate. The applicant still had to demonstrate cogent reason for disclosure. That was particularly so if the documents related to a criminal investigation, given the public interest in protecting the integrity of criminal investigations.

[10] The minuter had refused to identify particular documents of interest. It had produced a list of 18 proposed averments that were said to justify access to documents. There was no justification for recovery of documents bearing on seven instances where the minuter stated that full averments had already been made, and there was no definitive identification of eight instances where it was said that access to documents would enable fuller pleading. Reference was made to the observations of Lord Cameron in *Moore* v *Greater Glasgow Health Board* 1978 SC 123 at page 131 regarding recovery of documents prior to the allowance of proof. The list took no account of admissions made by the Lord Advocate in

the minuter's action which cut down the range of documentary evidence required. In relation to some items the minuter would have documentation of its own.

[11] The proper course of action was for the minuter to produce a list of the documents that it wished to use, with an explanation of why. Although it was accepted that even producing such a list would, technically, be a breach of the implied undertaking by the pursuer and his legal representatives, the Lord Advocate gave permission for the minuter to identify the documents it wished to use in its action. The list could be put to the Lord Advocate and insofar as the Lord Advocate granted permission for use, there would be no need for the court to make any ruling. The Lord Advocate further gave permission to the minuter to place the list and the documents referred to in it before the court, in order to enable the court to rule on the request for permission to use any documents that the Lord Advocate did not consent to release.

Argument for the minuter

[12] On behalf of the minuter, it was submitted that the interests of justice lay in favour of granting the minute. The same considerations applied to the present application as had applied to the pursuer's application in *Whitehouse* v *Chief Constable & Anor* (above). Requiring the minuter to provide a list, when there was already a bundle of documents in the hands of the same solicitors, and known to the same counsel, would be unduly onerous and expensive. There would moreover be a risk, if permission were restricted to certain documents, that counsel would inadvertently plead a case based on wider knowledge of the background. Permission was sought only to use and disclose the material in the context of the minuter's existing proceedings against the Lord Advocate. The reality was that the only

people who would see the documents were the legal advisers who had already seen them. The restriction on use meant that any wider dissemination would be a contempt of court.

[13] The task of compiling a list of the documents required would itself constitute a contempt of court. The ability to use documents did not depend on the permission of the Lord Advocate, but rather on the permission of the court to whom the implied undertaking was given. The purported permission did not lie in the gift of any litigant, even the Lord Advocate. That was particularly so when many of the documents in question had come not from the Lord Advocate but from other havers (who were not resisting the Minute).

[14] Commercial court procedure adopted a "cards on the table" approach. That was appropriate here. Permission limited to certain documents referable to what was needed to make pleadings relevant would not address the situation in advance of proof. The Lord Advocate's suggested approach would create difficulties in the event of witness statements suggesting testimony known to be contrary to documents not covered by the permission. In so far as the Lord Advocate relied upon preservation of the integrity of criminal proceedings, there was a reduced public interest in preserving the "integrity" of proceedings that were admittedly wrongful, at least in part. The admissions of liability that had been made were limited; the minuter claimed that the prosecution was wrongful from the outset, and would have to aver and prove why, and in whose mind the (admitted) malice rested.

Decision

[15] I am satisfied that in the circumstances of the case it is in the interests of justice to grant the Minute. The circumstances are unusual: permission is being sought to use documents in proceedings

- in the same court,
- arising out of the same facts and based on a broadly similar legal foundation as the proceedings in which the documents were lodged,
- in which the respective parties are closely connected,
- in which the same legal representatives – both solicitors and counsel – are instructed, and
- where the documents are already in the possession of those legal representatives.

That being so, many of the concerns discussed in other cases, such as understanding the use to which the documents may be put in proceedings in a foreign jurisdiction and assessment of their importance in those proceedings (as in, for example, *Tchenguiz* above), do not arise. It is, in effect, the minuter's intention to use the documents for the purposes for which they were lodged in the pursuer's case, albeit that they were not ultimately required for a proof in that case because it was resolved by settlement.

[16] I reject the Lord Advocate's submission that there is a principle that requires a selective approach to be adopted. In my view there is no underlying principle beyond application of the interests of justice. The process of recovery of documents in the pursuer's action was long, tortuous and expensive. In my judgment there is a strong likelihood that if the present application were dealt with by a staged approach, the result would be a repetition of that process, with disputes developing as to whether the minuter's explanation

for requiring each particular document was or was not accepted by the Lord Advocate. If the reference made during the hearing to *Moore* v *Greater Glasgow Health Board* is to be interpreted as an indication that a restrictive attitude would be adopted by the Lord Advocate, I fear that the disputes would be numerous and that the provision of the minuter's list would only be the beginning of another long and expensive procedure. That is not in the interests of justice.

[17] Nor, in my opinion, did the Lord Advocate provide a satisfactory answer to the minuter's submission that even providing a list would constitute a "use" of the documents and therefore a breach of the implied undertaking and a contempt of court. As the Dean of Faculty pointed out, it is not for the Lord Advocate to grant permission for a breach of an undertaking given to the court, whether in relation to documents that he/she has lodged or in relation to documents lodged by third parties. Moreover, as senior counsel for the Lord Advocate accepted, it would in practical terms be impossible now to make a separation between documents lodged by the Lord Advocate and documents lodged by others; in many instances the same document will have been lodged by more than one party. I have sympathy with the concern expressed by the Dean of Faculty that with the best of intentions it would be very difficult for the minuter's legal representatives, when preparing for a proof, to be confident that they were employing knowledge obtained from "listed" documents and not unwittingly making use of knowledge gained from other documents in respect of which no authorisation had been granted.

[18] At a practical level, it seems to me that granting the authorisation sought is likely to have benefits if a proof is required in the minuter's action. If all parties are aware from an early stage of the full extent of available documentation, I would express the hope that this would facilitate a coherent, co-ordinated and (I wish to emphasise) *selective* approach to the

lodging of documentary productions, with proper identification of a core bundle of documents and avoidance of multiple duplication.

[19] One qualification does, however, require to be made to the authorisation being granted. I have mentioned the restriction in section 162 of the Criminal Justice and Licensing (Scotland) Act 2010 on use of information disclosed in criminal proceedings by a prosecutor to an accused. In *Whitehouse* v *Chief Constable & Anor* (2021), I received an assurance, recorded at paragraph 7 of my opinion, that authorisation was not sought in relation to documents (including certain expert reports) disclosed by the Crown for the purposes of the criminal proceedings against the pursuer which had not been recovered in the civil proceedings by application for commission and diligence. Authorisation of the provision of documents to the minuter will require to be subject to an equivalent exclusion.

[20] Subject to that qualification, the minuter's motion is granted. I propose in the first instance to invite parties to agree the terms of the section 162 exclusion, whereupon I shall pronounce an interlocutor. If agreement on this cannot be reached, a further hearing will be fixed.