FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 23
P831/16

Lord President
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion by

THOMAS SHERIDAN

Petitioner and Reclaimer

against

THE SCOTTISH CRIMINAL CASES REVIEW COMMISSION

Respondents

Petitioner and Reclaimer: G Dangerfield, sol adv; Archer Coyle, Glasgow
Respondents: Moynihan QC; Scottish Criminal Cases Review Commission

10 April 2019

Introduction

[1] This is the latest episode in the saga of cases involving the petitioner, which stems from articles which were published in the *News of the World* in November 2004 and January 2005. In August 2006, a civil jury determined that the articles were defamatory. They awarded the petitioner £200,000. In March 2008, criminal proceedings for perjury at the civil jury trial were instituted against the petitioner. These culminated in the petitioner's conviction in December 2010. In August 2016 the publishers of the *News of the World* failed

in their attempt to secure a new civil jury trial (2017 SC 63). There have been subsequent skirmishes about interest (2018 SLT 249, 2019 SLT 10).

[2] Meantime, the petitioner was refused leave to appeal his conviction. His application to the respondents to refer the conviction to the High Court under section 194B of the Criminal Procedure (Scotland) Act 1995 was refused in March 2015 and again in June 2016 and 2017. The petitioner challenged the first two of those decisions by petition for judicial review. His challenge was rejected by interlocutor of the Lord Ordinary dated 21 June 2018 ([2018] CSOH 69). This is a reclaiming motion seeking review of that interlocutor.

[3] The reclaiming motion raises issues about the scope of judicial review in relation to the respondents generally and, in particular, the degree of investigation which the respondents are required to carry out and the extent to which they need to recover documents which were not produced at trial (1995 Act, s 194F). It concerns whether the respondents had closed their minds before reaching their decisions. It alleges that the respondents ought to have referred the case on the basis of evidence which was not heard at the trial (1995 Act, s 106(3)(a)). It maintains that the prosecution was oppressive because of, *inter alia*, the conduct of counsel for a co-accused.

The Perjury Trial

The Crown case

[4] On 23 December 2010, at the High Court in Glasgow, the petitioner was convicted, by a majority verdict, of perjury. Specifically, he was found guilty of telling lies on 21 July 2006, when giving evidence in the civil jury trial of his successful defamation action against News Group Newspapers. That action had related to the publication, on 14 and 21 November 2004 and 2 January 2005, in their Sunday newspaper, namely the *News of the*

World, of statements that the petitioner: had committed adultery with Fiona McGuire, AK and other unnamed persons; was a swinger and had participated in orgies; and drank champagne whilst purporting to be teetotal. He was thus, by innuendo, a hypocrite and an abuser of his position as the leader of the Scottish Socialist Party. The issue for the civil jury had been whether these statements were defamatory, to the petitioner's loss, injury and damage. The jury agreed that they were, at least in part, defamatory and awarded the pursuer £200,000. The motion for a new trial, which was based in part on the facts found established in the perjury trial, was refused on 19 August 2016.

[5] The untrue matters, which the jury found established, were that, when giving evidence in the civil trial, the petitioner had denied that, at a meeting of the Executive Committee of the SSP on 9 November 2004 he had: (i) admitted attending Cupid's Club, Manchester, in 1996 and 2002 and had visited it with AK (sub-heading A in the charge); (ii) previously admitted to two members of the Executive Committee, who had raised the issue, that he had attended a sex club in Manchester (sub-head B); and (iii) not denied having visited a swingers club in Manchester (sub-head C). He had also falsely denied that he had: (iv) attended Cupid's on 26 September 2002 with Andrew McFarlane and Gary Clark, AK and KT and had also visited a swingers club (sub-head M); and (v) had a sexual relationship from 2000 to 2005 with KT (a party worker) and had stayed overnight with her at an address in Dundee (sub-head O). It was not alleged in the perjury indictment that he had falsely denied having a sexual relationship with Ms McGuire.

[6] In relation to sub-heads A, B and C, the Crown had led evidence from BS, who said that she had been taking the minutes at the SSP Executive Committee meeting of 9 November 2004. She had made handwritten notes in a book. She had torn the relevant pages out of the book, but had retained both them and the book. She had later prepared a

typed minute of the meeting. According to BS, the petitioner had been invited to speak first. He had admitted that he was the, then anonymous, MSP who had been mentioned in earlier articles in the *News of the World* as having been at a swingers club in Manchester. He had admitted that he had visited the club with close friends on two occasions in 1996 and 2002. BS said that Alan McCombes had stated that he had been aware of the incident in 2001 (*sic*) and had asked the petitioner about it. He had denied it but, a year later, when he had raised the issue again in the company of Keith Baldassara, the petitioner had admitted that it was true, but had asked them not to mention it further.

[7] BS had written a note to CG, who had been sitting next to her, asking "Is this a dream?" CG had replied, "You know now, now you know how bad it is". For some reason, BS had been concerned about her bag being stolen, and with it her notes. It was for this reason that she had torn the pages out and given them to AG. She had had the notes with her when she had testified at the civil trial. She had handed them over to the police after the verdict in that case. Corroboration of BS's account of the meeting came from a number of witnesses who had attended, namely: Mr McCombes, Mr Baldassara, AG, CL, FC, RK, RV, CF, AK(no.2), DR, FG, CG, JH, KMcV, and SN.

[8] KT gave evidence about going from Glasgow to Cupid's in Manchester. AK, who was a freelance journalist, gave evidence that she had also been on this trip, as did Mr Clark. The petitioner was identified by TC and PT as having been in Cupid's. Various people spoke to admissions made by the petitioner that he had been to the club, including CMcC, JMcV and NMcK.

[9] After the civil action had concluded, NGN had paid George McNeilage for a videotape, which was subsequently given to the police and used at the trial. Mr McNeilage, who had been a friend of the petitioner, said that it showed a meeting between him and the

petitioner on 18 November 2004. He had secretly recorded it, although there were no clear images of the petitioner. A number of witnesses spoke to the voice of the person, who was not Mr McNeilage, on the tape being that of the petitioner. That person was heard to admit that he had visited a swingers' club on two occasions and regretted having made admissions at the SSP Executive Committee meeting. Mr McNeilage said that, shortly before the meeting, the petitioner had texted him to say that he was on his way. The petitioner's phone bill showed that he had phoned Mr McNeilage at that time (although the phone, which Mr McNeilage used, was not in his name). During the recorded episode, Mr McNeilage said that the petitioner had switched on his phone, which had been off, to show him a text message. Telephone records showed that, at the relevant time, there had been a short call (ie a text) to the petitioner's phone.

[10] The Crown produced the petitioner's diary for 2001. The word "Cupid" had been written in it for the date of 3 October 2001, although the entry had been scored out. Below that there was a telephone number, which bore a close resemblance to that of Cupid's, with only the final number "7" being substituted with "(3.5)". There was an entry of the same phone number under the name of a trades union organiser. The name was real, but the phone number was not his, but Cupid's.

[11] There were further phone records relied upon, notably one showing a call on 9 November 2004 from the petitioner to Mr Clark, and a later one to KT, followed by another to Mr Clark. The contention was that it was significant that the petitioner had phoned two of the alleged participants in the Cupid's visit immediately following the SSP Executive Committee meeting. There was an entry on the petitioner's phone bill for 23 November 2001, showing that Cupid's had been phoned. The various participants on the trip to

Cupid's, namely Mr Clark, AK and KT had all been phoned by the petitioner on 26 November 2002.

[12] In relation to sub-head O, KT gave evidence that she had joined the SSP in about 2000. She had been canvassing with the petitioner at the Anniesland by-election. She had had sexual intercourse with the petitioner at his house in December 2000. On another occasion, she had had intercourse with the petitioner at the house of Mr McFarlane in Glasgow. She described episodes when the petitioner had visited her in Aberdeen and stayed the night. She had had intercourse with the petitioner during the day. She had also had intercourse with him at Glasgow City Chambers, after a St Andrew's Day march, in 2001. On another occasion, when she was living in Dundee with RA, she had taken the petitioner back to her house and they had again had intercourse. The corroboration, that KT had had a sexual relationship with the petitioner, came from RA and RB, both of whom had been at the house in Dundee. CMcC had described the petitioner and KT flirting at the Anniesland by-election. He had spoken to an admission by the petitioner that he had had an affair with KT.

The Commission and Diligence

[13] During the criminal process, the petitioner had attempted to probe the depths of certain illegal activities carried out by the *News of the World* by using the commission and diligence procedure to recover documents from NGN and the police. Some of these activities had come to light between the civil and the criminal trials. In 2007, for example, Glen Mulcaire, a private investigator acting for the newspaper and the paper's royal editor, Clive Goodman, had been convicted of intercepting phone calls from the house of the Prince of Wales.

[14] The petitioner had made detailed averments in his application for a commission and diligence. This sought the recovery of "information" said to have a bearing on the issues in contention and which was necessary for the proper preparation and presentation of the defence (*McLeod* v *HM Advocate (No. 2)* 1998 JC 67 at 80). The petitioner maintained that NGN had had extensive contact with Crown witnesses, including the taking of statements from them. They had made, or offered to make, payments to witnesses for travel and accommodation expenses and, in the case of Mr McNeilage, for the delivery of the videotape. The petitioner averred that there were grounds to suspect that NGN had engaged in covert surveillance of the petitioner, including placing a "bugging device", which had been found on his car, and phone interception. Mr Mulcaire and Mr Goodman were named in the application, as was a *News of the World* journalist, namely Douglas Wight. The police investigation into Mr Mulcaire's activities had produced some evidence of surveillance on the petitioner. The petitioner averred that £25,000 had been paid to Ms McGuire, although she was not a witness in the perjury trial. He claimed that the prosecution had been the subject of "undue influence" from NGN. He complained about the leaking of information from the police to NGN.

[15] On 30 March 2011, the court had granted the commission to the extent of recovering documents concerning offers of payment (including those relative to the McNeilage tape), surveillance of the petitioner and leaks by the police concerning the petitioner's prosecution. The judge in the High Court had commented that he was bound by *McLeod* v *HM Advocate (No. 2)* (*supra*). He did not consider that a "general trawl or sweep for documents should be permitted" but, in relation to payments to witnesses or for materials, "that ... could constitute a basis for questioning designed to test the reliability and credibility of the

witness on the authority (*sic* ? authenticity) of the tape". He was also satisfied on the materiality of the other matters for which an order for recovery was granted.

[16] In due course, during the cross-examination of Bob Bird, who was the *News of the World*'s editor, the petitioner began exploring the techniques used by the newspaper, notably payments to persons for stories, phone hacking, surveillance and police sources. In a note concerning an objection to collateral evidence, the trial judge described these techniques as "all legitimate and relevant lines of inquiry".

Defence case

[17] The petitioner did not give evidence. In his speech, he asked the jury to consider whether the prosecution had been taken in the public interest or in those of NGN. He criticised the advocate depute's attempt to distance himself from the *News of the World*. The Crown had relied on the McNeilage tape, which had been supplied by the newspaper. They had used photographs from it and had led witnesses, whose names had been supplied by the newspaper to the police. It had been the newspaper that had given the police his phone records. He had earlier produced these in the civil case. It was the newspaper that had paid, or offered to pay, eight witnesses. NGN had been forced to produce emails and other records which demonstrated this. It had been the newspaper that had pressed the police to mount an investigation into this based upon the McNeilage tape, which the newspaper had asked its readers to view. The petitioner pointed to what he described as lies told by Mr Bird, during the civil trial, about whether there had been an offer of payment to KT. The petitioner complained that the true extent of the payments made to witnesses had only emerged after certain, but not all, of the newspaper's records had been recovered in the criminal process. The petitioner pointed to the costs of the investigation, compared to any

public benefit. He complained of his treatment by way of arrest and house search at the hands of the police. NGN's executives had considered themselves to be above the law. In short, the petitioner's line to the jury was to suggest that the prosecution had been mounted at the instance of NGN. They had produced fabricated evidence in the form of the McNeilage tape and paid witnesses.

[18] The petitioner had, without practical result, called the *News of the World*'s former editor, Andy Coulson, to talk about the extent of phone hacking. That extent was to become clearer after the criminal trial. It ultimately resulted in the closure of the newspaper in July 2011. In 2014, Mr Coulson was convicted in England of conspiring to intercept voicemails (ie phone hacking). He was later acquitted of committing perjury at the petitioner's trial.

The Application to the Respondents

General

[19] On 16 May 2011, the petitioner lodged a Note of Appeal which advanced three grounds. The first related to pre-trial publicity. The second concerned the admissibility of the McNeilage tape. The third was a general allegation that the Lord Advocate's act in bringing the prosecution was a breach of Article 6 of the European Convention. These were, not surprisingly, regarded as unarguable. Leave to appeal was refused at first sift on 8 June 2011 and at second sift on 2 August 2011. The petitioner applied to the respondents for a reference to the High Court on 10 June 2014. The respondents took some time to understand exactly what grounds for a reference were being advanced. They accurately describe the grounds as being "difficult to discern" from the initial letter from the petitioner's new law agent and the accompanying two folders of documents, much of which related to the civil trial.

The Petitioner's account

[20] Before determining whether there might be merit in the grounds, the respondents interviewed the petitioner, in the presence of his law agent, in order to ascertain what his position was on the salient points in the Crown case. On the minutes of the SSP Executive Committee meeting, which were said to have been kept by BS, the petitioner did not accept that they were minutes, as distinct from an "account", which, in any event, he denied. In particular, he denied that he had made any admissions about visiting a swingers/sex club in Manchester in 1996 and 2002; thus contradicting the evidence of many of those who had been present and had testified to the contrary. He denied having previously admitted anything relevant to Mr McCombes or Mr Baldassara, although he was unable to recall whether this had been raised at the meeting. He maintained that those who had given evidence against him had formed a political clique within the SSP and had targeted him. Some of them had given false evidence at the civil trial and had conspired with others to do the same in the criminal trial. The calls, which he had made after the meeting, to KT and Mr Clark had been in response to voice mails. Mr Clark had been heavily under the influence of alcohol and drugs at the time when he maintained that he had gone with the petitioner to Cupid's. Mr Clark's evidence, which differed from that which he had given when precognosced on oath, ought not to have been admitted. He had been pressurised and blackmailed by NGN.

[21] There had been inconsistencies in AK's evidence in the civil and criminal trials. KT was a close friend of AK, CG and other members of the clique. They were involved in the political conspiracy against the petitioner. Others, who had said that he had been in Cupid's, including AC and AP but not their respective partners, had been offered money by

NGN. The evidence of CMcC, to the effect that the petitioner had admitted having an affair with KT, had gone to a sex club, and had made a mistake about telling Mr McCombes and Mr Baldassara the truth, had been untrue and was politically motivated. Others, such as JMcV and NMcK, to whom the petitioner had allegedly made admissions about going to the club, were part of the overall conspiracy. The petitioner did not have a coherent explanation for Cupid's phone number being in his 2001 diary or for the "(3.5)" entry (*supra*). He did say that he and his wife had thought about visiting a club and may have phoned Cupid's once in 2001. He did not explain how the number had come to be in his diary under the name of a trades union organiser. When asked about calls to Mr Clark, KT and AK on the day before the alleged visit to Cupid's, the petitioner's agent had complained that the questioning was ludicrous. The petitioner said that he had already answered this question (presumably at the civil trial). On the McNeilage tape, and the coincidence of Mr McNeilage receiving a text at the same time as one recorded as being sent from the petitioner's phone, the petitioner said that it had not been Mr McNeilage's phone. When asked about another similar call, the petitioner's agent again complained about the questioning. The petitioner denied having a sexual relationship with KT. Her evidence had been untrue.

The grounds for a reference

[22] The respondents were eventually able to confirm that the petitioner was advancing five grounds for a reference. The first was that the commissioner, in the commission and diligence process, had wrongfully excluded evidence. This related to the production of two notebooks kept by Mr Mulcaire, which had contained the petitioner's phone number, voicemail number, two 4-digit numbers and other personal details. The Metropolitan Police had provided these to the commissioner in both an unedited and a redacted form. The

redacted elements, which had been revealed post-trial, contained references to other persons with some connection to the petitioner, including Ms McGuire, JMcA, RA and LMcK. The respondents rejected this ground. They had regard to the fact that the commissioner had considered the terms of the specification, which called for documents referable to surveillance of the petitioner by two specific methods: the placing of the "bugging device" in his car and the use of "listening devices". In the context of his excerpting function, the commissioner had determined that the editing had been appropriate. There had been no objection to this course of action at the time. The petitioner's then counsel had said that, given the terms of the specification, she did not see the relevance of the information relative to the persons whose names had been redacted. During the course of the trial, the petitioner had sought unredacted versions of certain documents, but these had not included the Mulcaire notebooks. The respondents reasoned that the absence of an objection at trial was fatal to this ground (1995 Act, s 118(8)). The commissioner's decision had been a discretionary one. It had also been the correct one.

[23] After the trial, the petitioner had obtained a considerable amount of material pursuant to Operation Rubicon; a police investigation into allegations made by the petitioner of phone hacking and counter-claims by him of perjury. This ultimately led to the prosecution of Mr Coulson. This material pointed to the *News of the World* targeting the petitioner and others in the periods before both the civil and the criminal trials and doing so by the use of illegal means. The respondents accepted that it may have supported the contention that NGN had been "out to get" the petitioner. However, having regard to the strength of the Crown case, there was no real possibility that the verdict would have been different, if this material had been available at the trial.

[24] The second ground commenced with a slightly different contention about the Mulcaire notebooks; that the Crown had failed to disclose the redacted elements. It continued with a much broader proposition that the police and the Crown had failed to investigate, obtain and disclose both evidence of the hacking of the petitioner's phone and the content of the notebooks, notably the phone numbers of CG, Mr McNeilage, Mr Baldassara, and both CMcC and AC, who were described as Mr Mulcaire's targets. The Crown had thereby deprived the petitioner of evidence to support his defence. This ground was rejected by the respondents for two reasons. First, the Crown had not been given unredacted copies of the notebooks. Secondly, they would not have been obliged to disclose them, because they neither strengthened nor weakened the defence case (see *McInnes* v *HM Advocate* 2010 SC (UKSC) 28). They were not relevant to the issue of whether the petitioner had committed perjury. In any event, there was no real possibility of their production resulting in a different verdict, having regard to the totality and strength of the evidence against the petitioner.

[25] The third ground was one of oppression and "abuse of process". The contention was that Mr Bird, Mr Wight, Mr Baldassara, Mr Coulson and others had conspired to pervert the course of justice at the petitioner's trial and had committed perjury in furtherance of that conspiracy. NGN had withheld evidence which they had been required to produce in the commission process. They had covered up information about the suspension of a journalist for phone hacking until after the trial. The history of the prosecution, according to the Crown Office, had been that an investigation had been requested by Brian Monteith MSP and another. A procurator fiscal depute had been tasked with reading a transcript of the civil trial and carrying out a limited investigation. Various members of the SSP had come forward to state that the petitioner had made admissions in their presence. In October 2006,

the McNeilage tape had been obtained. Shortly thereafter, the PFD had recommended a full police investigation, although this was not instructed by Crown counsel until December. The petitioner had appeared on petition on 27 March 2008 and was indicted on 27 January 2009.

[26] The respondents reasoned that there had been ample evidence to merit proceedings. There was no basis for the allegation that the Crown had failed to disclose, or concealed, exculpatory evidence either before or during the trial. Whether Mr Mulcaire had hacked the petitioner's phone was irrelevant. The fact that some witnesses may have lied about the phone hacking did not mean that the prosecution of the petitioner had been oppressive or amounted to an abuse of process nor did any delay in producing evidence of that hacking until after the trial.

[27] The fourth ground was one of "tainted evidence". This was that the evidence, of phone calls by the petitioner to Mr Clark and KT shortly after the SSP Executive Committee meeting and from them and AK on the eve of the trip to Cupid's, ought not to have been admitted. The respondents discovered that, on 5 October 2006, Mr Bird had given to the police a disc containing a list of the calls made by the petitioner. This was material which the petitioner had provided in the civil action. On a printed list of the calls, some names had been annotated, although the provenance of the annotations was not known. The police had thereafter traced several of the numbers to Mr Clark, KT and AK. The contention was that the annotations had come from the *News of the World* staff. Consequently, it was argued, the result of any further investigations, which had been based upon this information, constituted the fruits of a poisoned tree. This ground was rejected because, amongst other things, the phone numbers had been agreed and no objection had been taken to this evidence at the trial.

[28] The fifth ground advanced the existence of "fresh evidence"; that the petitioner's claims of a conspiracy by both the SSP members and the NGN staff were true. This was the material which had resulted in the conviction of Mr Wight and the prosecutions of Mr Coulson and Mr Bird. It also encompassed the actions of NGN relative to the suspension of a journalist for phone hacking. The evidence of DCS Williams, that nothing in the Mulcaire notebooks had meant that the petitioner's phone had been hacked, had been perjured. Mr Bird and/or NGN had secured the testimony of Mr Baldassara by means of threats or inducements. There was evidence that Mr McCombes had acted as a conspirator with NGN.

[29] The respondents did not consider that any of this evidence would have had a material part to play in the determination of the critical issues at trial. The issues were whether the petitioner had committed perjury in relation to: (1) what he had said at the SSP Executive Committee meeting "as spoken to by no fewer than 16 witnesses"; (2) whether he had had a sexual relationship with KT, which she had spoken to and had been corroborated by another three witnesses; and (3) whether he had attended Cupid's, as spoken to by three of the four people with whom he had attended and five others. The Crown had not led any evidence which had been obtained by phone hacking. Mr Bird's evidence was unrelated to phone hacking. Mr Wight had only been called as a courtesy to the petitioner. Mr Coulson and DCS Williams had been called by the petitioner. The petitioner's allegations about Mr McCombes and Mr Baldassara were speculative.

Further grounds

[30] On 31 March 2015 the respondents declined to refer the case as they did not consider that a miscarriage of justice may have occurred. They set out their considerations in a

detailed "Statement of Reasons". In accordance with their usual practice, the respondents allowed the petitioner 28 days to make any "further submissions". They explained that a further such period could be allowed if a reason was given, but any additional request for more time would be granted only in exceptional circumstances. Thereafter, the petitioner was allowed five extensions of time within which to make further submissions. After a prolonged period, the respondents considered the sporadically produced further material, including a "Note of Further Submissions" dated 23 December 2015, along with an opinion, dated 21 May 2015, from the senior counsel who had originally been instructed prior to the trial but had had his instructions withdrawn. This opinion outlined the five grounds previously advanced. It asserted that the fact that perjury had been committed at the petitioner's trial must *ex facie* have been "prejudicial to his defence", given that his "position was that he had been the victim of a conspiracy orchestrated by the newspaper". Proof of such a conspiracy must have impacted on the jury's assessment of credibility and reliability. The opinion focused particularly on new material about the "spiriting away" of Ms McGuire to Dubai for fear that she might have been recalled in the civil case. Since this was evidence that the newspaper had conspired to pervert the course of justice, and had been "out to get" the petitioner, this alone merited a reference. The new unredacted material also supported the existence of a conspiracy.

[31] In a letter dated 26 May 2016 (enclosing an email from senior counsel), the petitioner's agents outlined the "new" evidence which they were putting before the respondents for consideration by them at their meeting scheduled for the following day. The relevance of this new material proceeded on an assumption that the jury in the perjury trial had rejected the petitioner's "defence of conspiracy", which rendered "all of the evidence and witnesses emanating from NGN ... and from his enemies in the [SSP], which is

..., effectively, all of the Crown evidence" incredible and unreliable. The new evidence included an admission from Ms McGuire that she had fabricated her story, having been bribed and blackmailed into doing so. It encompassed the removal of Ms McGuire to Dubai by DC. There was a new allegation that the petitioner's wife's counsel, namely the late Paul McBride QC, had been "in the pay of NGN" and had been communicating with a *News of the World* journalist during the trial. It was said that Mr McBride had disclosed his junior's 60 page confidential report, which had set out the Crown case. The complaints repeated NGN's failure to respond truthfully to the requirements of the commission, especially in relation to a "5K" approach to KT and payments made for stories by other witnesses. The phone hacking evidence, and that disclosing leaks from the police, had only been disclosed post-trial.

[32] None of this persuaded the respondents that there was a real possibility of a different verdict. On 3 June 2016, the respondents confirmed their decision not to refer the case. They had examined all of the material, which was set out in a Supplementary Statement of Reasons. They again accepted that it could have provided some more support for the contention that NGN were "out to get" the petitioner both before and after the civil jury trial. However, the respondents did not consider that the further material about Ms McGuire was likely to have a material bearing on the jury's determination of whether the petitioner had lied in the civil trial about: (1) what he had said at the SSP Executive Committee meeting; (2) whether he had had a sexual relationship with KT; and (3) whether he had gone to Cupid's with, amongst others, KT and AK.

[33] The respondents regarded the allegations about Mr McBride as "unsubstantiated". In relation to various documents which had been submitted, there was no evidence that KT had received any payment from NGN. She had given evidence that she had not, although

Mr Bird's testimony had been that he had thought that an offer had been made to her. The respondents were of the view that the additional material would not have created a real possibility of a different verdict. This conclusion had regard to the strength of the Crown case and, in particular, the evidence of the numerous witnesses who had had no connection with the *News of the World*. As the advocate depute had submitted to the jury, whether phone hacking had occurred did not have a bearing on the critical issues at trial.

A third attempt

[34] The petitioner lodged his application for a judicial review of the respondents' decisions on 1 September 2016. The petition process was then sisted to enable the petitioner to obtain legal aid, and then to consider the consequences of legal aid being refused, until 10 May 2017. Meantime, on 28 April 2017, the petitioner wrote to the respondents, enclosing an opinion of (a different) senior counsel, dated 10 February 2017, on the petition's prospects of success. The opinion refers to a "draft blog" by the petitioner's law agent. The blog refers to meetings between James Mulholland, a *News of the World* journalist, and Mr McBride in 2008 and again between March and May and September and October 2010. It contains references to stories in the newspaper, which were published after the trial, involving views attributed to a "legal insider", who was thought to be Mr McBride and disclosing what was said to be confidential information. A memo referred to Mr McBride telling an NGN journalist on 16 November 2010 that the petitioner would not be giving evidence.
Mr McBride was alleged to have provided the BBC with copies of the taped interviews of the petitioner and his wife. It was also said that Mr McBride had unsuccessfully attempted to persuade Mrs Sheridan to encourage the petitioner to plead guilty. There was reference to the provision of junior counsel's summary of the Crown case to NGN.

[35] Based upon this information, senior counsel expressed the view that the respondents could not properly have said that the allegations against Mr McBride were unsubstantiated. The information that the petitioner would not give evidence would have been "of use" to NGN employees who might be called as witnesses. The pressure put on the petitioner's wife could, counsel reasoned, be "causally related to his being in the pay of NGN". In the circumstances, counsel reasoned that:

> "38 ... the approach of the [respondents] ... miss[es] the point. ... the trial process was corrupted by the fact that a key participant's integrity was compromised and that his loyalty was required by a third party who had a substantial financial and reputational adverse interest in the outcome. One cannot know whose interests he was serving".

On this basis, counsel was of the view that there was a "powerful body of evidence that a fair trial did not take place here."

[36] The respondents' decisions were, according to counsel, open to challenge on the basis that their view, that the allegations against Mr McBride were unsubstantiated, was irrational. Their dismissal of the allegations was in breach of their statutory duty to investigate. The respondents had applied the wrong test in dismissing the allegations. They had reached an unreasonable decision on the fairness of the trial. The prospects of success on the basis of this challenge were "good (7 or 8 out of 10)."

[37] On 1 June 2017, the respondents advised that they had considered the opinion, and its source documents. They reasoned that the source material did not support the wide ranging allegations against Mr McBride; in particular those that he was in the pay of NGN (or the Crown) or had disclosed confidential material to NGN. Taken at its highest it did:

> "nothing more than indicate that Mr McBride met Mr Mulholland, and, perhaps, that Mr McBride told Mr Mulholland: (i) Mrs Sheridan's defence team was of the view that the evidence against [the petitioner] was overwhelming; (ii) [the petitioner] refused a deal the Crown had offered him whereby he would plead guilty to a charge or charges ... and his wife would be acquitted; and (iii) [the petitioner] would

> not be giving evidence. ... Further, the Board remains of the view that it has no relevance to the question whether there may have been a miscarriage of justice in [the petitioner's] case; it provides no connection to the Crown witnesses who spoke to the libel against [the petitioner] and the defence witnesses who supported [the petitioner's] version of events."

The petitioner had not provided any evidence to support the allegations that Mr McBride had deliberately acted against Mrs Sheridan's interests. He had not specified how any of the matters raised might have assisted the petitioner's defence.

The Judicial Review

The Petition

[38] The petition sought reduction of the respondents' decisions of 2015 and 2016, together with an order for reconsideration. The petitioner founded on the reasoning of the court in refusing the motion for a new trial. This made reference to the material which had been placed before the court to demonstrate the funding of Ms McGuire's trip to Dubai and the pattern of "phone-tapping", which allowed NGN to identify persons with whom the petitioner was in contact and who might be in a position to testify against him. There was, the petition averred, new evidence to demonstrate that NGN had "disregarded requirements of the criminal law and had been in wilful contempt of an order of the High Court" (ie the commission). In a somewhat rambling, repetitive, and often rhetorical statement of fact, the petition complains that the respondents erred in looking at the strength of the evidence at trial in the absence of the factors, demonstrated by the new evidence, which weakened it. The respondents had failed to address the submission that "all of the Crown witnesses were tainted by an NGN-led conspiracy to pervert the course of justice".

[39] The Note, which had been issued by the High Court, when granting the commission, and the remarks made by the trial judge about the relevance of the nefarious activities of the *News of the World* had all pointed to the significance of the new material as a relevant line of inquiry. The respondents' decision had ignored this and had been both unreasonable and irrational. The respondents had incorrectly applied the test in *McInnes* v *HM Advocate* (*supra*) and had failed to take account of the petitioner's defence "of a criminal conspiracy against him by NGN… and members of the SSP". Had this been established, "the credibility and reliability of the Crown case would have been cast into doubt". The redacted elements of the notebooks and the evidence of Ms McGuire's sponsored trip to Dubai would have affected the verdict.

[40] The petition avers that:

> "It was … unreasonable and irrational for the respondent[s] to find that a conviction secured against a prima facia background of perjury, attempts to pervert the course of justice and a criminal conspiracy against the petitioner did not amount to a miscarriage of justice".

The respondents should have considered what material ought to have been recovered under the commission. They should have obtained that material, in so far as not already recovered, and then sought any further material which had been brought to light or not been properly disclosed. The respondents should have obtempered their statutory duty to investigate everything that remained undisclosed. They should have had regard to the petitioner's contentions about oppression, including that the petitioner's wife's counsel had been passing confidential information to NGN. The respondents should have investigated this too by recovering the relevant documents. The respondents had failed to apply the test in *McLeod* v *HM Advocate* (*supra*).

The additional material presented to the Lord Ordinary

[41] The Lord Ordinary makes a general observation that, despite the use of written Notes of Argument, there was little foreshadowing in the written material of the mass of documentation which the petitioner maintained was relevant and ought to have been made available in the trial proceedings. "…[M]uch of the detail of what the petitioner submitted orally was not prefigured either in the petition or the notes of argument". The submissions made very little reference to the respondents' decisions or the reasons for them. They focused instead on the respondents' approach to the recovery of documents, which had been sought but not obtained under the commission, and their powers to remedy any deficiencies. The petitioner had characterised his (extensive) correspondence with the respondents as meaning:

> "Please obtain this vast swathe of material that we know is there, which you require to do in order to ascertain what ought to have been disclosed."

[42] The petitioner had obtained more material after the respondents' first statement of reasons had been issued. This had included: material about looking after Ms McGuire in Dubai; payments to Mr Wight, LMcK and Euan McColm, who was the Scottish political editor of the *News of the World*; payments for a voice analysis of the McNeilage tape; a 78 page Sheridan Costs/File folder, which referred to the £200,000 which had been paid for the tape; a cash payment for a story which was to appear in the *News of the World* in August 2006; a telephone bill for Mr McColm, relating to the time of the civil trial (Mr McColm allegedly being the conduit between the *News of the World* and the SSP members). All of this material, it was maintained, carried with it the real possibility of a different verdict.

[43] More documents were then mentioned. These included emails between Mr Bird and Mr Coulson about post civil jury trial plans and the possibility of offering KT money, with

the annotation "5K". This was before Mr Bird had given evidence in the civil trial that no money had been offered to KT to give her account. At the criminal trial, Mr Bird had said that she had been offered money, but that he had been unaware of it at the time. There was mention in these emails to Mr McColm being allocated a task in relation to Mr Baldassara. There was more documentation about the £10,000 cost of sending Ms McGuire away.

[44] Emails in June 2006 from Mr Bird requested investigation of a phone number and referred to "satellite jiggery pokery" to find out where a call had been made from. There was evidence of "double tapping"; being a method of hacking into voicemails. These emails also referred to "good news about BS" meeting with SSP members to discuss providing her notes to the police. Further material revealed that Mr Bird had had lunch with two "Edinburgh detectives re Sheridan case" in October 2006. Yet another bundle, containing correspondence between NGN's solicitors and the police, directed the police to a potential witness and commented that the police had asked NGN to stop precognosing the witnesses. There was material involving contact between NGN and the police.

The Lord Ordinary's reasoning

[45] The Lord Ordinary started with the general proposition that the task of forming a view as to whether a miscarriage of justice had occurred was one for the respondents to make (*Raza* v *Scottish Criminal Cases Review Commission* 2007 SCCR 403 at para 8). The court's task was to determine whether the respondents had acted unlawfully. Applications for judicial review ought to identify specific complaints stating which aspects of the decision amounted to an error of law (*R (Ward and Howarth)* v *Criminal Cases Review Commission* [2005] EWHC 1062 (Admin) at para 31). It was for the respondents to decide what degree of investigation to commit to a particular application (*R (Ward)* v *Criminal Cases Review*

Commission [2014] EWHC 3072 (Admin), para 12). They must have regard to it and to any representations made (1995 Act s 194D). They have powers to recover documents (*ibid* s 194I), but they do not require to recover everything that an applicant may have asked the Crown to produce. In terms of *McDonald* v *HM Advocate* 2010 SC (PC) 1 (at para 50), the Crown were not obliged to review material at large in order to determine whether there might be disclosable material. This principle applied equally to the respondents.

[46] The Lord Ordinary commented that the petitioner had said very little about what documents the respondents had been asked to recover. Some of the documents were already in the petitioner's possession or had been produced by them subsequently. It was for the petitioner to use the material in formulating, or supporting existing, grounds of appeal in a focused manner. An appeal was a statutory process involving the examination of particular grounds (*McDonald* v *HM Advocate* (*supra*) at paras 70-71). It was not a general inquiry. If, having received the documents, and formulated his grounds of appeal, there was material unrecovered, the petitioner could have made a focused request for assistance.

[47] The respondents had not disputed that NGN had engaged in unlawful and/or unethical practices or that NGN were "out to get" the petitioner. This was clear from the opinion on the motion for a new civil trial (2018 SLT 249, at paras [94-98]). The outcome of that motion, which had left the civil jury's verdict intact, was not inconsistent with the view that there had been no miscarriage of justice in the criminal trial. The issues were different. The petitioner had not engaged with the respondents' reasoning. He had simply placed material before the court and asked it to reach a different conclusion.

[48] The Lord Ordinary considered each piece of documentation, which had been brought to her attention. The discovery of the price for the McNeilage tape was not new evidence. Mr McColm's phone bill did not show collaboration between NGN and the SSP

witnesses. The information about KT was not new. Mr Bird had testified at the trial that she had been approached. A submission that Mr McCombes and Mr Baldassara had collaborated with NGN was speculative. The material relative to phone hacking had been considered by the respondents, but no challenge to the redaction of Mr Mulcaire's notebook had been made at trial. The respondents had been entitled to the view that, having regard to the other evidence from witnesses, who were not connected with NGN, there was no real possibility of this evidence producing a different verdict. The Lord Ordinary continued:

> "[118] … I was not directed to any material which demonstrated that the respondents were not entitled to form the view that the jury in the criminal trial had heard evidence from witnesses in respect of whom there was no evidence of participation in a conspiracy. The information which [the petitioner] sought to deploy with a view to demonstrating participation on the part of SSP members in a conspiracy appeared to invite speculation rather than legitimate inference.
>
> [119] It is plain from the submissions … that the petitioner disagrees with the respondents' conclusions. The petitioner has not, however, demonstrated that those conclusions were ones which the respondents were not entitled to come to, and for that reason, his challenge to the decisions [in 2015 and 2016] fails".

[49] The Lord Ordinary went on to consider the allegations involving Mr McBride. These were dealt with in the respondents' decision letter of 1 June 2017, which she held had superseded the earlier determinations on this aspect. The Lord Ordinary accepted that junior counsel's summary of the Crown case must have been passed to NGN by one of Mrs Sheridan's legal team. This did not support a conclusion that whoever had done this had been "working for" NGN. The information provided to the respondents had been capable of showing that someone on Mrs Sheridan's team had said that the evidence against the petitioner was strong. He or she had disclosed that, had the petitioner pled guilty, his wife's plea of not guilty would have been accepted. It showed that Mr McBride had met with a *News of the World* journalist.

[50] The Lord Ordinary accepted that the conduct of a co-accused might amount to oppression, whereby the other party was placed at an unfair disadvantage and the just and proper conduct of the proceedings was thereby compromised. The petitioner could not say why the conduct of the co-accused's advisors should bar proceedings against him. The most obvious breach of confidentiality was the passing over of the summary of the Crown case, but this had happened after the trial. There was no basis for an argument that the conduct of the source had prejudiced the petitioner and caused a miscarriage of justice. The (oral) challenge to the decision of 1 July 2017 failed.

Submissions

Petitioner

[51] The central tenet of the reclaiming motion was that no reasonable decision-making body, correctly applying the law, could have reached the decision not to refer the petitioner's case. The Lord Ordinary erred in holding otherwise. If it was correct that a deliberate failure to disclose, and the alteration of, documents did not provide grounds for referral, the justice system was not fit for purpose. The respondents' decision was in direct contradiction to the trial judge's view that the exploration of the techniques of the *News of the World,* including paying persons for stories, hacking telephones, using listening devices, engaging private investigators and utilising sources within the police, were all legitimate and relevant lines of enquiry. If the Crown had singled out the petitioner for prosecution on the basis of what was now known, and if the court had allowed the prosecution to continue, then neither the Crown, nor the justice system, should be regarded as fit for purpose.

[52] The first enumerated ground of appeal was that the Lord Ordinary erred in holding that the respondents were not obliged to recover the material which had been withheld from

the petitioner's defence and which ought to have been disclosed. The failure to recover the material meant that they could not properly address the "second" test in *McInnes* v *HM Advocate* (*supra*). That was whether material, which ought to have been, but was not, disclosed, would, if available at the trial, have created a real possibility of a different verdict being reached. Their failure rendered the decision unlawful. NGN had a duty of disclosure to the petitioner. This was different from the "first" test, or "golden rule", in *McInnes,* which was that material which might have materially weakened the Crown cases or materially strengthened the defence case ought to be disclosed. The correct test, in the context of the commission procedure, was that in *McLeod* v *HM Advocate (No. 2)* (*supra*) of whether the documents were likely to be of material assistance to the proper preparation or presentation of the accused's defence. The calls in the specification of documents had been designed to obtain material which was not disclosable in terms of the "golden rule", but which might nevertheless have had a bearing on the issues of fact to be determined at the trial (*McDonald* v *HM Advocate* 2010 SC (PC) 1 at paras 50 and 64; see also *Bannerman* v *Scott* (1846) 9 D 163). NGN had breached their duty to produce the required material in the most egregious, and criminal, fashion.

[53] The petitioner had asked the respondents to recover this material in terms of their powers of investigation and recovery. The respondents had not recognised the failures of both the police and the Crown to obtain the relevant documents, when disclosure had originally been made in July 2010. Had the respondents done so they would, for example, have recovered the information in relation to Mr Bird paying for a lunch with the "Edinburgh detectives" and paying "sneaky Sam" for helping to "turn a mobile number around" for Mr Bird. This indicated that NGN were prepared to go to any lengths, including the corruption of officials, to "get" the petitioner. That was his defence. The

material now available included a memorandum in support of cash payments to "A Kilburn", a senior fire brigade employee, who had headed up a "consortium of tipsters" and upon whom NGN had relied heavily for good quality information. This ought to have been followed up by the respondents. Mr Kilburn had been paid £300 for a story called "Sheridan's biggest lie". The document referring to this had been redacted and the respondents had not followed the matter up and obtained an unredacted version. These documents had been discovered in the course of Operation Rubicon, as was one referring to a £200 phone bill incurred by Mr McColm, because of the high volume of calls during and after the civil jury trial. An email from Mr Bird, dated 21 July 2006, which was headed "Sheridan Aftermath (Fingers crossed that we win)", contained information that the *News of the World* had considered making a tentative approach of payment to KT.

[54] All of this provided grounds for referring the case. All of the documents had been at the heart of the defence. As it had been put by senior counsel, in the opinion sent to the respondents after the first refusal to refer, the defence was that the petitioner had been the victim of a conspiracy by some members of the SSP and by NGN. That conspiracy had been pursued by criminal means amounting to an attempt to pervert the course of justice in order to secure a conviction. The petitioner had been entitled to have the jury consider all competent evidence relevant to this position. The respondents had never engaged with the consequences of this.

[55] The second ground was that the Lord Ordinary erred in holding that, in respect of new evidence relating to the use of "corrupt" public officials and the unlawful conduct of the defence by the petitioner's co-accused, the respondents were not obliged to recover material relating to that evidence. The material would have included documents demonstrating the unlawful disclosure by Mr McBride of confidential defence information

regarding the petitioner to NGN both before and during the trial, in return for payment. The documents now recovered had revealed that NGN had been receiving "gossip" from the petitioner's wife's legal team. NGN had reasoned that the defence tactics would be:

> "disregard this mountain of Crown evidence, this is all about phone tapping, bugging, voice mail intercepting NOTW trying out to fit up a poor working class lad ... and the police are just helping them. Throw as much rubbish as possible at the NOTW and hope the jury take their eye off the ball."

[56] This was before the trial had started. On 5 October 2010, one of NGN's employees had met with Mr McBride for a coffee. On 16 November 2010, during the Crown case, Mr McBride had apparently informed NGN that the petitioner would not be giving evidence. There was reference to a "legal insider" saying that the Crown Office had missed a chance to undermine the petitioner's case by failing to have a voice comparison in connection with the McNeilage tape. NGN had obtained possession of the "summary of Crown case" against the petitioner's wife, which could only have come from one of Mrs Sheridan's team. It must have been Mr McBride. All that the respondents had to do was obtain some of the redacted material in order to demonstrate this. The petitioner's defence had been that NGN would go to any lengths but he did not know that his wife's team were co-operating with NGN for payment. This would have made an enormous difference to the outcome of the trial.

[57] The third ground was that the Lord Ordinary had erred by refusing to sustain a submission that, from the date of the issue of their first Statement of Reasons, the respondents had closed their minds to the relevance and importance of the material to be recovered. This rendered their subsequent decisions irrational, unreasonable and unlawful. The respondents had been obliged to ask themselves what material ought to have been disclosed in the commission proceedings. They did not do this, but took the view that such

material could not have resulted in the "second" *McInnes* test being met. Throughout, the respondents had focused on the Crown case and what they perceived to be its impregnable strength. They had pre-judged the very issue which should have been at the starting point of their deliberations. The respondents had disregarded the view of the minority of jurors who had had a reasonable doubt. The respondents had applied the "second" *McInnes* test of real possibility, without attempting to consider the "first" test and to discriminate between evidence to which *McInnes* applied and evidence to which the higher *McLeod* test applied.

[58] The fourth ground was that the Lord Ordinary erred in holding that the respondents had been entitled to decide that the new material was insufficient to meet the second test in *McInnes*. The respondents had acknowledged, but had then failed to engage with, the defence of conspiracy. Substantial assistance would have been afforded in the preparation and presentation of the petitioner's defence by the material which had been wrongfully withheld by NGN in the commission proceedings. It was inconceivable that the material now recovered would not have had a bearing on the outcome. Having detailed much of the evidence presented to her in relation to phone hacking, relations with the police, corruption in the commission and diligence process and both the perjury of Ms McGuire and the sending of her to Dubai, the Lord Ordinary had erred in saying that this did not offer anything further in support of the conspiracy which was at the heart of the defence case.

[59] All of the material previously referred to had a considerable bearing on the conspiracy. This included evidence that DC had been the person tasked by NGN to spirit Ms McGuire away to Dubai. There were numerous lines of enquiry which could have been pursued. There was DC's invoice of approximately £9,000 relative to the flight to Dubai. There was a schedule of the payments which had been made to various witnesses. In an email, dated 21 July 2006, from Mr Bird and headed "My secret plan", there was reference to

getting something new on KT, eventually. There was the annotation "? 5K". There was evidence of the tracing of names to put to various phone numbers, which had been identified. There was reference to a former police officer being prepared to pass information on for "a fee".

[60] The fifth ground was that the Lord Ordinary erred in holding that the respondents had been entitled to the view that the new evidence was insufficient to meet the test in *Fraser* v *HM Advocate* 2011 SC (UKSC) 113. Had the petitioner been able to put that evidence before the jury, it is inconceivable that the outcome would have been other than to satisfy the real possibility test. In terms of the defence strategy, which had been plotted by senior counsel, evidenced in a note from her to agents and sanctioned by both the trial judge and the judge granting the commission, all of the material bore upon the critical matter of conspiracy. The respondents' conclusion that this material did not weaken the Crown case was wholly wrong. It was not for the respondents to say that it did not have a material bearing on a critical issue. The view of the Extra Division, when refusing the application for a new trial, should have been adopted, whereby it had been established that there had been a conspiracy against the petitioner. There was a high level cover-up of material relevant to the defence and this had a bearing on a critical issue.

[61] The sixth ground was that the Lord Ordinary erred in holding that the respondents were entitled to decide that the new evidence did not satisfy the test for an abuse of process and/or oppression in *Stuurman* v *HM Advocate* 1980 JC 111, such that the just and proper conduct of proceedings was compromised (see also *Shetland Sea Farms* v *Assuranceforeningen Skuld* 2004 SLT 30 at paras [143-152]). NGN had produced and presented fabricated documents and withheld others. An inference could be drawn that they had compromised the just and proper conduct of the criminal proceedings by obtaining confidential

information from Mr McBride for payment during and after the trial. Breaches of confidentiality by legal advisers could, in some circumstances, do this. This would be an abuse of state power and an affront to justice (*Jones* v *HM Advocate* 2010 JC 255). Accordingly, the Lord Ordinary was in error in concluding that this conduct would not have barred criminal proceedings or otherwise caused a miscarriage of justice in the petitioner's case (see *R* v *Martin* [1998] AC 917; *R* v *Contostavlos,* 21 July 2014, Southwark Crown Court, Unreported, (aka the fake sheikh case)).

Respondents

[62] The respondents submitted that the Lord Ordinary had been entitled to conclude that the petitioner had not shown any reason to doubt the lawfulness of the respondents' decisions: (a) not to exercise their powers of recovery; (b) that the available material and the representations made did not justify a belief that a miscarriage of justice may have occurred; and (c) to reject the relevance of the allegations against Mr McBride. The respondents were an expert body, charged with an onerous statutory function (1995 Act, s 194C(1)). They had a duty to have regard to the terms of any application, representations made and other relevant matter (*ibid,* s 194D(2)). They had powers of investigation, including the power to obtain documents by application to this court (*ibid*, s 194F-I). For a reference to be made, the respondents had to believe that the statutory test had been met (*Raza* v *Scottish Criminal Cases Review Commission* 2007 SCCR 403 at paras 6-9). Although the respondents were amenable to judicial review, this did not extend to the merits of its decision (*R (Ward & Howarth)* [2005] EWHC 1062 (Admin) at paras 22-25). Any challenge should proceed on the basis of an analysis that was specific, targeted and coherent (*ibid*, at paras 29-31). That applied not only to substantive decisions on whether to refer but, also, to the degree of

investigation which ought to be undertaken (*R (Ward*) [2014] EWHC 3072 (Admin) at paras 7 and 11-12). The petitioner had not sought to engage with the tests or even to mention the Lord Ordinary's decision.

[63] Although a failure by the Crown to discharge its duty of disclosure may result in a miscarriage of justice, if there was a real possibility that the jury would have arrived at a different verdict (*McInnes* v *HM Advocate* (*supra*)), neither the Crown, nor the respondents, were under an unlimited duty to reconsider disclosure. When withheld documents were disclosed to an individual, such as the petitioner, it was for him to deploy them in support of a ground of appeal (*McDonald* v *HM Advocate* 2010 SC (PC) 1 at paras 70-77). As a generality, the petitioner did not approach the many documents to which he referred in the necessary discriminating manner. It was not sufficient to string a collection of documents together in order to raise a question.

[64] The petitioner had not addressed the test for the admissibility of the material on a new evidence appeal (*Megrahi* v *HM Advocate* 2002 JC 99). *McInnes* was uniquely based on Article 6. That did not apply to third party (NGN) actions. The respondents were bound by the statutory test of whether a miscarriage of justice may have occurred. The trial had to be looked at as a whole, having regard to both the Crown and the defence cases. The petitioner's submissions had focused only on the latter. They had not engaged with the respondents' decision and had presented the material recovered in a vacuum or in isolation. Although NGN had withheld some documents, they had produced others. In relation to the redactions, some of these had been made by the commissioner, applying the terms of the specification. A tactical decision had been taken by the petitioner not to pursue wider recovery. Further documents had been produced by the Crown after the trial, in September 2013. The petitioner had had ample opportunity to analyse them and to say how they

would have impacted on the conduct of the defence. Stating repeatedly that they could have had an impact was insufficient. As in defective representation appeals, it was incumbent on the appellant to say, and not just to speculate, on what would, not what might, have followed (*Lindsay* v *HM Advocate* 2008 JC 310 at para [19], citing *McIntosh* v *HM Advocate* 1997 SCCR 389; *Yazdanparast* v *HM Advocate* 2016 JC 12 at para [15]; cf *Bannerman* v *Scott* (*supra*) at 166).

[65] In terms of a simple and lucid speech, the advocate depute had set out the four pillars of the Crown case: (1) BS's notes of the meeting; (2) the disguised Cupid's entries in the petitioner's diary; (3) the SSP members' agreement that the petitioner had denied having a relationship with Ms McGuire but not KT; and (4) the McNeilage tape, on which the petitioner had denied having sex with Ms McGuire, which would have been an odd feature if it was a concocted tape with an actor's voice.

[66] On the first ground of appeal, the Lord Ordinary recorded that the petitioner's submission had been that the respondents ought to have recovered a "vast swathe" of material. There was no duty on the respondents to pursue an investigation of that scope. With two exceptions, the petitioner had failed to specify the material that had remained undisclosed at the date of the respondents' decision and which he maintained ought to have been recovered. The first exception was in relation to Mr McBride and the second was the identities "A Kilburn" and "Sneaky Sam". There was no reason to suppose that the recovery of any additional material would have advanced the petitioner's case. The fact that the identity of these individuals was not ascertained fell into that category. As the Lord Ordinary had correctly commented, the petitioner's request in relation to other material had been "entirely unfocused" and had not linked up with any particular ground of referral. What was being asked for was a fishing diligence of the type disapproved in *McDonald* v

HM Advocate (*supra* at para 70 *et seq*). The respondents were a publicly funded body with a budget. The Lord Ordinary had been correct to reject the petitioner's contentions as involving an extravagant use of their powers.

[67] On the second ground, the same considerations applied. The documents which were disclosed to the petitioner, and deployed by him, in relation to Mr McBride had been duly considered by the respondents in their decision of 1 June 2017. This was under reference to the petitioner's letter of 28 April 2017, which had enclosed the opinion from a second senior counsel. By that time, documents had been recovered which suggested contact between Mr McBride and *News of the World* journalists. The respondents had given careful consideration to the allegations. The Lord Ordinary was troubled by them, but concluded that the petitioner had been unable to say why any acts of Mr McBride, if proved, would have barred proceedings against him.

[68] On the third ground, the respondents had given careful consideration to all of the representations made and the supporting material. The Lord Ordinary had been entitled to reject the submission concerning the allegation that the respondents had closed their minds for the reasons which she gave.

[69] The complaint in the fourth ground about the reasonableness of the decision lacked specification. As the Lord Ordinary observed, the petitioner had failed to engage with the terms of the respondents' decisions. It was not clear what specific criticisms were being made. In so far as the petitioner contended that the evidence now available would have bolstered his defence or weakened the Crown case, these matters had been addressed by the Lord Ordinary and she had been entitled to reach the conclusions which she did. The respondents had discharged their duty to have regard to the application and the representations made on it, despite the difficulty of discerning what the grounds for review

actually were. The respondents' assessment of the strength of the Crown case was a judgment by them on the merits of the case. Their conclusion reflected the simplicity of the Crown case as presented by the advocate depute in his speech to the jury. In relation to the spiriting away of Ms McGuire, and the payments made to the person who did that, this had been raised by the petitioner during the trial. It had been known that DC had been paid. The issue, of whether payments had been made to KT, had also been raised in the evidence of Mr Bird. The point could have been pursued further with the person who had allegedly offered her money and whose name was known.

[70] The fifth ground did not add anything to what was stated in ground 4. In terms of *Fraser* v *HM Advocate* (*supra*), regard had to be had to the manner in which the Crown had presented its case (see *Megrahi* v *HM Advocate* (*supra*)). Evidence had been available prior to the trial that payments had been made to Mr Mulcaire and this had been referred to in the cross-examination of Mr Bird. The documents here would not have constituted fresh evidence.

[71] Finally, on the sixth ground, the allegation of improper conduct on the part of the co-accused's defence team had been considered separately by the respondent in its decision of June 2017. It had been addressed by the Lord Ordinary and she had been entitled to reject the complaint.

Decision

[72] The petitioner's case fails to appreciate the limitations under which the court operates when asked to review the decision of a specialist tribunal such as the respondents. As the Lord Ordinary correctly reasoned, the task of forming a view on whether a miscarriage of justice may have occurred (Criminal Procedure (Scotland) Act 1995, s 194C)

has been entrusted by Parliament to the respondents. There is no statutory appeal process. The respondents' determinations are therefore susceptible to review by the court, but only on conventional grounds of illegality. These are that the respondents have improperly exercised the discretion conferred on them; that is that their decision:

> "is based upon a material error of law going to the root of the question for determination ... [or has] taken into account irrelevant considerations or ... failed to take account of relevant and material considerations ... [or] where it is one for which a factual basis is required, there is no proper basis in fact to support it ... [or] if it ... is so unreasonable that no reasonable [decision maker] could have reached ... it" (*Wordie Property Co* v *Secretary of State for Scotland* 1984 SLT 345, LP (Emslie) at 347-8, more recently followed in *RSPB* v *Scottish Ministers* 2017 SC 552, LP (Carloway), delivering the opinion of the court, at para [203]).

[73] In presenting a petition for judicial review, a petitioner should follow a scheme that sets out in clear terms the factual history and the issues of law:

> "The aim is to focus the issues so that the court can reach a decision upon them, in the interests of sound administration and in the public interest, as soon as possible" (*Somerville* v *Scottish Ministers* 2008 SC (HL) 45, Lord Hope at para [65], endorsed in *Wightman* v *Advocate General* 2018 SC 388, LP (Carloway) delivering the opinion of the court, at para [10]).

If the court is faced with a morass of factual averment and indistinct legal propositions, or the petition fails to state exactly what category of error is being founded upon, the court will, as it has in this case, require very considerable amounts of time to sift through the factual and legal material in order to discover whether there is a real point of substance requiring analysis. That sift ought, in the first instance, to have been carried out by the petitioner's legal representatives. In this case, as the Lord Ordinary recognised, neither the averments of the petition nor the petitioner's notes of argument attempt to focus on the respondents' decisions in order to pin-point an error of law. Although lip service is paid at an early stage in the petition, and sporadically throughout it, to the test in *Wordie Property Co* (*supra*), what the petition consists of in substance is little more than a contention that, having

regard to a string of documents in connection with NGN's illegal or improper activities, the respondents' decisions were wrong. This is dressed up behind frequent references to certain matters amounting to an "error of law" on the part of the respondents in circumstances in which no such error is visible.

[74] There is a fundamental flaw in the application for a judicial review of the respondents' decision. This is the idea, which was repeated by the petitioner throughout the process, that the existence of a conspiracy by NGN, or members of the SSP, to "get" or "target" the petitioner amounts to a defence to the charge of perjury. Proof of such a conspiracy may serve to undermine the credibility or reliability of witnesses, which may in turn lead to an acquittal. It does not follow that, because persons, including witnesses, display animus of an extreme nature towards an accused, the jury would be bound, or even likely, to acquit. After all, hostility towards accused persons, especially towards those who have committed the crime libelled, is, not surprisingly, far from unusual on the part of those affected.

[75] If the publishers of a newspaper genuinely considered that they had been found liable in damages because of perjured evidence, or if members of a political party thought that the future of their cause had been jeopardised by immoral and later criminal actings on the part of their leader, they might well wish to provide all reasonable assistance to the police and the prosecuting authority. If they decide to carry out their own investigations and to provide these authorities with evidence, in the form of the names of potential witnesses, reports of what they might say or real material in the nature of recorded conversations or phone records, that is entirely a matter for them. If they determine that they should talk to the police, that is also permissible and may even be encouraged in certain situations. This applies whether they are providing or seeking information relevant

to a case with which they are involved. If two or more people join together to secure what they might perceive to be justice, and even engage in criminal activity themselves on the way, it does not necessarily follow that the object of their ire should thereby be acquitted of his own criminal acts. The only substantive defence to the crime of perjury, other than coercion, is one that seeks to demonstrate that what was said under oath or affirmation in court did not constitute, or at least was not proved to be, false evidence of relevant fact, deliberately given.

[76] It is not disputed that an accused person is entitled to seek to recover material which shows, or tends to show, that the potential testimony against him has been procured by illegal means. This assumes that the accused has a basis for a suspicion of that nature. An accused may also seek to obtain material which points to a piece of real evidence, such as a video tape, having been fabricated. This is what the petitioner attempted to do by utilising the commission procedure. A commissioner was appointed and he carried out his excerpting function. Even before the commencement of this procedure, the petitioner had some material to support his suspicion that he had been the subject of surveillance, including phone tapping and "bugging", and that some witnesses were paid at least for stories and certainly in the form of expenses. It was known that the McNeilage tape had been paid for; even if the precise price may have remained temporarily elusive. The commission produced further material. At that stage, the petitioner had an option. He could decide, as the petitioner's then senior counsel presumably did decide, that the commission had served its purpose in securing such material as was necessary to demonstrate that the accused's suspicions were well founded. He could alternatively decide that the material produced appeared insufficient. In that event, he could proceed to an open commission to examine potential havers at an oral hearing. If this procedure is not followed

and the accused is content to rely on what has already been obtained, it will be difficult for him to found upon material as falling into the category of new evidence; ie that there was a reasonable explanation for the evidence not being heard at the trial diet (1995 Act, s 106(3A)).

[77] On the first ground of appeal, neither an application to the respondents for a reference nor an appeal to the High Court constitutes an invitation to either institution to conduct a general inquiry into the circumstances of a conviction. Just as the Court can be expected to narrow the scope of an appeal to the grounds lodged, so too can the respondents be expected to focus their investigations on what the applicant is saying ought to be the basis of a prospective appeal. Neither institution is obliged to view a case from the applicant's or appellant's perspective and be required to carry out enquiries which rightly fall within the province of his or her law agents; albeit that both may be called upon to assist with the recovery of material when that seems to be in the interests of justice. It is primarily for the petitioner to take steps to recover material from third parties which he considers would advance his case for a reference. He cannot view the respondents as his own personal private investigators.

[78] One singular problem which the respondents and the Lord Ordinary faced was a lack of any form of reasonable filter on the information provided and a clear statement of what fact a particular document would prove, which had not already been established, and would have had a material bearing on the trial jury's considerations of a material issue. The respondents had been bombarded with a mass of material which, they considered, supported the contention that NGN was out to "get" the petitioner. This material, or at least some of it, was obtained after the trial as a consequence of Operation Rubicon. However, at the trial, the petitioner already had enough material to demonstrate that NGN had been out

to "get" the petitioner. There can have been little doubt about it, especially given the vitriolic coverage of the petitioner's activities in the *News of the World*. As the petitioner had said in his address to the jury, it had been NGN who had bought the McNeilage tape and passed it onto the police or the prosecution. They had paid for "stories" from witnesses. There was the device found on the petitioner's car. Although at the trial there had been no evidence that persons connected to the case had had their phones hacked, it was known that the *News of the World* engaged in this practice. The Operation Rubicon material was recognised by the respondents as adding fuel to this fire, but it had already been well alight at the trial.

[79] The petitioner's complaint is that the respondents did not pursue the matter further by recovering more material to prove NGN's motives and practices. There are several answers to this. The first is that, apart from the activities of Mr McBride and the identity of NGN's sources, the respondents had not been asked to recover particular information. As already noted, an applicant to the SCCRC will normally require to set out, in relatively clear terms, his potential grounds of appeal and their evidential foundation. The SCCRC would be duty bound to consider these (Criminal Procedure (Scotland) Act 1995, s 194D). They are empowered to carry out their own inquiries (*ibid*, s 194F). They can themselves apply to the High Court for a commission and diligence to recover documents or other material (*ibid* s 194I). The extent to which they do carry out their own inquiries or seek to recover documents are matters within their discretion. They can hardly be faulted for not recovering items which they were not asked to obtain.

[80] Secondly, in relation to information which they are asked to uncover, they are entitled to consider whether that information is material to the issue of a miscarriage of justice. In the petitioner's case, the respondents did not consider that the allegations in

relation to Mr McBride had been substantiated. That was, for reasons which will be explored, not an unreasonable determination. The respondents did not consider that identifying the sources of NGN would tell them anything which was not already known.

[81] Thirdly, and most important, the respondents had reasoned that demonstrating that NGN had been out to "get" the petitioner would not have affected the jury's verdict given the strength of the Crown case. It could not successfully have countered: (a) the testimony of the 16 witnesses who spoke to what had happened at the SSP Executive Committee meeting; (b) the many witnesses who spoke to the petitioner's presence at Cupid's, as supported by the diary entries and phone records; (c) the content of the McNeilage tape, which was proved by reference to the phone records to have shown the petitioner making certain important admissions; and (d) the testimony of KT as corroborated by others. This evidence was extremely compelling. Especially in the absence of oral evidence from the petitioner which contradicted this at trial, the respondents were entitled to take the view that attempting to recover further material would be a waste of time, effort and expense. They were equally entitled to reach the conclusion that it would not affect their overall view that, given the strength of the Crown case, there was no material to show that a miscarriage of justice may have occurred.

[82] The second ground is an allegation, which was rejected by the respondents, that the Crown and the police had failed to investigate, obtain and disclose evidence of the petitioner's phone being hacked and to disclose an unredacted version of the Mulcaire notebook. It may be possible to envisage a situation in which a failure by the police to follow up an obvious line of inquiry has resulted in an unfair trial (see the arguments in *Henderson* v *HM Advocate* [2017] HCJAC 43 and *Gordon* v *HM Advocate* 2010 SCCR 589). In this case, the police would have had no reason, in the context of the prosecution of the

petitioner, to investigate whether the petitioner's phone had been hacked. That was not relevant to the issues in the case. These concerned whether the petitioner had told lies about certain specific matters. There was no duty to investigate this and consequently there was no duty to provide the Crown with the results of that investigation under section 117 of the Criminal Justice and Licensing (Scotland) Act 2010. Since the Crown did not have this information, there was no duty of disclosure on them under section 121 of the 2010 Act. Similar considerations apply to Mr Mulcaire's notebooks. In any event, the respondents would still have been entitled to their view that none of this type of material demonstrated that a miscarriage of justice may have occurred. It might have lent further support to the contentions about NGN's activities, but these were not central to what the perjury trial was about.

[83] There is no merit in the third ground of appeal. The respondents have shown great patience with the petitioner in establishing exactly what he was saying in relation to a potential reference and analysed the ascertained basis with some care, before deciding that they were not satisfied that a miscarriage of justice may have occurred. Far from closing their collective mind, the respondents afforded the petitioner considerable latitude within which he could make further submissions, based on the existing grounds of review. After several extensions of time well beyond the stated deadline of 28 days, the petitioner did proffer an additional 51 pages of submissions. These were, along with the opinion of senior counsel, duly considered, as was the accompanying "voluminous documentation". The respondents did not view the new representations and material as even attempting to meet their view as expressed in the original statement of reasons. That view was that the petitioner's contentions concerning an NGN conspiracy could not overcome the plethora of evidence of perjury led by the Crown from persons unconnected with NGN. There is

nothing in the respondents' reasoning to suggest a closed mind. They followed their normal procedures in providing a statement of reasons and allowing an applicant to comment upon it before making a final decision. They even allowed the petitioner to present more argument on the Mr McBride contentions before considering and ultimately rejecting them. All of this is a context in which an applicant may re-apply to the respondents, especially if he uncovers new matter.

[84] The fourth ground amounts to little more than a disagreement with the respondents' decision on the merits and the Lord Ordinary's refusal to enter into that debate. At the risk of unnecessary repetition, the respondents had made their reasoning clear when declining to make a reference. The witness testimony, the McNeilage tape, the diary entries and the phone records all combined to build a compelling case of perjury, which the complaints of conspiracy did not dent to any significant degree. The petitioner does not accept this and asserts, it being little more than that, that the new material would have raised a real possibility of a different verdict. Quite apart from the fact that this is not the statutory test for a reference, the petitioner was unable to point to any error of law in the respondents' decision that firming up on matters, which were known at least in general terms at the trial, would not have made any difference to the verdict. The particular example of Ms McGuire's disappearing act to Dubai towards the end of the civil jury trial, as sponsored by NGN, adds nothing to the equation. It may demonstrate that NGN were prepared to go to extreme, potentially illegal, lengths (albeit unsuccessful ones) to win the defamation action. It could have no substantial impact on the consideration by the jury of the evidence in the criminal trial. The position with a potential offer of money to KT remains uncertain, but it was one which could have been, and was, explored before the jury.

[85] The test for the admission of new evidence as a ground of appeal (1995 Act, s 106(3A)) is set out in *Megrahi* v *HM Advocate* 2002 JC 99 (LJG (Cullen), delivering the opinion of the full bench, at para [219]). In a new evidence appeal, assuming that there is a reasonable explanation for the evidence not having been heard at the trial diet, its significance must be such that a reasonable jury would have found it of material assistance in their consideration of a critical issue at the trial. The assessment of this, in the context of a potential reference, is for the respondents to make. They have done so and reasoned that it would not have been of such assistance as it was essentially collateral to the principal issues of fact. There is no identifiable error of law in the respondents' reasoning. The petitioner disagrees with the respondents, but that is not a sound basis for the court to interfere with what is the respondents' decision on the merits. The fifth ground accordingly fails.

[86] A court can determine that proceedings are oppressive, and thus sustain a plea in bar of trial, where it is demonstrated that the accused cannot obtain a fair trial (*Phan* v *HM Advocate* 2018 JC 195, LJG (Carloway), delivering the opinion of the court, at para [40]). The actions of the Crown do not come close to the situation where such a plea might have been sustained in this case. Whatever NGN may have done, the evidence ingathered by the Crown had justified the proceedings. That evidence consisted of the various persons attending the SSP Executive Committee meeting, the many witnesses to the petitioner's visit to Cupid's, KT's account as supported by others and the diary entries and phone records. There was nothing oppressive about the prosecution.

[87] So far as Mr McBride's activities are concerned, little more has been established than that he had met *News of the World* journalists before and during the trial. This can be classified as unwise and perhaps unethical, but of itself it does not justify a conclusion that the petitioner's trial was unfair. Mr McBride was not acting for the petitioner. He appears

to have passed comment to the journalist on how the trial was proceeding and what the outcome might be. That is of little, if any, relevance or significance to what was actually unfolding in court before the jury. After the trial, he may have provided the journalist with his junior's summary of the Crown case, which seems to have been prepared in advance of the trial. There is nothing in any of the material produced to suggest that Mr McBride was in any position to do any damage to the petitioner's interests or that he did anything which had the capacity to do so. His actions may, and it can be put no higher than that, have breached his duty of confidentiality owed to the petitioner's wife. That too would have been unethical and potentially illegal, but it could have had no discernible impact on the petitioner's own defence. The respondents looked into this matter and rejected the petitioner's inferences as unsubstantiated. In so far as they had no apparent bearing on the issues at the trial, this approach cannot be faulted as amounting to any form of error of law.

[88] The court will refuse the reclaiming motion and adhere to the interlocutor of the Lord Ordinary.