SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2021] SC EDIN 52

EDI-A788-18

JUDGMENT OF SHERIFF A W NOBLE

in the cause

JOHN TRAVERS

Pursuer

against

THE CITY OF EDINBURGH COUNCIL

Defender

Pursuer: Smith QC, MacLeod; Clyde & Co (Scotland) LLP, Glasgow
Defender: Sandison QC; Brodies LLP, Edinburgh

Edinburgh, June 2021

The sheriff, having resumed consideration of the cause, finds in fact:

1. The pursuer is John Travers. He resides at [address redacted] and is 66 years of age. He has been an employee of the defender for 39 years. He is currently a senior community development worker.

2. He is married to Deirdre Travers, who resides with him. They have one son. Mrs Travers has also been employed by the defender, since 1986.

3. The defender is The City of Edinburgh Council, a local authority constituted under the Local Government etc (Scotland) Act 1994, with premises at Council Chambers, High Street, Edinburgh EH1 1YJ.

4. In 2002, the pursuer was a member of the community learning and development team in the defender's community education department.

5. Between 4 and 23 October 2002, he sent four emails ("emails 1, 2, 3 and 4") to the then Leader of the Council, Councillor Donald Anderson. These emails, sent under a pseudonym, "Donald Reekie", alleged misuse of public funds, misappropriation of intellectual property and council employees working for their own company in breach of their contracts of employment.

6. A fifth email ("email 5") bearing to be from "Donald Reekie" was sent on 26 November 2002 to "Community Education All Staff". It referred disparagingly to recent appointments in the community education department. It was not clarified in the present proceedings whether the pursuer was the author of this email.

7. Three further emails ("emails 6, 7 and 8") were sent shortly thereafter. Email 6 was sent by the pursuer, under his own name, to several of his colleagues. It contained the image of a snake. Emails 7 and 8 were sent by someone using the pseudonym Donald Reekie to Community Education All Staff. These emails were not sent or instigated by the pursuer, as was later established.

8. No investigation in relation to the truth of the allegations in emails 1-4 was carried out at that time, or for many years afterwards, as hereinafter found. Enquiries were undertaken to discover the identity of the person who had sent the emails, and it was ascertained that it was the pursuer.

9. In January 2003, the pursuer was notified that he was the subject of a disciplinary investigation in respect of emails 1-5.

10. In April 2003, the pursuer was instructed to attend a disciplinary hearing in respect of emails 1-4 and 6-8. There were two disciplinary hearings, and between the hearings the pursuer was notified that he was also being disciplined in respect of email 5.

11. On 13 May 2004, the pursuer was given a written warning in respect of emails 1-6. He appealed internally. In August 2004, following delays in the hearing of his appeal, and in order not to be time barred, he lodged an application with the Employment Tribunal. It was said on his behalf that emails 1-4 were protected (whistleblowing) disclosures and that his right not to be subjected to a detriment by his employer had been infringed.

12. In October 2004 the defender's director of education wrote to the pursuer's solicitor stating that the written warning was only in respect of email 5.

13. The defender contested the Employment Tribunal application. Following hearings in May and December 2005, the Employment Tribunal found in the pursuer's favour in January 2006. It awarded him compensation of £5,000.

14. While the disciplinary and Employment Tribunal proceedings were ongoing, and afterwards, the pursuer was harassed in multiple different ways. His emails were spoofed on multiple occasions. His email address was put on a website. The Employment Tribunal findings were posted online and emailed to council education staff. In 2007 and 2008 derogatory comments in respect of the pursuer were posted on councillors' blogs. Derogatory comments were posted about the pursuer on various websites. Derogatory comments were made on Edinburgh Evening News forums about the pursuer and his wife. Personal family and medical information was disclosed.

15. In May 2006, while the foregoing harassment was continuing, the pursuer made a further application to the Employment Tribunal on the basis that the defender or its employees had subjected him to detrimental acts as a consequence of the protected disclosures which he had made. The defender contested the proceedings. They were ultimately settled. The defender paid the pursuer a substantial sum of money in settlement of his claim.

16. The pursuer was thereafter transferred to work in the defender's culture and sports division.

17. As found previously, the pursuer's wife, Deirdre Travers, was also an employee of the defender. In particular, she worked at an educational establishment, Cameron House. Certain of her line managers were closely connected to those who were the subject of allegations in emails 1-4. She also became the subject of repeated incidents of harassment. She was disadvantaged in the type of work she was given to do. Pornography was sent to her work computer. She was continually denied access to her computer, or files thereon, because it had been interfered with.

18. On one occasion, the chair of Cameron House management committee was not told of an important meeting which she should have attended, and a fake email was created to show that the pursuer's wife had been tasked with informing her of it.

19. The pursuer's son, then a schoolboy, was also the subject of harassment. He received online abuse, and social media messages falsely bearing to have been written by him were also released. In addition, items purporting to have been ordered by the Travers family, but not in fact so ordered, were delivered to the Travers' home.

20. Huge issues existed in relation to the construction and maintenance of Cameron House.

21. In 2014 the defender's governance, risk and best value committee ("the GRBV committee") commissioned Turner Townsend to investigate historic and ongoing maintenance issues at Cameron House. The defender was unable to locate material relevant to this investigation. Mrs Travers was able to supply documentation which informed the main basis of the Turner Townsend report.

22. In December 2014, councillors on the GRBV committee were permitted to read the Turner Townsend report under supervision in a data room.

23. An executive summary of the report's findings was also provided to the GRBV committee.

24. The Cameron House management committee and Mrs Travers, who was health and safety officer for Cameron House, were denied sight of the Turner Townsend report.

25. In February 2015 Mrs Travers made a formal request to see the report in order to fulfil her statutory health and safety responsibilities. This was declined, without explanation. Mrs Travers was rebuked and was told she was not allowed to pursue the matter further. Mrs Travers was ultimately able to see the report in 2017.

26. In March 2015, at a meeting of the GRBV committee, the chair of Cameron House management committee made allegations of misconduct on the part of council officers involved in the commission and build of Cameron House and the defects arising therefrom. Links were made between that and the pursuer's whistleblowing allegations made in 2002.

27. On 5 March 2015 the GRBV committee agreed that these claims should be investigated by the defender's Chief Internal Auditor, Magnus Aitken, who was seconded from PricewaterhouseCoopers.

28. In May 2015 Mr Aitken interviewed Mrs Travers. She was able to provide Mr Aiken with a full dossier of documents. The dossier also catalogued the links to the pursuer's whistleblowing case.

29. In October 2015 Mr Aitken's report was presented to the GRBV committee under a B (i.e. private) agenda. It was made available to councillors through a data room. The report was not made available to Mrs Travers, the Cameron House management committee, or members of the public.

30. Mr Aitken's report was entitled the Cameron House Monitoring Officer Investigation Report: Allegations of Misconduct by Council Officers involved in Cameron House Project. The monitoring officer referred to in the title of the report is a statutory appointment. A person appointed as monitoring officer of a council has certain duties and responsibilities directed towards ensuring that the council and its officers and councillors maintain the highest standards of conduct. The defender's monitoring officer at this time was Alastair Maclean. He was also chief operating officer and deputy chief executive of the defender. He was the person who formally instructed the report, albeit it was at the behest of the GRBV committee.

31. Significant parts of the report were leaked to the press, in particular the Edinburgh Evening News. There was extensive press coverage. Representations were made by local councillors to the GRBV committee. The convener of the committee instructed the directorate of the council to apologise in person to the Cameron House management committee.

32. Councillor Cameron Rose was the councillor for the ward in which the pursuer and his wife lived. In 2015 he was the leader of the Conservative Group on the council. He had had a number of dealings with the pursuer and his wife over the years in relation to the various issues that had arisen between Mr and Mrs Travers and the defender. He had also had regular contact over the years with Mr Maclean.

33. On or about 29 October 2015, Councillor Rose had discussions with Mrs Travers. These discussions included consideration of a council sponsored inquiry into unresolved events between Mr and Mrs Travers and the defender. Mrs Travers made clear that she and her husband welcomed such an inquiry, and also made clear that subject to three conditions she and the pursuer would be willing to supply the documentation they held. The

conditions were that (1) the documentation would not be held or allowed on council premises and would not be accessible to people within the council; (2) that the inquiry would be independent of the council; and (3) that Mr and Mrs Travers would be given the completed report from the inquiry.

34. During November 2015 Councillor Rose had several meetings or telephone calls with the pursuer and his wife. He also had discussions with Mr Maclean. During one such meeting Mr Maclean informed Councillor Rose that he was reopening the matter and wished to instruct an independent enquiry. He asked Councillor Rose to assist in persuading Mr and Mrs Travers to release the documentary evidence which they held. The Travers' three conditions formed part of that discussion. It was made clear that it was a non-negotiable condition that the Travers were to have access to the completed report.

35. On 10 November 2015 Mr Maclean approached the pursuer when he was at work and asked him, in respect of his 2002 allegations, if he was sure that fraud had taken place. The pursuer said that he was. Mr Maclean thereafter determined to order a further investigation. He was aware that the pursuer had a substantial volume of documentation relevant to the investigation. He was also aware that any material documentation would likely have disappeared from the defender's offices. It was accordingly essential that he obtain the documentation held by the pursuer.

36. On 18 November 2015 Mr Maclean, along with Carol Campbell, at that point Head of Legal, Risk and Compliance at the defender, approached the pursuer as he was working. Ms Campbell was also about to be (or had just been) appointed as the defender's monitoring officer, in succession to Mr Maclean (the post being moved down one grade). The three of them went to a meeting room in the defender's premises. The purpose of the meeting was to get the pursuer to agree to hand over the documentation in his possession. The meeting

was a difficult one. Part way through the meeting Mr Maclean asked Ms Campbell to leave. Thereafter the meeting proceeded with only the pursuer and Mr Maclean present.

37. After Ms Campbell left, Mr Maclean agreed to the pursuer's three conditions as specified in finding 33. In particular, he agreed that the pursuer would receive a copy of the report. The pursuer agreed in principle to handing over the documentation in his possession, subject to final agreement on matters of detail such as the terms of reference of the report and the storage and access conditions relative to the documentation he provided.

38. After that meeting, the pursuer told his wife that Mr Maclean had agreed to all their conditions, and Mrs Maclean passed on that information to a number of other persons, including Councillor Rose.

39. Following the meeting, a number of emails were exchanged between the pursuer, Mr Maclean, Ms Campbell and Councillor Rose. The emails are to be found between pages 40 and 47 of the electronic bundle prepared for the purposes of the proof.

40. Pages 41 and 42 contain the initial draft terms of reference, dated 19 November 2015. They provided only for investigation of the pursuer's original whistleblowing concerns. That was picked up and pointed out by Councillor Rose.

41. Pages 45 and 46 contain a later version of the draft terms of reference. *Inter alia*, the scope of the enquiry has been widened "to investigate the conduct of Council staff towards the whistle blower between 2002-2006, from the first protected disclosure through to the settlement of the employment tribunal". The agreement to provide copies of documentation was said to be entirely and without exception with PwC and strictly not with the defender. PwC were expressly forbidden from sharing documentation which they received from the pursuer, or allowing any council staff access to full or part documents. The documents were to be stored offsite. The draft agreement also made provision, against a statement that the

pursuer had been advised that there was a legal risk involved to him and his family, for the defender to provide the pursuer with access to a legal fund to cover any legal expenses incurred.

42. At almost the end of the exchange of emails, Ms Campbell sent an email to the pursuer on Friday 27 November 2015 at 8.16 pm in the following terms:

> "John
>
> Many thanks for your email below to Alastair. As you may be aware, we had an initial meeting with the PwC investigation team today and I understand you and Deirdre are meeting them on Monday. We're expecting a draft scope from PwC shortly that will set out the areas of their investigation, and we'll share that with you as soon as it's available.
>
> In the meantime we wanted to come back to you in relation to the limitations you set out in your email, to allay your entirely understandable concerns about security and confidentiality.
>
> We are proposing to conduct the investigation, with your help and co-operation, on the following basis:
>
> 1. The investigation will be commissioned by Alastair as Deputy CEO and me as Monitoring Officer of CEC and will be conducted by PwC on our behalf.
>
> 2. All the information you provide will be held off site by PwC on a secure and strictly confidential basis and only accessed by the named PwC personnel working on the investigation.
>
> 3. PwC personnel will provide findings (including interim reports) to CEC's Chief Executive, Deputy Chief Executive and Monitoring Officer only and these will not be shared with any other CEC staff.
>
> 4. As you'll appreciate, the findings may require a report by the Monitoring Officer to the full Council in line with statutory obligations, and (as you've anticipated in your comments below) may also require to be reported to other relevant authorities (such as Audit Scotland, Police Scotland) and nothing would prevent or restrict CEC from complying with any legal obligations it may have in relation to the findings of the investigation.
>
> 5. On the assumption that you're happy with the above, we would assume in relation to any information you provide that you have obtained any permissions from anyone else you consider necessary to allow the information to be used as set out above.

> You also asked us to support you in relation to legal costs. Having discussed this with Alastair I can confirm that (if we can agree the approach set out above) the Council would be prepared to indemnify you for legal costs you properly and reasonably incur in relation to your co-operation with the investigation. We would suggest this would be up to a maximum of £10,000.
>
> Could you let me know whether you would be happy to proceed on this basis?
>
> Kind regards
>
> Carol"

43. By email dated 28 November 2015 the pursuer replied that he had forwarded on the email to his solicitor and would be getting back to Ms Campbell in early course. By email dated 1 December 2015 the pursuer stated that he had now had an opportunity to take advice from his solicitor and was happy to proceed with the terms as outlined in their exchange of emails.

44. Although he and his wife were employees of the defender, the pursuer did not understand or intend head 3 of Ms Campbell's email to mean that he and his wife would be prohibited from seeing the PwC report. He understood it would apply to other employees of the defender. The pursuer's interpretation is the correct interpretation of head 3, given the context and content of the email exchange, and the fact that Mr Maclean had expressly told him on 18 November 2015 that he would be given a copy of the PwC report.

45. The pursuer duly handed over all the relevant documentation in his possession, in excess of 3,000 documents, and PwC began its investigation.

46. On 23 November 2015, while the email exchange was continuing, Mr Maclean and Ms Campbell and others visited Cameron House for a meeting. After the meeting, Mrs Travers showed Mr Maclean and Ms Campbell round the building. At one point,

Mrs Travers reminded Mr Maclean that the pursuer would require a copy of the report, and Mr Maclean nodded in agreement.

47. Mr Maclean and Councillor Rose also had a brief chance meeting, possibly in a corridor at the defender's premises. Councillor Rose took from their conversation that Mr Maclean had accepted that he had agreed to provide the Travers with a copy of the report, but the words that he recollected being used, to the effect that the Travers had been sorted out, are capable of more than one interpretation.

48. In December 2015, there was a meeting between Mr Maclean and Ms Campbell and the PwC investigators. PwC had prepared a draft report but it merely set out work done and to be done. It was not in any sense a complete report simply requiring revisal. The meeting had been called by Mr Maclean, who was desirous of seeing what progress there was. He had formed an unrealistic view of the time the report would take. As he had known prior to instructing the report, he was due to leave the defender's employ in January 2016, and he had believed that the report could have been completed prior to his departure.

49. Mr Maclean duly left the defender's employ in January 2016. Ms Campbell also left the defender's employ shortly thereafter.

50. PwC submitted what was intended to be the final report to Nick Smith, the defender's then monitoring officer, in April 2016. Mr Smith instructed some additional work to be done. It is unclear whether this work was carried out by PwC or employees of the defender. This additional work was completed by June 2016.

51. The defender refused to give the pursuer a copy of the PwC report. Instead, he was given what bore to be excerpts from the report, with hundreds of sections missing. It is represented by the defender that this was what the pursuer would have been entitled to receive had he made a subject access request in terms of the Data Protection Act 1998.

52. In 2016 the pursuer's solicitors attempted to obtain the full report from the defender, without success. As part of that attempt, they obtained affidavits from a number of persons, including Mr Maclean. In his affidavit, Mr Maclean stated that he could not recall if he did agree to issue the pursuer with a copy of the final PwC report.

53. The pursuer has undertaken that he will accept a copy of the report from which personal data such as email addresses, telephone numbers and addresses of any individual have been redacted.

Finds in fact and in law:

1. The parties entered into an agreement whereby the defender agreed to provide the pursuer with a copy of the PwC report in return for the pursuer providing the defender with the documentation in his possession relevant to the subject matter of the report, which the pursuer did.

2. The pursuer is not barred from obtaining a copy of the PwC report by reason of the terms contained in Ms Campbell's email of 27 November 2015, in particular head 3, and the pursuer's acceptance thereof.

3. It has not been established that the pursuer is barred from obtaining a copy of the report by virtue of the Data Protection Act 1998 or the Data Protection Act 2018.

4. Accordingly sustains the first plea-in-law for the pursuer and repels the remaining pleas-in-law for the parties; ordains the defender to deliver to the pursuer within 7 days of the date hereof a full, unredacted and complete copy of the document prepared and completed by Price Waterhouse Coopers LLP ("PwC"), Accountants, Atria One, 144 Morrison Street, Edinburgh EH3 8EX, and delivered to the defender on or around March 2016 or April 2016 documenting the investigation completed by PwC on behalf of the

Monitoring Officer of the defender into allegations made by the pursuer regarding claims he had made of corruption by employees of the defender, and bullying and harassment suffered by the pursuer and his wife following his "whistle blowing" upon those who were engaged in the wrongful scheme and referred to as the PwC report; and reserves the question of expenses and appoints parties to address him thereon on

at , said hearing to take place by way of WebEx videoconference unless the parties are advised otherwise.

Sheriff

NOTE

[1] This is an action of specific implement. In terms of his first crave, the pursuer craved the court

> "to grant an order against the defenders that they deliver to him within seven days a full, unredacted and complete copy of the document prepared and completed by Price Waterhouse Coopers LLP ("PwC"), Accountants, Atria One, 144 Morrison Street, Edinburgh EH3 8EX, and delivered to the defenders on or around March 2016 or April 2016 documenting the investigation completed by PwC on behalf of the Monitoring Officer of the defenders into allegations made by the pursuer regarding claims he had made of corruption by employees of the defenders, and bullying and harassment suffered by the pursuer and his wife following his 'whistle blowing' upon those who were engaged in the wrongful scheme and referred to as the PwC report, by the defenders, together with all appendices, previous versions and later revisions to the said report which was commissioned by the defenders."

(Following proof, the pursuer was content to restrict the terms of the crave. I shall deal with that issue at the end of my note.)

[2] I heard a three day proof before answer. The pursuer was represented by senior and junior counsel. The defender was represented by senior counsel. There were only three witnesses led by the pursuer: the pursuer himself; his wife, Deirdre Travers; and Cameron Rose, the councillor for the ward in which the pursuer and his wife reside, and in 2015/16

leader of the Conservative Group on the defender council. The defender led two witnesses, Alastair Maclean, ultimately the defender's deputy chief executive, until he left to become Head of Group Legal at Baillie Gifford at the beginning of 2016, and Carol Campbell, who was latterly Head of Legal, Risk and Compliance and monitoring officer (in succession to Mr Maclean) at the defender until she too left in or about February 2016 to take up a position at CMS Cameron McKenna. Mr Maclean went on to hold a number of other senior positions in Baillie Gifford, and was still employed there at the time of the proof.

[3] The defender's witnesses had also been on the pursuer's witness list, and the pursuer had lodged in process affidavits from them and from his wife and Councillor Rose. These affidavits were referred to in evidence and as agreed by the parties formed the substance of the examination-in-chief of Mrs Travers and Councillor Rose when they gave evidence for the pursuer. Except in the case of the pursuer's wife, whose affidavit was sworn in 2020, the affidavits were sworn in 2016, at a time when the pursuer was endeavouring to obtain the report sought in the present action. As mentioned later, the terms of Mr Maclean's affidavit assume a little significance in deciding a crucial factual issue in the case. Affidavits had also been lodged by the pursuer in respect of other witnesses on the pursuer's list who were not called. I omitted expressly to confirm the position with the parties at the point of submissions, but I have assumed, in the absence of agreement of the parties to the contrary, that I was not to have regard to them, and have not done so.

[4] The primary issue of fact was whether at a meeting between the pursuer and Alastair Maclean on 18 November 2015, Alastair Maclean had agreed that the pursuer would receive a copy of the PwC report referred to in the crave. It was the pursuer's position that he had, the defender's position that he had not. (In their averments, it is suggested that there were discussions at the meeting, but the parties' obligations were to be

subsequently set out in writing.) In submissions, the defender advanced a secondary argument, not wholly reflected in the pleadings, that if Mr Maclean had said that he would provide the pursuer with a copy of the report, it would have been a personal moral commitment, rather than a contract made on behalf of the defender. It is said in the defender's pleadings that if Mr Maclean had made a statement to that effect, he would have had no authority to do so, given that it would have been unlawful for the defender to provide a report having regard to the terms of the Data Protection Act 1998, but no separate lack of authority point was advanced in submissions. Instead, the defender's second principal argument was the direct one that even if there was a contract between the parties, it was not enforceable. The defender had done the most it could do consistent with its obligations under the Data Protection Act, having provided the pursuer with an extract (or a number of extracts) from the report. (As commented on by the pursuer, the defender has provided a somewhat rough looking document. It is plainly not the PwC report with visible redacted areas. According to the defender, it comprises excerpts from the PwC report, all that the pursuer would be entitled to receive had he made a subject access request under the Data Protection Act 1998.) In their pleadings, the defender avers that it has offered to facilitate an independent determination by the Information Commissioner's Office ("ICO") of whether its redactions to the report went beyond those required by law, which offer the pursuer has not accepted.

[5] Reference to the ICO produced the one objection raised in the course of the evidence, and I might deal with it now. The defender's offer was raised with the pursuer in cross-examination. After he had answered a number of questions about the matter, objection was taken by senior counsel for the pursuer on the basis, as I understood him, that it would lead to the disclosure of advice given to the pursuer by his advisers. I allowed the evidence to

continue under reservation, but in fact little more was asked, and nothing additional to what had already been said was elicited. Senior counsel for the pursuer insisted upon his objection, which was broadened to include the submission that it was against public policy to discuss offers of settlement. Senior counsel for the defender had three responses, first that the objection came too late (to which the pursuer responded in turn that it was an objection to the line and had been taken while the line was being pursued); secondly, that senior counsel for the pursuer was no longer entitled to object since he had dealt with the matter in re-examination of the pursuer (to which the response was that the evidence had been reserved; the pursuer was entitled to deal with it in re-examination and if the objection were later upheld, the evidence elicited in both cross-examination and re-examination would be excluded); and thirdly, that the defender, as the party which had made the without prejudice offer, was entitled, if it wished, to "change its mind" and refer to it in evidence.

[6] I propose to repel the objection. The offer, as noted, is referred to in the pleadings and was referred to in other evidence. The pursuer was not asked about any legal advice he was given, and it did not appear to me that he disclosed any such advice. He did give his objection to the offer. As I understood him, the present action would have been dismissed, he would have sought the report from the defender, the defender would have refused and matter would have been referred to the ICO. The pursuer also said that he had offered to have the report considered by an independent QC, but the defender had refused that. It was put to him in cross-examination that that would have involved the report being seen by a third party.

[7] As said, the principal issue of fact was what was said at the meeting between the pursuer and Alastair Maclean on 18 November 2015. To enable that question to be

answered, it is necessary to consider what happened in the years prior to that meeting and in the months following it.

[8] The preceding history, about which the parties were not in dispute, may be dealt with relatively briefly. As set out in the findings, it begins in 2002, when the pursuer was a member of the community learning and development team in the defender's community education department. Between 4 and 23 October 2002, he sent four emails ("emails 1, 2, 3 and 4") to the Leader of the Council, Councillor Donald Anderson. These emails, sent under a pseudonym, Donald Reekie, alleged misuse of public funds, misappropriation of intellectual property rights and employees working for their own company in breach of their contracts of employment. A fifth email ("email 5") was sent by "Donald Reekie" on 26 November 2002 to "Community Education All Staff" referring disparagingly to recent appointments in the community education department. (Although it does not appear to be a matter of controversy in the relevant extract from the report, it was not clarified in the present proceedings whether the pursuer was the author of this email.) Three further emails were subsequently sent, on dates not established. Email 6 was sent by the pursuer, under his own name, to several of his colleagues. It contained the image of a snake. Emails 7 and 8 were sent by someone using the pseudonym Donald Reekie to Community Education All Staff. These emails were not sent or instigated by the pursuer, as was later established.

[9] No attempt was then made to investigate the truth of what was said in emails 1-4. (Councillor Anderson did pass on the pursuer's emails to a senior employee in the community education department. Unfortunately, this employee was allegedly at the heart of the matters alleged in the emails.) Instead, enquiries were undertaken to establish the author of the emails, and when it was established that it was the pursuer, disciplinary proceedings, with the ultimate sanction of dismissal, were taken against him. Two

disciplinary hearings were ultimately held. The pursuer was advised that the first hearing was in respect of emails 1-4 and 6-8. Between that hearing and the second hearing the pursuer was notified that he was also being disciplined in respect of email 5. (For what it's worth, there is nothing within the extracts taken from the report to suggest that this was a *bona fide* disciplinary undertaking which had merely failed to notice the enactment of the Data Protection Act 1998 and/or placed too great weight on the means of disclosure and too little weight on what was disclosed. On the contrary, the pursuer's belief that they were out to get him seems a plausible one.)

[10] On 13 May 2004 the pursuer was given a written warning in respect of emails 1-6. He appealed internally. In August 2004, following delays in the hearing of his appeal, and in order not to be time barred, he lodged an application with the Employment Tribunal. It was said that emails 1-4 were protected (whistleblowing) disclosures and that his right not to be subjected to a detriment by his employer had been infringed. In October 2004 the defender's director of education wrote to the pursuer's solicitor stating that the written warning was only in respect of email 5.

[11] Following hearings in May and December 2005, the Employment Tribunal found in the pursuer's favour in January 2006. It awarded him compensation of £5,000. I was not referred to the tribunal decision, but presumably it accepted that emails 1-4 were protected disclosures, and it is unlikely to have been impressed with, at best, the lack of clarity in relation to which emails the pursuer was being disciplined for.

[12] Unfortunately the disciplinary and Employment Tribunal proceedings were not all that the pursuer had to contend with. As set out in the findings, while these proceedings were ongoing, and afterwards, he was harassed in multiple different ways. His emails were spoofed on multiple occasions. His email address was put on a website. The Employment

Tribunal findings were posted online and emailed to council education staff. In 2007 and 2008 derogatory comments in respect of the pursuer were posted on councillors' blogs. Derogatory comments were posted about the pursuer on various websites. Derogatory comments were made on Edinburgh Evening News forums about the pursuer (and his wife). Personal family and medical information was disclosed.

[13] In May 2006, while the foregoing harassment was continuing, the pursuer made a further application to the Employment Tribunal, on the basis that the defender or its employees had subjected him to detrimental acts as a consequence of the protected disclosures which he had made. The defender contested the proceedings. They were ultimately settled, with the defender paying the pursuer a substantial sum of money. The pursuer was thereafter transferred to work in the defender's culture and sports division (which was what the pursuer wanted, not a further instance of harassment).

[14] The pursuer was not the only victim of harassment. So also were his wife and son. In relation to the son, he received online abuse, and social media messages falsely bearing to have been written by him were also released. Items purporting to have been ordered by the Travers family, but not in fact so ordered, were delivered to the Travers' home.

[15] So far as the pursuer's wife was concerned, multiple factors combined to make her situation a particularly intolerable one. As set out in the findings, she was also an employee of the defender. In particular she worked at an educational establishment, Cameron House. Unfortunately for her, certain of her line managers were closely connected to those who were the subject of allegations in emails 1-4. She was disadvantaged in the type and range of work she was given to do. Moreover, she was also the victim of repeated incidents of harassment. Amongst other things, pornography was sent to her work computer. She was

continually denied access to her computer, or files thereon, because it had been interfered with.

[16] Added to that, huge issues existed in relation to the construction and maintenance of Cameron House. These were not explored in the evidence. As a further matter, although again not explored in evidence, there were allegations of misconduct on the part of council officers involved in the commission and build of Cameron House and in relation to the defects arising therefrom. Connections were made between that and the pursuer's whistleblowing allegations made in 2002. (Although not of special significance, in finding 18 I describe an occasion spoken to by Mrs Travers where the chair of the management committee of Cameron House was not told of an important meeting which she should have attended in connection with Cameron House, and a fake email was created to show that Mrs Travers had been tasked with informing her of it, an attempt to kill two birds with one stone.)

[17] As set out more fully in the findings, two reports were instructed in connection with Cameron House. In 2014 the defender's governance, risk and best value committee ("the GRBV committee") commissioned Turner Townsend to investigate historic and ongoing maintenance issues at Cameron House. Secondly, in March 2015, at a meeting of the GRBV committee, the chair of Cameron House management committee referred, as mentioned earlier, to allegations of misconduct on the part of council officers involved in the commission and build of Cameron House and in respect of the defects arising therefrom. Links were made between that and the pursuer's whistleblowing allegations made in 2002. On 5 March 2015 the GRBV committee agreed that these claims should be investigated by the defender's Chief Internal Auditor, Magnus Aitken, who was seconded from PricewaterhouseCoopers. The report was formally commissioned by Alastair Maclean in his

role as the defender's monitoring officer, by virtue of which role he had certain duties and responsibilities directed towards ensuring that the defender and its officers and councillors maintained the highest standards of conduct.

[18] In relation to both reports, Mrs Travers played a pivotal role by way of the provision of information. Material in the defender's hands had disappeared. It appeared to be expected that it would have disappeared. Mrs Travers was able to supply documentation which she had obtained through her work at Cameron House, and in connection with the pursuer's whistleblowing allegations.

[19] Despite her provision of information, and despite the fact that she was the health and safety officer at Cameron House, Mrs Travers was not initially given sight of either report. Ultimately, she obtained sight of the Turner Townsend report in 2017.

[20] The monitoring officer's report was produced in October 2015. Significant parts of the report were leaked to the press, in particular the Edinburgh Evening News. There was extensive press coverage. Representations were made by local councillors to the GRBV committee. The convener of the committee instructed the directorate of the council to apologise in person to the Cameron House management committee.

[21] Councillor Cameron Rose, the then Conservative group leader on the council, and also councillor for the ward in which the pursuer and his wife lived, had had a number of dealings with them over the years in relation to the various issues between them and the defender. He had also had regular contact over the years with Mr Maclean.

[22] On or about 29 October 2015, Councillor Rose had discussions with Mrs Travers. These discussions included consideration of a council sponsored inquiry into unresolved events between Mr and Mrs Travers and the defender. Mrs Travers made clear that she and her husband welcomed such an inquiry, and also made clear that subject to three conditions

she and the pursuer would be willing to supply the documentation they held. The conditions were that (1) the documentation would not be held or allowed on council premises and not accessible to people within the defender; (2) that the inquiry would be independent of the council; and (3) that Mr and Mrs Travers would get the completed report from the inquiry.

[23] During November 2015 Councillor Rose had several meetings or telephone calls with the pursuer and his wife. He also had discussions with Mr Maclean. During one such meeting Mr Maclean informed Councillor Rose that he was reopening the matter and wished to instruct an independent enquiry. He asked Councillor Rose to assist in persuading Mr and Mrs Travers to release the documentary evidence which they held. The Travers' three conditions formed part of that discussion. It was made clear that it was a non-negotiable condition that the Travers were to have access to the completed report.

[24] On 10 November 2015 Mr Maclean, along with Ms Campbell, approached the pursuer and asked him, in respect of his 2002 allegations, if he was sure that fraud had taken place. The pursuer said that he was. Mr Maclean thereafter determined to order a further investigation. He was aware that the pursuer had a substantial volume of documentation relevant to the investigation. He was also aware that any material documentation would likely have disappeared from the defender's offices. It was accordingly essential that he obtain the documentation held by the pursuer.

[25] On 18 November 2015, at the defender's premises, Mr Maclean and Ms Cunningham approached the pursuer while he was working and asked to have a meeting with him. They went to a meeting room within the defender's premises. The pursuer did not immediately agree to hand over the material that he and his wife had, and the meeting became quite heated. After some minutes, Mr Maclean asked Ms Cunningham to leave. The explanation

for doing that suggested by Mr Maclean and Ms Cunningham was that it would lower the temperature of the meeting. It would no longer be two against one, and the person departing was a lawyer (although Mr Maclean was also a lawyer). After Ms Cunningham went, the pursuer agreed, at least in principle, to handing over the documentation. Some matters of detail, such as the inquiry's terms of reference, still had to be worked out. According to the pursuer, he agreed to hand over the documentation because Mr Maclean agreed to his pre-conditions; in particular, Mr Maclean told him that he would be given a copy of the report. Mr Maclean's position, in essence, was that he would not have said such a thing.

[26] Before reaching a view as to what was said at the meeting, it is appropriate to consider what happened thereafter.

[27] First, in terms of their evidence, the pursuer told his wife that Mr Maclean had agreed to provide a copy of the report, and she passed that news on to some other people, one of these being Councillor Rose. He confirmed that in his evidence.

[28] Second, Mrs Travers, Mr Maclean and Ms Campbell all spoke to an occasion on 23 November 2015 when Mr Maclean, Ms Campbell and others visited Cameron House for a meeting. After the meeting, Mr Maclean and Ms Campbell were shown round the building by Mrs Travers. According to Mrs Travers, at one point she had said to Mr Maclean that he had been mean to John [the pursuer] at their last meeting i.e. the meeting of 18 November 2015 and that was not the way to get John's co-operation. Ms Campbell had said to Mr Maclean "I told you not to do that." In her evidence, Ms Campbell "sort of" remembered something like that being said, but said that it had been jocular. Mr Maclean said he had no memory of it. Mrs Travers also testified that at another point on the tour she had said to Mr Maclean that John would not take part without the terms of reference and he

would require a copy of the report. According to Mrs Travers, he had nodded his head in agreement. Mr Maclean said he had no recollection of that, and so also did Ms Cunningham. Mrs Travers was not sure if Ms Cunningham would have been aware of it.

[29] Third, Councillor Rose spoke of a brief chance meeting with Mr Maclean, perhaps in a corridor at the defender's premises. His recollection of it was limited. He thought that he had said something like "Have the Travers been sorted out?", to which Mr Maclean had responded in the affirmative. Councillor Rose took from the conversation that Mr Maclean was indicating that he had agreed to provide the Travers with a copy of the report. Mr Maclean had no recollection of any such conversation to that effect.

[30] Fourth, after it became clear, in 2016, that the defender was unwilling to give the pursuer a copy of the report, the pursuer's solicitors obtained affidavits from a number of persons. With the exception of Mrs Travers' affidavit, which was obtained in 2020, all the affidavits lodged by the pursuer in this case dated from 2016. Presumably they were used in an attempt to make the defender change its mind, although exactly how they were used was not specified. In any event, one of the persons who provided an affidavit was Mr Maclean, who as noted had left the defender by that stage and was working at Baillie Gifford. In evidence, he described a process whereby he was interviewed by solicitors from the firm representing the pursuer. The solicitors prepared the affidavit and Mr Maclean had the opportunity to make changes to it. The affidavit was signed by him on 3 August 2016, and included the following passage:

> "Carol Campbell was also in attendance with me for part of that meeting [the meeting of 18 November]. She was the Council's head of legal, risk and compliance at the time. She regularly helped me with me [*sic*] monitoring officer reports and was a trusted advisor. When it became apparent that John was not as forthcoming as he had been previously (he was clearly concerned as to whether he could trust

> anyone in the council including me) I asked Carol to leave the room to allow John and me to have a more open one-to-one. John and I had an intense and difficult discussion. Broadly we agreed that John would assist us with the investigation and that he would talk to Magnus Aitken of PwC about how the information could be made available directly to PwC and not come through me or anyone on the Council. I asked John to prepare or assist me in preparing the PwC remit so that we got that correct and he agreed to do so. From recollection I offered to keep him fully in the loop as the investigation went ahead, recognising that I may not be able to stray into individual staff matters. I would have said that I would talk to him through the findings of the report in detail. I cannot recall if I did agree to issue with a copy of the final report. Equally I cannot recall if I said that I would not give him a copy of the final report. Given my usual practice of not releasing my monitoring officer reports it is unlikely that I would have promised that but I do accept that I was seeking to reassure John and persuade him to cooperate in the investigation. I certainly would have told Carol Campbell exactly what I agreed with John at our meeting on 18 November when she was not present. What I can be sure of is that I would have given John a commitment to let him know what was in the Report."

Ms Campbell's evidence is that Mr Maclean did not tell her that he had agreed to provide the pursuer with a final copy of the report. In relation to what is said in the third last sentence of the extract, Mr Maclean accepted that he had allowed a number of persons to see the monitoring officer report in respect of Cameron House, but he distinguished that on the basis that it was a report instructed at the instigation of the GRBV committee.

[31] Fifth, there are the emails exchanged in the days following 18 November 2015, at least initially seeking to agree the terms of reference in respect of the report. As noted in the findings, the emails are to be found in the agreed bundle of documents at pages 40-47. The relative findings in fact are numbers 39-43. As noted, the only express reference to which persons are to have access to the report, as opposed to the documentation provided by the pursuer, is in an email sent by Ms Campbell on 27 November 2015, at almost at the end of the chain. The full email is contained in finding [33], and in particular it contains a head 3 in the following terms:

> "PwC personnel will provide findings (including interim reports) to CEC's Chief Executive, Deputy Chief Executive and Monitoring Officer only and these will not be shared with any other CEC staff."

As noted, on receipt of that email, the pursuer forwarded it to his solicitor, obtained his advice and thereafter indicated that he was happy to proceed with what was agreed in the exchange of emails. The defender relied upon this provision in the email for two reasons: first, the limited reference to persons who were to see the report; and secondly, the fact that it prohibited disclosure of the report to employees of the defender apart from the chief executive, deputy chief executive and monitoring officer, the pursuer and his wife obviously being employees of the defender. To dilute any argument that the parties were simply agreeing the terms of reference of the PwC report, the defender relied upon another element that entered the email chain, a provision that the pursuer would have his legal fees met by the defender in the event of proceedings being taken against him, which the defender agreed up to a limit of £10,000. In relation to head 3, the pursuer testified that he had not understood employees to include him.

[32] Returning to the question of whether the pursuer was told that he would get a copy of the report, I should say that I was favoured with written submissions from the parties on that and other issues. These are with the process, and I do not set them out at length here, but simply refer to them as necessary. I have had full regard to their terms. (Senior counsel for the pursuer accepted that in para 17 of his submissions he had erroneously ascribed something said by Mr Maclean to Councillor Rose to Mr Maclean's meeting with Mrs Travers at Cameron House: findings 46 and 47. Senior counsel for the defender orally added to his written submissions by suggesting that Ms Cunningham, the last person to give evidence, was also a credible and reliable witness.) The global approach of the pursuer was to suggest that all the witnesses, with the exception of Mr Maclean, were credible and reliable. In relation to Mr Maclean it was suggested that his evidence at least bordered on

incredible. The defender's global approach was to suggest that all the witnesses were credible and the dividing line between them was reliability. It was emphasised how much depended on the evidence of the pursuer, and it was suggested that he and his wife had persuaded themselves that what they desired had been what happened.

[33] In my view, on the balance of probabilities, Mr Maclean did tell the pursuer that he would be given a copy of the report. It was clear from the evidence of the pursuer, his wife and, subject to a little qualification, Councillor Rose that getting the report was a condition which had to be agreed before the pursuer was willing to hand over the documentation in his and his wife's possession. In Councillor Rose's case, he sometimes phrased it as getting access to the report, although he also used the words getting the report. I accept the evidence of the pursuer and Mrs Travers that what was wanted was a copy of the report. Getting access to the report is a somewhat vague concept which would not have satisfied the pursuer. In my view, it is highly improbable that he would have "buckled" at the meeting on 18 November 2015 and agreed to hand over the documentation which Mr Maclean wanted in the absence of agreement. That does not square with his subsequent insistence that the terms of reference be agreed before he actually handed over the documentation. It is also highly unlikely, in my view, that he would have told his wife that it had been agreed that the report would be handed over if that were not the case. I accepted Mrs Travers' evidence that Mr Maclean had affirmed to her, by nodding his head, that he had agreed to provide the pursuer with a copy of the report. So far as Councillor Rose is concerned, I accept his evidence that he and Mr Maclean had a brief conversation, and that he took from that conversation that Mr Maclean had confirmed that he was going to give the pursuer a copy of the report. The difficulty is that Councillor Rose's recollection of the words used is

limited, and even more unfortunately, the possible exchange that he suggested does clearly raise the risk of mixed messages. I therefore leave it out of account.

[34] In his affidavit, Mr Maclean accepts that he might have told the pursuer that he would give him a copy of the report, although he also says that he might not. I have to say that the wording of the affidavit seems strange to me. I accept that Mr Maclean was not the person who framed it, but he was able to amend it, and the tenor of his evidence was that he had not agreed to hand over a copy of the report. Senior counsel for the pursuer stressed the embarrassment that Mr Maclean would have felt if the report could not have been progressed. Senior counsel for the defender responded by suggesting that Mr Maclean could simply have reflected the embarrassment back on to the pursuer and his lack of co-operation, but the pursuer would have been able to explain the reason for his lack of co-operation, and it would also have been apparent that the pursuer's co-operation was only necessary because the documentation which the defender should have had had "disappeared". (I do not think Ms Campbell expressly commented on the matter, but it was evident that none of the other witnesses had any expectation that the relevant documentation would be found.) I do not think the emails, in particular Ms Campbell's email of 27 November 2015, assist the defender's case. From the point of view of PwC, their immediate concern – which would also of course be the pursuer's immediate concern – would be to know the inquiry's remit and the conditions relating to storage of the pursuer's documentation and access to that documentation. I do not consider it strange that the first mention of who was to receive the report should appear at a later stage in the email chain. It is not altogether clear that it need have appeared at all. The pursuer's concerns appear to relate to who was to have access to his documentation. Even without Mr Maclean's agreement that he would be given a copy of the report, it would not be surprising for the

pursuer to believe that head 3 did not apply to him and his wife. Against the background that the pursuer was told that he would get a copy of the report, head 3 cannot apply to him.

[35] As noted earlier, senior counsel for the defender advanced the subsidiary position that if Mr Maclean did say something about providing the pursuer with a copy of the report, he was simply indicating a personal commitment to do what he could to get the pursuer a copy of it. I reject this alternative scenario. It does not appear in the defender's pleadings, although in mitigation of that point it may be said that Mr Maclean is not the defender. Beyond that, however, Mr Maclean did not say it in evidence. Moreover, in terms of his evidence Mr Maclean's thinking at the time was that the report could be completed by the time he left the defender's employment. He was the one who would be getting the report. There would be nothing stopping him handing over a copy to the pursuer.

[36] The last barrier put up by the defender was the suggestion that an unredacted copy of the report could not be handed over on data protection grounds. The pursuer's submissions on the point were relatively brief, and focussed on the paucity of the defender's averments and the generality of the defender's submissions. In the pursuer's submission, the pleadings about the DPA [to use the pursuer's abbreviation] were immature and not developed. There was no explanation as to why the DPA would prevent disclosure when the Act was riddled with exceptions. Absent any proper pleadings in this respect, that was not a defence. Senior counsel drew a distinction between disclosure of the report and its findings, and disclosure of sensitive personal data, and I should not engage in second guessing of the position that might arise with the DPA. In any event, senior counsel submitted, in relation to a court order, there was an exemption, and section 35 of the Data Protection Act 1998 was quoted, which I assume indicates that that is the appropriate Act,

and the Act identified as DPA in the remainder of his submissions. Section 35 provides as follows:

> "(1) Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law of law or by the order of a court.
>
> (2) Personal data are exempt from the non-disclosure provisions wherever the disclosure is necessary-
>
> > (a) for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings, or
> >
> > (b) for the purpose of obtaining legal advice,
> >
> > or is otherwise necessary for the purposes of establishing, exercising or defending legal rights."

In senior counsel's submission, the defender would have nothing to fear if the crave were granted. Senior counsel reiterated that the court should not, without full and clear pleading, have to second guess the DPA obligations as the Act was punctuated with numerous exceptions. If it was agreed to hand the report over, then the defender ought to state with clarity why they could not. Were the defender to argue that it would illegal to hand the report over, there were insufficient pleadings to justify that assertion, which was in any event wrong.

[37] Turning to the defender's submission, senior counsel for the defender also advanced relatively brief submissions. In his submission, the pursuer had been provided with an extract of the final report redacted in a way which the defender said was the most it could do consistent with its obligations under the Data Protection Act. It had offered to have that issue determined by the ICO and the pursuer had refused. Senior counsel referred me to para 16 of Schedule 2(3) to the Data Protection Act 2018 and article 15(4) of the General Data Protection Regulation (which deal with disclosures which also disclose information

identifying others). The defender considered that it would contravene those requirements if it provided the pursuer with an unredacted copy of the report. Senior counsel reiterated that the defender had not sought to make itself the judge of that; it had offered to let the regulator decide. Senior counsel further submitted that the court was being asked to order the defender to do something illegal because it had supposedly agreed to do so. He suggested it would be very strange indeed if any person or body could escape the constraints of the Data Protection Act and GDPR simply by agreeing to do something unlawful and when taxed with its being illegal, could simply say, "Well we agreed to do it, so that makes it legal, regardless of whatever rights of third parties are thereby trampled." In senior counsel's submission, that was not the law. Whether a court would enforce a contract that contained an illegal obligation depended nowadays on the application of the principles set out in the UK Supreme Court case of *Patel* v *Mirza* [2017] AC 467. The claimant in *Patel* had paid a large sum of money to the defendant pursuant to an agreement that he would use it to bet on the movement of shares on the basis of insider information, an agreement of that nature being illegal. The agreement could not be carried out since the expected insider information was not forthcoming. The claimant sought repayment of his money on the basis of unjustified enrichment. He failed in the High Court, but was successful in the Court of Appeal and Supreme Court. It was held, in short, that the general rule was that a person who satisfied the ordinary requirements of unjust enrichment was not debarred from recovery by reason of the fact that the consideration was an unlawful consideration; an order for restitution should be made in the case because it would merely return the parties to their pre contract position and prevent the defendant unjustly enriching himself. Senior counsel for the defender relied on a passage in the headnote as providing an accurate summary of the judgment, as follows:

> "The two broad policy reasons for the common law doctrine of illegality as a defence to a civil claim are that (i) a person should not be allowed to profit from his own wrongdoing and (ii) the law should be coherent and not self-defeating. The essential rationale of the doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality). The rule that a party to an illegal agreement cannot enforce a claim against the other party to the agreement if he has to rely on his own illegal conduct in order to establish the claim does not satisfy the requirements of coherence and integrity of the legal system and should no longer be followed. Instead the court should assess whether the public interest would be harmed by enforcement of the illegal agreement, which requires it to consider (a) the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) any other relevant public policy on which the denial of the claim may have an impact and (c) whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but the court is not free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of those considerations, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

In senior counsel's submission, the legal policy underlying the Data Protection Act and the GDPR would plainly be set at nought if the contract were to be enforced by the court. There were no weighty countervailing considerations given that the people whose rights would be trampled if the contract were enforced were third parties who had nothing to do with the supposed contract. Their rights would be gone through no fault of their own if the court enforced the contract.

[38] In my view, neither the Data Protection Act 1998 nor the Data Protection Act 2018 bars the pursuer from receiving an unredacted copy of the PwC report. In saying that, and in the absence of detailed submissions on the point, particularly from senior counsel for the pursuer, I take the relevant legislation to be the 2018 Act. Clearly the pursuer sought the report long before May 2018 when the 1998 Act and the Data Protection Directive were supplanted by the 2018 Act and the General Data Protection Regulation, but I am being asked to make an order now. I was not addressed on any changes brought about by Brexit,

although I would understand that UK GDPR largely replicates the GDPR, with some transpositional changes. However, it appeared to me that the parties' submissions remained in the shallower waters of data protection, and I would not propose to venture out more deeply in the absence of fuller submissions. I would allow the pursuer to have a full unredacted report essentially on two grounds. First of all, all I have is the defender's assertion that data protection issues arise. Senior counsel for the pursuer partly covered the matter in his submissions in relation to the paucity of the defender's averments. In addition, the only two witnesses led for the defender were persons who had left the defender's employ long before the report was completed. In terms of the defender's submissions, as recorded in the previous paragraph, senior counsel did not submit that the provision of an unredacted report would breach data protection law, he merely submitted that the defender believed it would. The defender is obviously willing to have the matter ruled upon by the ICO, but the pursuer has brought an action in this court. In the absence of any argument that the court cannot decide the point, which could presumably have been determined at debate, I am simply left with the defender's *ipse dixit*. Secondly, if it be assumed that some third party disclosure will inevitably occur, if it becomes a matter of making a *Patel* v *Mirza* type calculation, the balance in my view falls very firmly in favour of providing the pursuer with a copy of the report. I have found that there was an agreement that he would get a copy of the report. The agreement was a bilateral one. In return for getting the report, the pursuer handed over in excess of 3,000 pieces of documentation. Had he not done so, the report would not have got off the ground. Although not part of the agreement, he and his wife also provided assistance by way of agreeing to be interviewed by PwC. The report was being prepared for a worthy purpose and was a valuable document from the point of view of both the pursuer and the defender. From the pursuer's point of view, it might shed light

on the appalling victimisation that he and his family had suffered for a number of years. From the defender's point of view, it might expose corruption and financial loss within the council (a matter also of concern to the pursuer). It is not permissible to indulge in speculation, but it is not immediately obvious that any significant personal data breaches would arise as a result of the pursuer receiving a copy of the report. I note that the pursuer has undertaken to accept a report with matters such as email addresses and the like redacted. Senior counsel for the defender did suggest there was an incongruity in seeking an unredacted report and offering to accept redactions. All I would say is, if the pursuer is content to allow those redactions, well and good, but his offer is not a factor I rely on in persuading me that he is entitled to the remedy which he seeks.

[39] The final issue is the terms of the crave to be granted. Senior counsel for the pursuer was content to remove the final clause referring to appendices, previous versions and later revisions. In relation to appendices, in the excerpts from the report provided to the pursuer, reference is made to an Appendix 1, which apparently contained the initial emails. There may be other appendices. Senior counsel having sought the deletion of the clause, I do not think I can leave in the reference to appendices, but it does appear to me that in ordinary usage, reference to "a report" would include the appendices to the report in addition to the report itself. I would expect the report which the pursuer is to receive to include appendices; he will not be getting any more than it was agreed that he would get. In relation to previous versions and later revisions, the evidence revealed that what was described as an interim or draft report was produced by PwC in December 2015. It appeared however that this document was prepared at the behest of the defender to see what progress was being made. It was only a few pages long and detailed the work done and still to be done. It was not in any sense a draft to be revised into a final document and it

is understandable that it was not sought by the pursuer. However, it also appeared that when what was intended to be the final report was handed over by PwC in or about April 2016, some further investigations were required by the then monitoring officer of the defender, Nick Smith. It was not clear whether these were carried out by PwC or the defender's employees. The investigations appear to have been completed by June 2016. For the avoidance of doubt, if adjustments were made to the report, the adjusted report is the document which should be handed over to the pursuer; June 2016 is close enough to be described as "on or around March 2016 or April 2016". If something separate was produced, then regrettably I think it is not included.

[40] In the result, I have sustained the pursuer's first plea-in-law and repelled the parties' remaining pleas-in-law and granted decree in terms of the pursuer's first crave, as restricted. I was asked by both parties to reserve expenses. I have done so, and appointed a hearing on the question. If parties are able to reach agreement about expenses, they can inform the sheriff clerk's office and the hearing can be discharged. Sanction has previously been granted for the employment of senior and junior counsel.