



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 63

P426/23

OPINION OF LORD SANDISON

In the Note of

(FIRST) THORNTONS INVESTMENT HOLDINGS LIMITED; (SECOND) MATHESON CONSULTING LIMITED; and (THIRD) THORNTONS WEALTH MANAGEMENT LIMITED

Noters

against

(FIRST) RORY MATHESON; (SECOND) LISA MATHESON; (THIRD) MARGARET McINTOSH; (FOURTH), ROBERT McINTOSH; and (FIFTH) GRANITE WEALTH CONSULTING LIMITED

Respondents

**Noters: MacColl, K.C., Ower; Thorntons Law LLP
First and Second Respondents: McIlvride, K.C.; Blackadders LLP
Third and Fifth Respondents: Tosh; Mackinnons Solicitors LLP**

21 September 2023

Introduction

[1] This is a Note within a pending petition process which was brought to obtain orders in terms of section 1 of the Administration of Justice (Scotland) Act 1972. The Noters (the petitioners in the petition process) ask the court to excuse their use, without prior permission, of documents recovered by way of “dawn raids” authorised by the court under section 1 of the 1972 Act, and to grant permission for those documents to be used for certain purposes other than that for which the section 1 order was granted. The first and second

respondents maintain that no such orders should be granted. The third and fifth respondents go further and ask the court not only to refuse the prayer of the Note, but to sanction the Noters for their unauthorised use of the documents in various ways.

Statutory Provision and Rules of Court

[2] Section 1(1) of the Administration of Justice (Scotland) Act 1972 is in the following terms:

“1. — Extended powers of courts to order inspection of documents and other property, etc.

(1) Without prejudice to the existing powers of the Court of Session, of the Sheriff Appeal Court and of the sheriff court, those courts shall have power, subject to the provisions of subsection (4) of this section, to order the inspection, photographing, preservation, custody and detention of documents and other property (including, where appropriate, land) which appear to the court to be property as to which any question may relevantly arise in any existing civil proceedings before that court or in civil proceedings which are likely to be brought, and to order the production and recovery of any such property, the taking of samples thereof and the carrying out of any experiment thereon or therewith.”

[3] Chapter 64 of the Rules of the Court of Session 1994 deals with applications for an order under section 1 of the 1972 Act made where a cause is not depending before the court in which the application is made, and *inter alia* provides as follows:

“64.3 The petitioner shall lodge with the application –

...

(b) an undertaking by the petitioner that he –

(i) will comply with any order of the court as to payment of compensation if it is subsequently discovered that the order, or the implementation of the order, has caused loss to the respondent or, where the haver is not the respondent, to the haver; and

(ii) will bring within a reasonable time of the execution of the order any proceedings which he decides to bring; and

(iii) will not, without leave of the court, use any information, documents or other property obtained as a result of the order, except for the purpose of any proceedings which he decides to bring and to which the order relates.

Modification of undertakings

64.4 The court may, on cause shown, modify, by addition, deletion or substitution, the undertaking mentioned in rule 64.3(b).”

Factual Background

The Parties

[4] The Noters are a group of companies involved in the business of the provision of investment advice and financial planning. The ultimate owners of the group are present and former partners in the firm of solicitors presently known as Thorntons Law LLP. Until December 2020 the third Noter was not part of the group, but was owned by the first and second respondents, Rory and Lisa Matheson, and was known as Matheson Financial Consulting Limited. It changed its name in December 2022 to Thorntons Wealth Management Limited, and it now trades as “Thorntons Wealth”, but I shall refer to it as “MFC”, an abbreviation of the name by which it was known during the period when most of the events relevant to this dispute occurred. The Mathesons sold their shares in MFC to the group in December 2020 and entered into certain restrictive covenants aimed at preventing them from competing with the business of MFC, or attracting away its clients, for a three-year period after the sale. Mr Matheson also remained employed by MFC on terms which prevented him disclosing confidential information to others during and after his employment. The third respondent, Margaret McIntosh, was also an employee of MFC and her terms of employment likewise contained anti-competition and confidentiality provisions. The fourth respondent, Robert McIntosh, is Margaret’s husband, but his involvement in the events in issue in the Note is limited and he did not lodge answers or otherwise participate in the Note process. The fifth respondent, Granite Wealth Consulting Limited, is a company set up in May 2022, owned by Mrs McIntosh and to which Mr McIntosh is the company secretary, and which is alleged by the Noters to have been

intended as a vehicle for Mrs McIntosh, with the backing of Mr Matheson, to compete with MFC and lure away its clients.

The Section 1 Petition

[5] In April 2022 Mrs McIntosh gave notice of her intention to resign from her employment with MFC. The following month, Chris Forde, Head of Financial Planning for MFC, claims to have received a package in the mail from an anonymous sender enclosing a copy of an email between Mr and Mrs McIntosh suggesting that Mr Matheson was attempting to put Mrs McIntosh in touch discreetly with an accountant in connection with a proposal to set up a new company for her to carry on business in the financial services sector. Later in May 2022, Stephen Webster, the Noters' Chief Executive Officer, is said to have received a further anonymous package consisting of a note warning him that plans were well established to transfer clients to a new entity set up, funded and staffed by current employees, together with emails bringing to light the connection between the McIntoshes and Granite Wealth and implying that Mr Matheson was providing that company's initial capital by way of loan to Mrs McIntosh. Documents bearing to be a timeline and business plan for the new enterprise were also provided, suggesting that it was proposed that other employees of MFC would in due course leave it and join the new venture, and that existing clients of MFC would be lured to it as soon as Mrs McIntosh's restrictive covenants expired.

[6] The Noters, instructing Thorntons Law LLP as their solicitors, then all petitioned this court under section 1 of the Administration of Justice (Scotland) Act 1972 narrating that they intended to bring proceedings against the Mathesons based on their alleged breaches of the restrictive covenants in their share sale contract, and against Mr Matheson and Mrs McIntosh in respect of their alleged breaches of their employment contracts, as well as

against Granite Wealth, for damages or an account of profits. They narrated that those intended proceedings would also seek interdict against wrongful actings, and orders for delivery up of confidential material. It was claimed that, in order to allow the proposed proceedings to be properly pled, certain types of documents and property should be taken into the possession of the court, and to that end that authority should be given to commissioners of the court to enter the homes of the Mathesons and the McIntoshes without prior notice, to search for and seize material of the relevant description, and to deliver it to the custody of the court. The material in question was, broadly speaking, any hard copy or electronic document containing information relating to the business of the Noters obtained by Mr Matheson or Mrs McIntosh in the course of their employment with MFC; information confidential to MFC or Matheson Consulting Limited (including client details, terms of business, financial information, and business, strategy and marketing plans); the identities of any third parties to whom such confidential information had been disclosed, and the nature of any such disclosure; the terms on which the Mathesons had provided financial backing to the McIntoshes or Granite Wealth to facilitate the establishment or operation of the latter; and generally any communications amongst the Mathesons and the McIntoshes in connection with the incorporation of Granite Wealth, or communications with clients in connection with investment, wealth management or financial planning services.

[7] On 23 June 2022 the court was persuaded to grant the orders sought. It appointed one senior member of the Bar to attend at the Mathesons' house, and another to attend at the McIntoshes'. In accordance with Rule of Court 64.3(b)(iii), the Noters were required to undertake to the court as a pre-condition of the order being made that they would not, without the court's leave, use any information, documents or other property obtained as a result of the order, except for the purpose of any proceedings which they decided to bring

and to which the order related - in other words, for the purposes of the particular proceedings which they had told the court in the section 1 petition they intended to bring, as described above. That undertaking was given on their behalf by Scott Milne, a solicitor and partner in Thorntons Law LLP and a member of the boards of directors of all three Noters.

Implementation of the Section 1 Order and its Aftermath

[8] “Dawn raids” took place at the homes of the Mathesons and the McIntoshes on 24 June 2022. A solicitor from Thorntons Law LLP was present at each raid, as was an IT expert appointed to assist the relevant commissioner to identify any electronic devices and, if possible, ascertain on the spot whether those devices contained any material falling within the terms of the court’s order. In the event, electronic devices were seized from the Mathesons’ home so that they might, with the leave of the court, subsequently be examined in order to ascertain whether they contained any such material. Such devices were seized from the McIntoshes’ home for the same purpose, as were hard copy documents.

Mr McIntosh initially asserted a claim to confidentiality in respect of the contents of a mobile telephone and a laptop seized from him and used for the purposes of his (unrelated) employment, but then withdrew that claim. Each of the commissioners subsequently reported to the court. The commissioner who had attended at the McIntoshes’ home initially did so on 29 and 30 June 2022. Each of his reports was submitted, not only to the court, but to Thorntons Law LLP. The report of 29 June 2022 outlined in general terms what had been seized from the McIntoshes’ home, both documents in hard copy and electronic devices, but did not disclose any detail of the content of those items. The report of 30 June 2022 slightly amended the inventory of electronic devices seized and noted the results of an initial professional examination of Mrs McIntosh’s mobile telephone, which suggested that

some deletion of call logs may have taken place, or else that it was not the only such telephone used by her.

[9] On 8 July 2022, on the application of the Noters, the court allowed them to inspect, borrow and take copies of the hard copy documents listed in the McIntosh commissioner's report of 30 June 2022, and allowed the electronic devices seized during the raids in respect of which Mr McIntosh had withdrawn his initial claim of confidentiality to be sent to the IT expert for analysis. It is important to note that the court was not asked to, and did not, allow the hard copy documents to be used for any purpose other than that specified in the section 1 petition, viz., for the purpose of raising proceedings against the respondents along the lines set out in the petition. Equally, the court was not asked to, and did not, allow the petitioners to have any access to the content of the electronic devices sent in the first instance for analysis. Rather, it expected the analyst to report to the relevant commissioner, who would in turn report to the court, which itself would decide, in the absence of consent on the part of those from whom the material had been seized, whether any of it should be released to the Noters.

[10] In his capacity as solicitor to the Noters, Mr Milne attended at court on 8 July 2022 and borrowed the hard copy documents to which the Noter had been allowed access. He also uplifted the electronic devices in respect of which confidentiality had initially been asserted to be sent to the IT expert, who already had the other devices seized during the raids for analysis.

[11] On 12 July 2022 the Matheson commissioner reported to the Court, identifying the electronic devices seized from the Mathesons and noting that they were in the possession of the IT expert in order that he could search them for any material falling within the terms of

the court's original order. He stated that he believed that he had exhausted the court's commission to him.

[12] On 14 July 2022 Mr Matheson lodged answers to the section 1 petition. He opposed a further motion made by the Noters to be permitted to examine the material seized by the Matheson commissioner, and given that the petition was now a contested one, the court on 4 August determined that any access to that material should wait until the determination of a hearing on the petition and answers, which was fixed for 27 September.

[13] The IT expert carrying out the examination of the remaining electronic devices seized in both raids reported his findings to the commissioners on 11 September 2022. That report not only stated, *inter alia*, that material falling within the court's order had been found on certain devices, but also indicated the nature of that material. Thorntons Law LLP became aware that this report had been sent to the commissioners and emailed them both on the morning of 12 September asking to be shown the expert report as soon as possible and enquiring whether the court's permission was required to achieve that. The McIntosh commissioner issued a further report dated 12 September, which effectively simply brought to the court's attention the entirety of the IT expert's report and thus disclosed not only the existence, but also the nature, of material falling within the court's order found on the electronic devices seized in the raids. That report was sent to the court and also to Thorntons Law LLP. The commissioner stated in an email to Thorntons Law LLP that he did not think it necessary to seek the court's permission to access the content of the expert's report but that it would be best to check that matter directly with the court. The Matheson commissioner stated in an email to Thorntons Law LLP that, insofar as he had any remaining jurisdiction, he was content that the IT expert's report might be released to the Noters. Thorntons Law LLP then decided, seemingly having consulted counsel, that it

would be in order to disclose the commissioners' reports, incorporating the IT expert's report, to the Noters without further recourse to the court. The reports were disclosed by Mr Milne to other solicitors at Thorntons Law LLP, and to Mr Webster and Mr Forde of the Noters. In consequence of that disclosure, instructions were received for Thorntons Law LLP to raise on behalf of the Noters the litigations against Mr Matheson, Mrs McIntosh and Granite Wealth contemplated in the section 1 petition. The petition proceedings were sisted and the hearing in them scheduled for 27 September did not take place. Summonses in the actions contemplated by the section 1 petition passed the Signet on 17 October 2022, and are being defended. The Noters intend to make use of the material recovered in the section 1 petition in those litigations, although objection is taken by at least some of the defenders in those actions to that use. No attempt was made by any party to obtain an express ruling from the court in that connection in these proceedings.

Improper Use of Recovered Material

[14] Winding back the clock for a moment, on the same day as the dawn raids were carried out, 24 June 2022, Mr Matheson and Mrs McIntosh were suspended from their employment by MFC (Mrs McIntosh already being on gardening leave after having given in three months' notice of her intended resignation in April). Matthew Strachan, Chief Investment Officer with MFC, was charged with carrying out an investigation into Mr Matheson's conduct in light of the concerns raised by the content of the anonymous deliveries already said to have been received. Mr Strachan had available to him the information contained in the recoveries made under the section 1 petition and appears to have made unauthorised use of it, to an extent that remains uncertain (since the court did not hear from him), for the purposes of his investigation. Mr Matheson was in due course

summoned to a meeting with Mr Strachan to address matters of concern, but immediately prior to that meeting, on 3 November 2022, he resigned from his employment with immediate effect. In January 2023 he raised proceedings in the Employment Tribunal against MFC, claiming to have been constructively unfairly dismissed and referring in that regard to the dawn raid having been carried out at his home at MFC's instance, and to the action raised against him by the Noters, which he maintained was unjustified. In response to those proceedings, MFC, again acting through Thorntons Law LLP, stated in its defences to the Employment Tribunal proceedings that:

"A Section 1 petition is not granted lightly - there has to be a strong prima facie case on the basis of the evidence before the court which is presented on an ex-parte basis and the court also has to be satisfied that there is a likelihood of proceedings being raised against the respondent (in this case, the Claimant). The petition being granted demonstrates that there was such a prima facie case."

It also maintained in those defences that Mr Matheson's suspension had proceeded upon the anonymous material received:

"and also data, client records, telephonic documents, the business plan and other data held in digital format, including communications with the Claimant, recovered from Ms McIntosh's property".

That statement carried the implication that the material seized from Mrs McIntosh was apt in some unspecified regard to justify the suspension of Mr Matheson. The solicitors at Thorntons Law LLP who stated that defence did so because they were informed by Mr Milne that such was the case. In fact, as already narrated, Mr Matheson was suspended on 24 June 2022 before any recoveries from the dawn raids had been considered. Counsel reviewing the Employment Tribunal proceedings realised that the claim made by MFC therein that Mr Matheson had been suspended at least in part because of the content of the recoveries could not be true. On 21 April 2023 Thorntons Law LLP wrote to the Employment Tribunal withdrawing MFC's claim that Mr Matheson had been suspended, at

least in part, as a result of the nature of the recoveries made in terms of the section 1 petition, but went on to state:

“However, whilst this information was not taken into account as part of the Respondent's decision to suspend the Claimant, and the Claimant resigned prior to the disciplinary investigation actually taking place, the Respondent considers that some of this information is relevant to the Respondent's *Polkey* and contributory fault arguments (narrated in paragraph 20 of the attached version of the ET3 paper apart). Therefore, the Respondent would intend to include this information in the bundle. However, the Respondent does not currently have permission from the Court of Session to use them for the purposes of this Employment Tribunal claim. Accordingly, it is seeking such permission now.”

That communication plainly carried at least an implication as to the nature of the material recovered, namely that it was considered by MFC to support a “*Polkey*” defence (i.e. an argument that any award to Mr Matheson in respect of unfair dismissal should be discounted in order to reflect that he might in any event have been fairly dismissed) and to support a contributory fault argument.

[15] On 23 April 2023, MFC applied to the court by motion for permission to use the section 1 recoveries in the defence of the Employment Tribunal proceedings. Given that that application required to take into account relatively complex facts and was hotly disputed, it was directed to proceed by way of the present Note. A substantive hearing in the Employment Tribunal scheduled for May 2023 was postponed to enable the Note proceedings to be concluded first.

[16] In respect of Mrs McIntosh, she was also put under investigation pursuant to MFC's disciplinary processes. On 7 July 2022 Mr Webster wrote to her, stating:

“An external investigation continues following the Discovery Process, and we await the final report on findings (‘the external report’) which we anticipate may take up to 4 weeks.

Once we have received the external report, our internal investigation will commence which forms part of our Disciplinary Procedure. In that regard, we have appointed Matt Strachan to lead and conduct the disciplinary investigation. The aim of the

investigation is to establish the facts of the matter by gathering as much relevant information as possible and his investigation will take into account the external report following the Discovery Process.”

The external report referred to in that letter must have been either of both of the commissioner’s anticipated final report to the court, or the IT expert’s report on the content of the recovered devices (the release of which to the Noters the court had not authorised).

Mr Strachan produced a summary report on his disciplinary investigation on 5 October 2022. It noted that his terms of reference were:

“Physical documents and files and digital data (including phone and mail records) recovered from Margaret McIntosh’s home on 24th June 2022 during authorised Section One recovery process”.

The summary report contained an extensive narration of the content of material recovered by way of the section 1 petition process and stated Mr Strachan’s view that it justified the commencement of disciplinary proceedings. Those proceedings were carried out by Edward Rosengarten, a non-executive director in the Noters’ group. They also relied extensively on the content of the recoveries. Mrs McIntosh did not participate in the disciplinary proceedings, which found on 19 October 2022 that she had breached various duties of fidelity and confidentiality incumbent on her. She was dismissed from MFC’s employment, but on 11 November 2022 appealed that dismissal in terms of its domestic processes. Her appeal specifically complained of the unauthorised use of the section 1 recoveries for the purposes of the investigation and disciplinary processes which had been maintained against her. The hearing of that appeal has been overtaken by the current dispute and the appeal has not yet been determined.

[17] Further, MFC, Mr Matheson and Mrs McIntosh are subject to regulation by the Financial Conduct Authority. MFC formed the opinion, assisted by external advice by compliance consultants, that it required to notify the FCA of the commencement of

disciplinary proceedings against those individuals. On 13 July 2022. Stephen Webster, the Chief Executive Officer of MFC (to whom, it will be recalled, Mr Milne had shown the material recovered in terms of the section 1 petition) notified the FCA of those proceedings, and in doing so stated:

“At the time of writing this notification the court representatives are conducting their inspections of the various devices and documents seized. I was invited by the court officials on the 8th July 2022 and 11th July 2022 to inspect two boxes of documents which were acquired from the home of Margaret McIntosh during the implementation of the section one order. The boxes contained a significant amount of client personal and financial information belonging to our firm which has been taken without knowledge and consent of the business.”

Mr Webster also repeated to the FCA the opinion of the IT expert, referred to in the report of the McIntosh commissioner of 30 June 2022, that Mrs McIntosh’s mobile telephone may have had certain logs deleted from it before being surrendered to the commissioner.

[18] On 20 October 2022 MFC responded to a request for an FCA regulatory reference for Mrs McIntosh which it had received earlier that month from a third party. It referred to Mr Webster’s previous report to the FCA and added that:

“following completion of our investigatory process, it was determined that the individual had committed gross misconduct during her employment and had she not already left the Company’s employment by the date of that determination she would have been summarily dismissed.”

On 28 October 2022 Mr Webster again wrote to the FCA, informing it of the outcome of the disciplinary proceedings against Mrs McIntosh (which, as already noted, had proceeded largely on the basis of the section 1 recoveries). He was not aware (because he had not been told by Mr Milne) that use of the recovered material without the court’s permission for the purposes of reporting to the FCA or giving a regulatory reference was contrary to the undertaking given to the court on behalf of the Noters in order to enable the dawn raids to take place in the first place.

[19] According to affidavits sworn by Mr Milne, there was no deliberate attempt on his part or on the part of the Noters or their employees to circumvent the undertaking given to the court. He apologises to the court for what he refers to as a lack of proactivity on his part which might have avoided a breach of the undertaking.

Noters' Submissions

[20] On behalf of the Noters, senior counsel moved the court to excuse the unpermitted previous use of the section 1 recoveries and to permit their use by the Noters in the Employment Tribunal proceedings and in correspondence with the FCA. The Noters accepted that their use of the recovered documentation in those contexts should not have occurred without prior permission of the court: *Iomega Corporation v Myrica (UK) Limited* 1998 SC 636, 1999 SLT 796. Although the use of the content of the IT expert's report for the purposes of the litigations contemplated by the section 1 proceedings had not, strictly speaking, been in breach of the undertaking given by the Noters to the court, and had occurred in consequence of what the commissioners had said and done, it was accepted that the court had not formally pronounced any order permitting the Noters to have access to that material, and that accordingly its use, even for those purposes, should not have occurred. The Noters, their representatives and, in particular, Mr Milne, tendered their sincere apologies to the court for those inadvertent lapses or mistakes on their part. There had been a failure on the part of Mr Milne to clarify to the Noters the exact uses to which the recovered material could and could not properly be put. He had not been conscious, when he provided the Noters with the recovered material, that any use other than the one contemplated by the section 1 proceedings was under consideration or might come to be so. The court could now allow such collateral use of the recovered material as appeared to it to

be in the interests of justice: *Duff & Phelps Ltd, Minuter* [2022] CSOH 16, 2022 SLT 450 at [4] - [6].

[21] In respect of the Employment Tribunal proceedings, it was accepted that the Noters had acted in breach of their undertaking to the court. However, Mr Matheson had chosen to raise those proceedings and to found upon the events of the section 1 petition process as one of the principal bases of his claim. MFC wished to refer, in its written pleadings, and in any hearing which took place, to the documents which were recovered in terms of the section 1 order. Reference to those documents was both necessary and in the interests of justice, because consideration of them gave useful context to whether the execution of the order gave rise (or could have given rise) to any breach of contract on the part of MFC. It was likely that, had the Noters sought the court's permission in advance for collateral use of the recoveries in the Employment Tribunal proceedings, such permission would have been granted. No true prejudice had been caused to Mr Matheson by the use of those materials. It was both sensible and desirable that the materials in question should be placed before the Tribunal.

[22] In relation to the Financial Conduct Authority, it was equally accepted that the Noters had acted in breach of their undertaking to the court. However, they were under a regulatory obligation to inform the FCA if any regulated individual became subject to a disciplinary investigation. Mr Webster's reference to certain of the recoveries in his notification to the FCA followed the advice of the Noters' compliance consultants that the fact that disciplinary and court proceedings based on highly credible and incriminating allegations had been instituted was sufficient to trigger the notification requirements of the FCA in relation to potential breaches of its Code of Conduct for those whom it regulated. It was accepted that Mr Webster's use of the documentation recovered under the order was a

breach of the undertaking given to this court, but again that breach was an inadvertent mistake. Mr Webster had been unaware that there were limitations on the use of the recovered material because Mr Milne had failed to explain the matter to him. Again, it was likely that a prospective application to the court for such use of the recovered material would have been granted. It would be artificial to cause the Noters to withhold from the FCA that which it had a proper interest to know, and it was competent for the court to allow that to happen.

[23] It was submitted that it was necessary, both in order for the Noters to defend the Employment Tribunal proceedings and in order for them to continue to comply with their obligations to the FCA, that they should be permitted to refer to the documents recovered in terms of the order. The Tribunal and the FCA should be provided with the material necessary to enable them to perform their functions properly. The respondents had no proper interest in preventing that. The court should (a) excuse the use, without prior permission, of the documents recovered in terms of the order, for purposes other than the use contemplated in the section 1 petition; and (b) grant permission for the use by the Noters of the documents recovered in terms of the order, including in particular all of the commissioners' reports, and the recoveries and inventories referred to therein, for the purposes of the Employment Tribunal proceedings and in order to ensure that the Noters continued to comply with their obligations to the FCA. It was a matter for the court's discretion whether to impose conditions on such future use of the recoveries. These were not appropriate proceedings in which to decide any issue of contempt of court which might arise.

Respondents' Submissions

[24] On behalf of the Mathesons, senior counsel submitted that the Noters were not entitled to the orders sought, and the prayer of the Note should accordingly be refused. The application for permission to use all of the documents recovered under the order and all of the commissioners' reports was premature in relation to any documents recovered from Mr Matheson and any reference to such documentation in the commissioners' reports, because pending the determination of the section 1 petition which he had opposed, the court had granted no order entitling the Noters to inspect, copy or otherwise intromit with any documents or electronic devices recovered from him.

[25] In any event, the wide-ranging orders sought by the Noters should be refused. The court should conclude that the Noters had deliberately and consciously breached the terms of the undertaking, or at least that they had acted with wilful disregard of those terms and of the obligations owed by them to the court. Their actions amounted to an egregious breach of the undertaking on the basis of which they obtained the order *ex parte*, and to a contempt of court. Such conduct should not be excused.

[26] The starting point in considering the application for permission for future use of the recovered material for purposes other than those contemplated by the section 1 petition was that the court should preserve the integrity of the undertaking given to it. It was for the Noters to persuade the court that it was necessary in the interests of justice for any collateral use to be permitted. The Employment Tribunal proceedings were not proceedings of the same or similar character to those contemplated by the section 1 petition, although it was accepted that at least some of the recovered material was *prima facie* relevant to the determination of those proceedings and that a prospective application to the court for permission to use it in that context might well have been successful. Reference was made to

Iomega, per Lord President Rodger at 641E and 646A - D, Lord Kirkwood at 651D - E and Lord Caplan at 654C - D and 656C - D, and to the discussion of various factors of potential relevance to the grant of prospective permission in *Cobra Golf Inc v Rata* [1996] FSR 819 at 830 - 832.

[27] So far as the Noters' application for what in effect was retrospective permission to use the recovered materials for purposes not contemplated by the section 1 petition was concerned, there was no Scottish authority on whether the court had power to grant such permission. In *Miller v Scorey* [1996] 1 WLR 1122, Rimer J had pointed out at 1132 A - B that in English law unpermitted use of recoveries of the kind in issue here involved a contempt of court and in consequence amounted to an abuse of the process of the court. The same conclusions ought to be drawn in Scotland. That characterisation of prior unpermitted use of recoveries made it difficult for the court in effect to accede to the suggestion that an abuse of its processes should be treated as nugatory. In *Miller*, Rimer J had not found it necessary to decide whether the court had power to grant retrospective leave for the unpermitted use of recovered material, observing merely at 1132 C - D that any such jurisdiction could properly be exercised only in rare circumstances.

[28] In *Lakatamia Shipping Co Ltd v Su* [2020] EWHC 3201 (Comm), [2021] 1 WLR 1097, Cockerill J had concluded at [61] under reference to *Miller* and to *Shlaimoun v Mining Technologies International Inc* [2011] EWHC 3278 (QB), [2012] 1 WLR 1276 that a jurisdiction to grant retrospective permission existed, but would be exercised only in limited circumstances. In *Shlaimoun*, Coulson J had considered that questions of whether the breach of undertaking was inadvertent or not, whether permission would have been granted if sought prospectively, whether prejudice had been caused to other litigants, and where the requirements of proportionality lay were relevant to the potential grant of retrospective

permission. In *Lakatamia*, Cockerill J had adopted a similar approach, noting that the other proceedings in which retrospective permission to use recoveries was sought were closely related to the proceedings in which their use was already permitted, and indeed only existed as separate proceedings by happenstance. The allegations in the other proceedings were very serious in nature and it was in the public interest that they be tested by consideration of all relevant evidence, the recoveries being plainly relevant to that exercise. Her Ladyship noted that the breach of undertaking in that case, though serious, had not been deliberate, and that no prejudice or harm had been caused by the unpermitted prior use. In those circumstances, it had been concluded, narrowly, that retrospective permission should be granted, albeit with a costs sanction and a public admonition to those responsible for the breach. In the present case, however, if the court was considering the grant of retrospective permission, it should conclude at the very least that the breaches of the undertaking in this case, and the unpermitted use of the content of the IT expert's report, were egregious in nature and the product of reckless indifference to the duties of the Noters and the rights of the Mathesons and McIntoshes. Mr Matheson had plainly suffered prejudice by the prior unpermitted use, in that the allegations made to the FCA had resulted in him being unable to work in the financial services sector for the foreseeable future. In such circumstances the only effective sanction was for the court to refuse to grant retrospective permission for the prior use of the recoveries in question.

[29] On behalf of Mrs McIntosh and Granite Wealth, counsel invited the court to refuse the Noters the orders they sought and instead to find them in contempt of court and to have abused the court's processes. He agreed with, and in general terms adopted, the submissions made for the Mathesons.

[30] The Noters should be sanctioned for their wrongful use of the material recovered in terms of the order. In particular:

- (i) the Noters should be ordained to return to the court and to delete all material recovered in terms of the order;
- (ii) the actions raised against Mrs McIntosh and Granite should be dismissed or at least the Noters should be ordained to delete any averments which had been made in reliance upon material recovered in terms of the order;
- (iii) the Noters should be ordained to make reasonable reparation to Mrs McIntosh for the breach of the undertaking given to the court and the wrongful use of material recovered in terms of the order and information derived from that material, and to that end Mrs McIntosh should be appointed to lodge a schedule of damages and, if necessary, inquiry should be allowed to determine the quantum of damages;
- (iv) the Noters should be ordained to retract the disclosures made to the FCA insofar as they wrongly relied upon material recovered under the order or information derived therefrom;
- (v) MFC should be ordained to allow Mrs McIntosh's appeal against the finding of gross misconduct made in the disciplinary proceedings brought against her and thereafter to discontinue those proceedings;
- (vi) interdict should be pronounced against the Noters prohibiting them from making any further use of material recovered in terms of the order;
- (vii) the Noters should be ordained to take such steps as the court considered reasonably necessary to draw the terms of that interdict to the attention of their officers, employees and other staff or contractors;

- (viii) the Noters should be found jointly and severally liable to Mrs McIntosh and Granite in the expenses of the Note, the section 1 petition, and the action directed against Mrs McIntosh and Granite on a solicitor-client, client paying basis; and
- (ix) a written judgment should be handed down to give publicity to the court's decision.

It was clear on the Noters' own averments and from the documents produced to the court that they had used documents and other property recovered under the section 1 order, and information derived therefrom, for a number of collateral purposes, namely:

- (i) to carry out an internal investigation into allegations against Mrs McIntosh;
- (ii) to defend a claim brought by Mr Matheson against MFC in the employment tribunal;
- (iii) to seek advice from external compliance consultants;
- (iv) to prosecute disciplinary proceedings against Mrs McIntosh;
- (v) to make a series of disclosures to the FCA; and
- (vi) to issue a regulatory reference in respect of Mrs McIntosh to a prospective new employer.

Each of those uses amounted to an obvious breach of the undertaking the Noters had given to the court. It was clear from Mr Webster's letter to Mrs McIntosh dated 7 July 2022 that the Noters had intended to use material recovered under the order for such collateral purposes from a very early stage. Indeed, given that that letter had been issued before the Noters had been allowed to inspect any of the recovered items, it might reasonably be inferred that the order was sought, in part, for one or more of the collateral purposes to which the documents recovered were then in fact put.

[31] Although the Noters ought to have been aware from the outset that their use of documents recovered under the order for such collateral purposes was not permitted by the court and that such use amounted to a breach of the undertaking they had given to the court, those matters were in any event drawn specifically to their attention in Mrs McIntosh's appeal, submitted on 11 November 2022, against the outcome of the disciplinary proceedings brought against her. Those proceedings had nonetheless not been discontinued, despite the fact that she had given notice of her resignation on 4 April 2022 and her employment had thus in any event terminated on 3 July 2022. That might be contrasted with the position in relation to Mr Matheson, into whose actions an investigation by MFC had been terminated upon his resignation. The disclosures made to the FCA about Mrs McIntosh and the regulatory reference provided to her prospective new employer had stymied her efforts to secure alternative employment in any FCA-regulated role or organisation.

[32] The Noters had in addition originally sought to secure an order for use of material recovered in terms of the section 1 order by motion, without disclosing that they had already made use of that material, other than for the purposes of the actions they had raised, without the permission of the court. The motion failed to acknowledge that the Noters were, in fact, seeking retrospective permission.

[33] Further, the Noters' use of information extracted from electronic devices seized in the dawn raids for the purposes of the actions raised against Mr Matheson, Mrs McIntosh and Granite Wealth was without the permission of the court. All the court had allowed was for those devices to be examined by the IT expert. It had never allowed the Noters to inspect, borrow or copy any forensic image or analysis extracted from those electronic devices. The IT expert's report should not have been incorporated into the McIntosh

commissioner's report of 12 September 2022 and, despite having been so incorporated, should not have been used by the Noters. The commissioner had indicated to Thorntons Law LLP that the court's permission for such use might be required, but no heed had been paid to that observation, without adequate explanation.

[34] None of these matters supported the Noters' present position that their unauthorised use of the material recovered in terms of the section 1 petition was inadvertent or that they genuinely regretted what had happened. On the contrary, the court should conclude in all the circumstances that the breaches were contumacious and the apology circumspect.

[35] Where a company gave an undertaking or became subject to an order prohibiting it from doing certain acts, the company had a duty to take all reasonable steps to ensure that its relevant employees and agents were made aware of the requirement to comply with the undertaking or order. Where the undertaking or order had been breached, the onus rested on the company to show that it had taken all reasonable steps to ensure that the undertaking or order was complied with. Where the undertaking or order had been breached as a result of a failure to do so, the company would have committed a contempt of court. It was not necessary for any person to have acted with the intention of breaching the order or undertaking: *Beggs v Scottish Ministers* 2005 1 SC 342, 2005 SLT 305 at [39]; *Smith v Scottish Ministers* [2015] CSOH 15, 2015 SLT 131 at [13]. The Noters admitted several breaches of the undertaking that they had given to the court. Other breaches were not admitted but nonetheless clear. Accordingly, the Noters bore the burden of showing that they took all reasonable steps to ensure that their undertaking and the court's orders were complied with. They had failed to discharge that burden. Mr Milne, the experienced solicitor conducting the section 1 proceedings on behalf of the Noters, accepted in his affidavits that he had spoken only to Mr Webster about the recovered material, and that he had not advised

Mr Webster that it could not properly be used for purposes other than the raising of the litigation contemplated in the section 1 petition, without the permission of the court. No explanation had been given about what steps were, had since been, or in future would be taken to draw the terms of the undertaking or order to the attention of other directors or staff of the Noters who had used documents or property recovered under the order, or information derived from those documents, for a range of collateral purposes. The Noters had instead, at least in part, tried to blame the commissioners for what had happened. No attempt had been made to obtain the havers' consent for what the Noters proposed to do with material belonging to them; the havers had not even been told what was proposed. No attempt had been made to withdraw what had been said without authority to the FCA.

Against that background, the Noters' approach to ensuring compliance with the undertaking and order had been "so slipshod and lackadaisical, as ... to constitute heedless indifference and recklessness": *R (Bemipoa) v Southwark LBC* [2002] EWHC 153 (Admin) at [46]. The undertaking and order had simply not been taken seriously enough: cf *Beggs* at [50]. What was done plainly fell far short of the requirement to take all reasonable steps to procure compliance contemplated by *Beggs*. Such failings threatened the right to privacy and the public interest in the administration of justice engaged by section 1 proceedings: *Lakatamia* at [47] - [48]. In those circumstances, it was appropriate that the Noters be found in contempt of court and punished accordingly for their abuse of the great privileges which the grant of a section 1 order bestowed.

[36] Collateral use of documents recovered under the order also constituted an abuse of process: *Cobra Golf* at 830 (point 5); *Iomega* 1998 SC 636 per Lord Caplan at 654C. The court could exercise its inherent jurisdiction in the case of an abuse of process by way of a procedural sanction such as dismissal or expenses: *Moore v Scottish Daily Record and Sunday*

Mail Ltd [2008] CSIH 66, 2009 SC 178 at [14]. In the circumstances, it was appropriate that the Noters be found to have committed an abuse of process and that appropriate sanctions be imposed for that abuse.

[37] Separately, the court could also order an inquiry as to damages: *Moore* at [14]; *Bemboa* at [56] - [57]. Whether a right to damages for contempt of court or abuse of process arose at common law did not require to be determined. The Noters had expressly undertaken to comply with any order of court as to payment of compensation if it was subsequently discovered that the order or implementation of the order caused measurable loss to the respondents.

[38] The Noters presented their application as one for both retrospective and prospective permission to use documents recovered under the order, but in reality, their application was one for retrospective permission. They had already used the documents and property recovered under the order, or information derived therefrom, in the Employment Tribunal proceedings and to make disclosures to the FCA. Mrs McIntosh's interests had been grossly prejudiced by the FCA disclosures, which effectively and immediately prevented her from continuing to be employed in the financial services sector despite the allegations against her remaining unproven. In essence, the Noters were asking the court to permit them to carry on and finish what they had already started.

[39] The court could (at least prospectively) grant permission for the use of material recovered for use in other proceedings. In deciding whether to grant such permission and if so on what conditions, the court was exercising a discretion and the guiding principle in the exercise of that discretion was the interests of justice in the circumstances of the particular case. It was not for a party resisting such an application to advance reasons why permission should be refused. It was for the party seeking permission to demonstrate cogent and

persuasive reasons why permission should be granted. The various considerations discussed in *Cobra Golf* at 830 - 832 and in *Iomega* at 1998 SC 646B - D and 651B - E were instructive. There was no compelling reason in the present case to grant the orders sought by the Noters. That the Noters would find the orders they sought useful for their own purposes came nowhere near an adequate justification for their grant. They would suffer no injustice by being kept to the default position in section 1 applications. On the other hand, the injustice to the respondents were their documents to be used for purposes not contemplated by the section 1 proceedings was obvious.

[40] If the court was vested with a power to grant permission retrospectively (which was not clear on the Scottish authorities), it would be proper to exercise that power only in rare circumstances, particularly where there had been or would be prejudice to any party.

Whether permission would have been granted, if sought prospectively, was important, but not sufficient: *Miller* at 1133C - H; *Lakatamia* at [61] - [63]. As a general proposition, the nature and extent of the breaches of the undertaking and order which had already occurred were sufficient to warrant refusal of the Noters' application. The Noters had shown repeatedly that they could not be trusted to comply with the terms of the undertakings they had given or the orders granted by the court.

[41] In any event, even without having regard to the various previous breaches of the undertaking, the relief sought by the Noters should be refused. They should not be granted permission to use the material recovered in the Employment Tribunal proceedings, at least until the final determination of the litigations which had been brought by them.

Mrs McIntosh and Granite intended to object to the admissibility of any of that material for the purposes of proof in those litigations on the grounds that the material used to obtain the order (i.e. that which was said to have been provided anonymously to the Noters) had been

unlawfully obtained and that, as a result, the material recovered in the section 1 proceedings was similarly tainted and inadmissible. That objection would be defeated or seriously undermined if the Noters were entitled to examine Mr and Mrs McIntosh in the Employment Tribunal about the material recovered before they had had the opportunity to have their objection considered and determined. It was not in the interests of justice for the permission sought to be granted at this stage.

[42] The Noters were not entitled to permission (either prospective or retrospective) to provide information to the FCA. Quite apart from the fact that it was wholly unclear what further disclosure to the FCA might be called for, the court's power was confined to permitting the use of material recovered for the purposes of other civil proceedings: 1972 Act, section 1; *Iomega*; cf *Cobra Golf* at 831, point 11(b). Any disclosure to the FCA would not be made in or for the purposes of any proceedings (civil or otherwise). The Noters' application was, in this respect, incompetent. The position might be different once the substantive litigations contemplated by the section 1 proceedings had concluded, at least if the material in question had by then been properly canvassed in open court and findings relevant to the proper exercise of the FCA's functions had been made.

Decision

Proper Conduct of the Section 1 Process

[43] The events disclosed by this Note indicate a serious and apparently widespread misunderstanding of the proper function of a "dawn raid" authorised in terms of section 1 of the 1972 Act. The sole purpose of that process is to take documents or property in relation to which the court considers a question may relevantly arise in an action likely to be brought into the custody of the court without giving those in possession of such material an

opportunity to conceal or destroy it. Nothing that is recovered by way of a “dawn raid” is to be disclosed to or put into the possession of the petitioner in a section 1 application, or the petitioner’s agents, without the consent of the person from whom it was recovered or an order of the court. The court places considerable trust in petitioners, their agents, and its own commissioners, to respect that basic principle and all that flows from it. It appears that that trust may on occasion at least have been misplaced.

[44] For example, in the present case, Mr Milne states in one of his affidavits that a good deal of material was recovered from Mrs McIntosh’s address and that the solicitor representing the petitioners at the raid “with the Commissioner's consent, had the opportunity to view most of that material during the execution of the orders”. It is vital to the proper conduct of a “dawn raid” that the court’s commissioner should be, and should throughout be seen to be, wholly independent of the petitioner and its agents. The sole purpose for which a representative of a petitioner is permitted to attend a “dawn raid” is to provide the commissioner, if he or she is in doubt, with more specialised knowledge which may assist in determining whether or not a particular item being examined by the commissioner does or does not fall within the description of the material which the court has ordered may be taken into its custody. Solicitors in attendance at a dawn raid on behalf of a petitioner should not routinely be shown items which the commissioner is considering seizing, and should not under any circumstances be shown items which he or she has already decided to seize. Any examination by the solicitor of a petitioner of an item under consideration by the commissioner should be limited to the extent strictly necessary in order to provide the assistance just described. Any knowledge gained by such examination should be regarded as subject to a duty of confidence to the person originally in possession of the item. It may be that the court has in the past been too ready to authorise the

attendance of petitioners' representatives on these occasions, and should in future require a clear demonstration that specialised knowledge may be required, and can be provided by such a representative, before such authorisation is given.

[45] Likewise, the court authorises the attendance of IT specialists at "dawn raids" for the purpose of assisting the commissioner to examine or image, on the spot, electronic devices or data repositories for the presence of material to which the court's order relates. If no such examination or imaging takes place, and devices are simply seized and taken away for later analysis, it is difficult to see that the attendance of such specialists is justified. That is a matter of concern because the very considerable cost of a dawn raid, particularly if swollen by the attendance of unnecessary personnel, can easily become an instrument of oppression in the underlying dispute. Again, that is something in relation to which the court may need to develop a more robust attitude than has to date been apparent.

[46] Further, although it is a minor issue in light of the sequence of events which subsequently ensued, in the absence of agreement from those from whom the electronic devices had been seized, it should have been one or other of the commissioners, and not the Noters' solicitor, who ought to have facilitated the transmission of the electronic devices initially in the custody of the court because of the assertion of confidentiality in relation to them to the IT expert once that assertion was withdrawn and the court had permitted their examination by that expert. While there is no suggestion that anything untoward was done in respect of those devices during that transmission, they simply should not have been in the custody of the Noter's solicitor at all before they had been released to the Noters by the court. That they were again betokens a failure to understand the basic principles upon which the section 1 "dawn raid" facility depends.

[47] More seriously, when the IT expert reported to the commissioners in September 2022, by way of a report which contained details of the analysis (and thus of the content) of the seized electronic devices, that report should not have been provided by the commissioners to Thorntons Law LLP, but should have been provided to the court alone. The Noters ought then to have enrolled a motion for disclosure of the expert's report (and the relevant material) to them, which the court would have determined after giving those respondents who had entered appearance in the petition process (and, at its discretion, potentially other interested parties) the opportunity to object. That the IT expert's report was simply handed over to Thorntons Law LLP with no more than a mild suggestion that someone might like to check with the court whether that was in order represented a serious error on the part of the commissioners. That error ought to have been appreciated by Thorntons Law LLP, who should have returned the report unread to the commissioners, and it ought to have been appreciated by counsel whom they apparently consulted on the matter. The question was not an arcane or difficult one; the material seized in the dawn raids was in the custody, and subject to the control, of the court. Absent the consent of those from whom it had been seized, no material obtained in the execution of the section 1 order should have been released to the Noters or their agents without an order of the court permitting that to occur. That so many of those involved in the process apparently did not understand its basic principles suggests the existence of a systemic misunderstanding of the court's procedures which is deeply concerning.

The Noters' Treatment of the Material Released to Them

[48] It was against that background that the Noters proceeded (a) to use the hard copy documents seized from the McIntoshes' home for purposes other than the court had

permitted in its interlocutor of 8 July 2022, in breach of their undertaking to the court; and (b) to use the material in the IT expert's report dated 11 September 2022, without having been given any permission at all by the court to do so. The uses to which that material was put included its use for the purposes of the internal investigations into the behaviour of Mr Matheson and Mrs McIntosh, and the disciplinary proceedings against the latter; for the defence of the Employment Tribunal proceedings brought by Mr Matheson against MFC, and for and in connection with the report to the FCA and the regulatory reference given in respect of Mrs McIntosh.

[49] It is said by the Noters that these uses of the material in question were "inadvertent", and are all ultimately referable to the failure of Mr Milne to advise Mr Webster of the limitations on the use to which material recovered in a section 1 process could properly be put. However, the suggestion that this was an isolated failure on the part of Thorntons Law LLP is difficult to reconcile with the series of events in the execution of the section 1 process set out above. In any event, it is euphemistic in the extreme to describe Mr Milne's failure to remind the Noters of the content of the express undertaking which he had signed on their behalf as merely inadvertent. While I do not accept that the suggestion that he deliberately facilitated the Noters' breach of undertaking or other unpermitted use of the section 1 recoveries, or that he acted recklessly - that is to say, without care for the consequences - in that regard, his actions were undoubtedly careless, and indeed grossly so.

[50] Moreover, the error into which the Noters had fallen was pointed out to them explicitly by Mrs McIntosh in November 2022. That provoked, however, no outward recognition that any mistakes had been made, nor any outward change in the Noters' position. It was not until April 2023 that they approached the court to ask permission for future use of the recovered material, and even then they did not expressly acknowledge that

there was an unresolved issue about its previous impermissible use by them. At around the same time, while withdrawing from the Employment Tribunal their claim on behalf of MFC that Mr Matheson had been suspended in part because of the content of the recoveries, Thorntons Law LLP stated to the Tribunal that MFC considered that the recovered material was relevant to its *Polkey* and contributory fault arguments. That was a further breach of MFC's undertaking to the court, which extends not only to use of recovered material itself, but also to use of the content of that material (*Duff & Phelps* at [6], *Cobra Golf* at 830).

[51] More generally, the attitude taken by the Noters to the issue of previous unpermitted use of the recoveries has very much been to downplay its significance, and to suggest that the matter should be regarded as minor and technical in nature - which it certainly is not. There is, further, an apparent lack of insight into the undesirable consequences of the Noters' choice to instruct Thorntons Law LLP in connection with their dispute with the respondents. The Noters are closely connected with that firm. There is a considerable overlap in the ownership of the four entities. Mr Milne, who gave the undertaking to the court on behalf of the Noters, and then failed to give them the advice necessary to enable them to comply with its terms, is a member of the firm and of the boards of each of the Noters. It is very difficult to see, in that situation, how an appropriate degree of professional independence can be shown to have been exercised in the relationship between the firm and the Noters in connection with the matters in issue. None of these considerations supports any sort of conclusion that serious consideration has been given by the Noters or Thorntons Law LLP as to why matters went awry, or as to how repetition of the errors made is in future to be avoided. While I accept that Mr Milne's apology to the court is a genuine one, it does not go nearly far enough to meet the situation which he created. The conduct of Thorntons Law LLP in general, and its member Mr Milne in particular, throughout the

sequence of events in issue, falls far short of meeting the standards to be expected by the court of its officers. That conduct merits the court's severe censure.

Retrospective Permission/Excusal

[52] I have no doubt that, in an appropriate case, the court has power retrospectively to grant permission in respect of the prior use of material recovered under section 1 of the 1972 Act for purposes not initially allowed. That is because the undertaking which restricts the use of recovered material is one required by the court in the public interest and given to it rather than to any interested party: cf *Iomega*, per Lord President Rodger at 641F - G, 646C - D. It is for the court to determine, both at common law and in terms of RCS 64.4, whether any modification of the standard undertaking is justified, and any modification may be prospective or retrospective.

[53] In *Lakatamia*, Cockerill J also decided at [61] that, in English law, the court had jurisdiction to grant permission retrospectively, but observed that that jurisdiction would be exercised only in limited circumstances. I consider that that statement equally represents the law of Scotland. In *Shlaimoun*, Coulson J indicated that whether another litigant had been prejudiced by the unpermitted use, whether that use was inadvertent, whether a prospective application would have been granted, and where the requirements of proportionality lay, would be likely to be material to any decision to grant permission retrospectively. I agree that these may well be matters of significance in determining whether to grant retrospective permission, but stress that the starting point, even in an application for prospective permission, will be to recognise the need to preserve the integrity of the undertaking (*Iomega*, per Lord President Rodger at 646B - C, following Lord Oliver of Aylmerton in *Crest Homes plc v Marks* [1987] 1 AC 829 at 857H) and that a

correspondingly heavy onus will lie on any party seeking retrospective permission. The same point is made in a slightly different way by Rimer J in *Miller v Scorey* at 1133C - D. In the present case, I have already concluded that to describe the unpermitted use of the recoveries as the result of mere inadvertence would be inadequate. It may be that, had the Noters been misled by faulty legal advice taken from an independent solicitor, they would have been better placed to ask the court to grant retrospective permission. Something of that sort appears to have influenced Cockerill J in *Lakatamia* at [137]. However, the unpermitted use by the Noters in the present case occurred despite Mr Milne, a member of their boards, indeed the person who signed the undertaking on their behalf, being aware of the restrictions on the use of the recoveries and failing to pass that knowledge on to those within the organisations who were to be dealing with them. There is no basis for the actions of the Noters to be regarded as separate and distinct from the actions of Mr Milne in such circumstances. Prejudice appears also to have been caused to Mr Matheson and Mrs McIntosh in the form of the reports to the FCA proceeding upon the recovered material, and the consequent adverse regulatory reference made in respect of Mrs McIntosh. The Noters come nowhere near to discharging the heavy onus on them in respect of a retrospective application for permission.

[54] Perhaps recognising the difficulties inherent in a frank application for retrospective permission, the Noters adopt the slightly different approach, at least in point of form, of asking, not for retrospective permission, but to be “excused” in respect of their prior unpermitted use of the recoveries, leaving the question of whether they are to be permitted to continue to use the recoveries already unlawfully deployed by them to be dealt with by the second and prospectively-directed element of the prayer of the Note. It appears that their request to be excused in respect of the prior use amounts to a request that they should

not be exposed to adverse consequences in respect of that use. Whether that amounts to anything substantially different to a request to be given retrospective permission seems debatable at least. In any event, for the same reasons as have already been set out, their request to be so excused cannot properly be granted. They are not excused, and the prayer of the Note will to that extent be refused.

Future Use of the Recoveries

[55] In *Iomega*, Lord President Rodger observed at 646C - D in the context of prospective applications for permission to use recoveries that:

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

The interests of justice are not, however, considered in a vacuum. The default position is that the rights of a haver to the peaceful possession of his documents and property is only to be infringed to the extent necessary to satisfy competing public interests, primarily but not perhaps entirely exclusively in the determination of civil rights and obligations involving the haver. As the matter was put by Lord Keith of Kinkel in *Home Office v Harman* [1983] 1 AC 280 at 308:

“Discovery constitutes a very serious invasion of the privacy and confidentiality of a litigant's affairs. It forms part of English legal procedure because the public interest in securing that justice is done between parties is considered to outweigh the private and public interest in the maintenance of confidentiality. But the process should not be allowed to place upon the litigant any harsher or more oppressive a burden than is strictly required for seeing that justice is done.”

(See also *Iomega*, per Lord Caplan at 654D - F, and Laddie J in *Cobra Golf* at 824 - 825.) Such considerations result in the principles already mentioned, that the preservation of the integrity of the undertaking is in itself an important element of the interests of justice, and

that, accordingly, permission is likely to be granted only where there are “special circumstances which constitute a cogent reason for permitting collateral use” (per Jackson LJ in *Tchenguiz v Director of Serious Fraud Office* [2014] EWCA Civ 1409 at [66]). Each of the judges in *Iomega* (the Lord President at 646D, Lord Kirkwood at 651D - E, and Lord Caplan at 656D) commended the list of factors capable of influencing the relevant decision set out by Laddie J in *Cobra Golf*.

[56] In *Cobra Golf* at 831, Laddie J re-iterated that the court had a discretion to grant permission prospectively for collateral use of recoveries and went on to observe, so far as relevant for present purposes, that:

- “11. The circumstances which may be taken into account include the following:
- (a) The extent to which relaxation of the undertaking will cause injustice to the party which provided the discovery.
 - (b) Whether the proposed collateral use is in court proceedings or outside litigation (e.g. for disclosure to the press as in *Harman*). *Prima facie* if it is for use outside litigation, it is not the court's function to release for that purpose.
 - ...
 - (d) In so far as the satellite proceedings are in this country:
 - ...
 - (ii) If the collateral use is for civil proceedings, the court should take into account:
 - (a) whether the hub proceedings and the satellite proceedings are similar in character;
 - (b) whether the parties in the two sets of proceedings are the same;
 - (c) the extent to which the party seeking relaxation of the undertaking would be able to obtain discovery by another route and, if so, which route is likely to be cheaper or quicker;
 - (d) whether the effect of the relaxation of the undertaking will have the effect of generating new proceedings or whether it will merely help in pursuing a claim or defence which already exists or could be run anyway;
 - (e) *prima facie* it is not in the interests of justice to hinder a party from advancing a good claim or defence in other proceedings;
 - ...”

In *Duff & Phelps* at [5], Lord Tyre made the additional point that the court could attach conditions to any grant of permission for collateral use in the exercise of its discretion.

[57] In the present case, permission is firstly sought for the future use of the recovered material in the Employment Tribunal proceedings raised by Mr Matheson against MFC. Those are other domestic civil proceedings which are already in existence. They arise out of the employment relationship between those parties and bear a close relation to the subject-matter of the litigations contemplated in the section 1 petition, although there is no exact correspondence between the two disputes. The recovered material may well be relevant in the Employment Tribunal proceedings, in that it may cast a certain light on Mr Matheson's claim that the section 1 petition directed against him was a breach of the relationship of mutual trust and confidence between him and MFC, or in any event enable MFC to state a defence to his claim which it might not otherwise be able to maintain. I understood counsel for the Mathesons to concede that the court might well have permitted at least some recovered material to be used in the Employment Tribunal proceedings had an application to do so been made prospectively, an assessment with which I agree. In these specific circumstances I consider that cogent reasons exist for permitting the use of an element of the recovered material, in the interests of justice, in the Employment Tribunal proceedings.

However, that conclusion relates only to material seized from the Mathesons, and not from the McIntoshes or Granite Wealth. It is Mr Matheson who has raised the proceedings in the Employment Tribunal and thus put in issue the question of whether the section 1 petition as directed against him was in breach of an implied term of his employment contract. That consideration overrides any claim to claim to peaceful possession of his own documents insofar as their content may cast light on the proper resolution of the claim which he has stated and insisted upon. While I appreciate that material recovered from the other respondents may also be relevant to the just disposal of Mr Matheson's claim, those other respondents have done nothing to waive their right to peaceful possession of their

documents and property outwith the context of the litigations contemplated by the section 1 petition. Further, given the unfortunate history of the use by the Noters of the recovered material without permission, I do not consider it appropriate to allow the material seized from the Mathesons to be used, even within the context of the Employment Tribunal proceedings, for whatsoever purpose may ultimately commend itself to the Noters, That material is only be used in that context, and then only for the purposes of defending the claim made by Mr Matheson against MFC and for providing the Tribunal with the means necessary to determine the quantum of any sums properly due to him by MFC in respect of that claim.

[58] In relation to communications between the Noters and the FCA, I reject the submission made on behalf of Mrs McIntosh and Granite, that the court has no power to permit recoveries to be used other than for the purposes of civil proceedings. Although the court has to be persuaded before granting a section 1 order outwith the context of existing proceedings that the material sought is material in respect of which a question may relevantly arise in civil proceedings which are likely to be brought, once that material is in the custody of the court it may be used for such purposes as the court sees fit, in accordance with the principles already discussed. I accept, however, that an application for permission to use such material other than for the purposes of civil proceedings is inherently likely to face greater difficulty in furnishing the court with the cogent reasons required to enable it to conclude that collateral use should be permitted in the interests of justice, or in the public interest more widely. That is the point which I understand Laddie J to have been making at point 11(b) in *Cobra Golf* at 831, set out above. That is the position in respect of the Noters' application to be permitted to use the recoveries in this case for the purposes of regulatory correspondence with the FCA. Properly viewed, there is no regulatory requirement

incumbent on the Noters to furnish the FCA with material or views formed on the basis of material which is either not lawfully in the possession of the Noters at all, or else is in their possession for a strictly circumscribed purpose not including the fulfilment of any regulatory reporting duties which might otherwise be incumbent upon them. There was no need for the Noters to report to the FCA as they did, and there remains no such need. There are no cogent reasons, whether in the interests of justice, or in the public interest more generally, justifying such a collateral use of the recovered material in advance of a determination by the court in the course of the litigations already before it as to exactly what conclusions of potential relevance to the FCA that material justifies. The Noters' application to be permitted meantime to use the recoveries for the purposes of communication with the FCA is refused. Indeed, as a function of my refusal to excuse the Noters in respect of their prior unpermitted use of the recoveries, they shall be ordained to write to the FCA within two weeks of the date of issue of this opinion stating that their prior communications, insofar as based on those recoveries, were in breach of their obligations to the court, and that they unreservedly withdraw such communications. They shall be ordained to write in similar terms and within the same timeframe to the party to whom they provided the unfavourable regulatory reference in respect of Mrs McIntosh. The terms of those communications shall be agreed amongst the parties, which failing shall be settled by the court.

Remedies Sought by the Third and Fifth Respondents

[59] I deal with the remedies sought by Mrs McIntosh and Granite as follows:

- (i) *That the Noters be ordained to return to the court and to delete all material recovered in terms of the order.*

An order in such wide terms would not be justified. Material properly in the hands of the Noters (i.e. the hard copy materials seized by the McIntosh commissioner and listed in his report of 30 June 2022) may – subject to resolution of the objection to such use on different grounds which Mrs McIntosh and Granite have stated – be retained and used by them for the purposes of the litigations contemplated by the section 1 petition and currently in dependence before the court. The further material seized from the Mathesons which I have determined the Noters shall be allowed to be used for the specific purposes identified above in the context of the Employment Tribunal proceedings may be retained by them for those purposes. Any material not falling within those categories shall be returned by the Noters to the custody of the court, and no copies in any format shall be retained, nor shall the content of such material be used in any manner by them.

(ii) That the actions raised against Mrs McIntosh and Granite be dismissed, or at least the Noters should be ordained to delete any averments which had been made in reliance upon material recovered in terms of the order.

Dismissal of the substantive action raised against those parties would be a disproportionate response to the Noters' actions. However, it is only the material properly in the hands of the Noters, as identified above, which is capable of being used for the purposes of that action (and the related action against Mr Matheson) as matters stand. Insofar as there are averments in those actions which flow from other recoveries, the Noters shall apply for permission to use those recoveries in those actions, if so advised, within two weeks of the date of issue of this opinion, failing which the court shall, on the application of the relevant respondents, strike such

averments from the relative Record. I further observe that any residual issue as to the extent to which the Noters may competently use recovered material in these actions should be resolved in advance of the proof diets in them, by way of motion at the instance of any interested party.

(iii) That the Noters be ordained to make reasonable reparation to Mrs McIntosh for the breach of the undertaking given to the court and the wrongful use of material recovered in terms of the order and information derived from that material, and to that end Mrs McIntosh should be appointed to lodge a schedule of damages and, if necessary, inquiry should be allowed to determine the quantum of damages.

I understand that this remedy is said to flow from the submission that unsanctioned collateral use of section 1 recoveries constitutes an abuse of process and a contempt of court (see *Cobra Golf*, at 830 point 5), which in turn justifies the court in ordering the payment of a sum of money to a haver who has suffered loss in consequence of the making or implementation of a section 1 order (cf RCS 64.3(b) (i)).

However, there are a number of problems with that submission. Firstly, this Note is not an appropriate vehicle for reaching any final conclusion about whether the Noters ought to be regarded as being in contempt of court. That is a matter which ought to proceed on the basis of a form of process specifically directed at the issue (such as a further Note in the section 1 petition process), so that averments may be made and answered in that specific context. It certainly appears from what was said in *Beggs* and re-iterated in *Smith* (both of which were specific contempt processes) that, were the pleadings in the present Note to be replicated in such a process, there would be little answer to a complaint that a contempt had been committed. One of

the consequences of my refusal to excuse the Noters in respect of their unpermitted prior use of the recoveries is that it remains open to the respondents to make such a complaint.

Further, although there has been a ready identification in English law between the commission of this type of contempt and an abuse of process, it is less than clear to me that the same conclusion would necessarily fall to be drawn in Scots law. In particular, it is not immediately obvious to me that one can abuse the processes of the court other than deliberately or recklessly. I would require much more detailed submission, again in proceedings specific to the issue, before being able to decide whether the Noters have abused the processes of the court.

Even had I been prepared to find the Noters in contempt of court and to have abused its processes, there would still have remained the question of whether such contempt and abuse can result in a liability to pay damages to havers in the position of the respondents. I do not find any support for the suggestion that it does in *Moore*, where the court at [14] indicated that an order for payment of money, other than expenses, to a party to an action was a matter of substantive right rather than a procedural sanction. Nor does RCS 64.3(b)(i) assist. It contemplates a situation in which the making of a section 1 order, or its implementation, has caused loss, and the court makes an order for compensation in respect of that loss. It is not clear to me that that rule was intended to deal with a situation where the limits on the use of properly recovered material are exceeded by a petitioner, as opposed to the situations where the order is obtained in breach of a petitioner's obligations of candour in the *ex parte* application for its grant, or where the execution of the order exceeds what it was intended to encompass, for example in the seizure and

potentially lengthy retention of electronic devices which were not reasonably supposed to contain material of interest to the enquiry. None of these matters was the subject of detailed argument before me. In the event, I shall do as Munby J did in *Bemproa*; identify issues which require resolution, decide nothing, and leave it open to the respondents to bring forward a specific application in this regard if they so wish and argue the matter fully.

(iv) That the Noters be ordained to retract the disclosures made to the FCA insofar as they wrongly relied upon material recovered under the order or information derived therefrom.

What is to occur in this regard has already been set out.

(v) That MFC be ordained to allow Mrs McIntosh's appeal against the finding of gross misconduct made in the disciplinary proceedings brought against her and thereafter to discontinue those proceedings.

Again, I do not consider that such an order would be necessary or proportionate.

The Noters are aware that their prior use of the recovered material for the purposes of Mrs McIntosh's disciplinary process was unpermitted and remains unexcused, and that their future actions in connection with the use of that material will be the object of intense scrutiny, if necessary by the court. It will be for the Noters in the first instance to decide to what extent the disciplinary process against Mrs McIntosh has been tainted by the unpermitted use of the recoveries, and what should be done in that regard. They will do so in the knowledge that the court will be metaphorically looking over their shoulder and will not hesitate to intervene decisively if the wrong decisions are made.

(vi) That interdict be pronounced against the Noters prohibiting them from making any further use of material recovered in terms of the order.

For the reasons just mentioned, I do not consider that any further order of that kind is presently justified. Should it transpire that the Noters continue to act in disregard of their obligations to the court, a condign response may be expected.

(vii) That the Noters be ordained to take such steps as the court considered reasonably necessary to draw the terms of that interdict to the attention of their officers, employees and other staff or contractors.

The same considerations, leading to the same conclusion, apply in this context.

(viii) That the Noters be found jointly and severally liable to Mrs McIntosh and Granite in the expenses of the Note, the section 1 petition, and the action directed against Mrs McIntosh and Granite on a solicitor-client, client paying basis.

I shall find the Noters jointly and severally liable to the respondents in the expenses of this Note on an agent and client, client paying basis. Decisions on the awards of expenses in the section 1 petition and the substantive litigations will be for the judges ultimately disposing of those causes to make, and the actions of the Noters herein described may or may not be considered relevant to those decisions as and when they require to be made.

(ix) That a written judgment be handed down to give publicity to the court's decision.

This is that judgment.

Conclusion

[60] For the reasons stated, I shall grant the prayer of the Note in part, and otherwise refuse it. Ancillary orders as set out above will also be made.