



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 85

CA81/22

CA82/22

OPINION OF LORD SANDISON

In the causes

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

Pursuers

against

RORY MATHESON

Defender

Pursuers: MacColl, KC et Ower, KC; DWF LLP

Defender: McIlvride, KC; Blackadders LLP

and

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

Pursuers

against

(FIRST) MARGARET MCINTOSH; and (SECOND) GRANITE WEALTH CONSULTING
LIMITED

Defenders

Pursuers: MacColl, KC et Ower, KC; DWF LLP

Defenders: Tosh; Mackinnons Solicitors LLP

29 November 2023

Introduction

[1] In these actions the pursuers, a group of companies involved in the business of the provision of investment advice and financial planning, seek remedies against firstly

Rory Matheson, one of the former owners of the third pursuer, and secondly Margaret McIntosh and Granite Wealth Consulting Limited. Mrs McIntosh is a former employee of the third pursuer and Granite Wealth is a company owned by her.

Mr Matheson and his wife sold their shares in the third pursuer to the pursuers' group in December 2020 and entered into certain restrictive covenants aimed at preventing them from competing with the business of the third pursuer, or attracting away its clients, for a three-year period after the sale. Mr Matheson also remained employed by the third pursuer on terms which prevented him disclosing confidential information to others during and after his employment. Mrs McIntosh's terms of employment likewise contained anti-competition and confidentiality provisions.

[2] In April 2022 Mrs McIntosh gave notice of her intention to resign from her employment with the third pursuer. Chris Forde, Head of Financial Planning for the first and third pursuers, claims to have received in the following month 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, Chief Executive Officer of the first and third pursuers, claims to have received a further anonymous package consisting of a note warning him that plans were well established to transfer the third pursuer's clients to a new entity set up, funded and staffed by its then employees, together with emails bringing to light the connection between Mrs McIntosh and Granite Wealth and implying that Mr Matheson was providing that company's initial capital by way of loan to her. Documents bearing to be a timeline and business plan for the new enterprise were also enclosed, suggesting that it was proposed that other employees of the

third pursuer would in due course leave it and join the new venture, and that the third pursuer's existing clients would be lured to that venture as soon as Mrs McIntosh's restrictive covenants expired.

[3] The pursuers then all petitioned this court under section 1 of the Administration of Justice (Scotland) Act 1972 narrating that they intended to bring substantive proceedings against Mr Matheson based on his alleged breaches of the restrictive covenants in his 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. The existence and nature of the anonymous material received by the pursuers was laid before the court at that stage as supportive of the claim that the pursuers had a prima facie case against Mr Matheson, Mrs McIntosh and Granite Wealth. The pursuers sought the court's authority for commissioners of the court to enter the homes of the Mathesons and the McIntoshes without prior notice, to search for and seize certain material, 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 pursuers obtained by Mr Matheson or Mrs McIntosh in the course of their employment by the third pursuer; information confidential to the second or third pursuers (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 the second pursuer's clients in connection with investment, wealth management or financial planning services.

[4] On 23 June 2022 the court granted the orders sought and "dawn raids" took place at the homes of the Mathesons and the McIntoshes the following day. The events of, and subsequent to, those "dawn raids" were not without controversy and are described in an earlier opinion of the court, [2023] CSOH 63, 2023 SLT 985. The court subsequently gave permission in principle for the material seized in the "dawn raids" to be used in evidence in the forthcoming proofs in the present consequential substantive actions, subject to resolution of the issues dealt with in this opinion. The pursuers wish to use the contents of the anonymous packages and the material obtained by way of the "dawn raids" as part of their cases. The defenders in both actions object to any such use, on the grounds that the material in the anonymous packages was illegally obtained by the pursuers, or in any event was confidential material to which a reasonable expectation of privacy pertained at common law and in terms of Article 8 of the European Convention on Human Rights, and that therefore the content of the packages, and any material obtained through their use, is inadmissible in evidence. The matter came before the court for an evidential hearing so that the question of the admissibility of the disputed evidence could be determined conveniently in advance of the conjoined diets of proof in the actions.

Background

The evidence

For Margaret McIntosh and Granite Wealth Consulting Limited

[5] **Margaret McIntosh** (48) swore an affidavit in which she stated that she gave notice of her resignation from her employment by the third pursuer at its Aberdeen office on

4 April 2022. Attempts were made to persuade her to withdraw her resignation, but when it became apparent that she was not going to do so, Mr Webster told her that things were going to get nasty for her. On 10 May 2022 she was placed on gardening leave for the remainder of her notice period and told to leave all keys, electronic devices and her work mobile phone on her desk, which she did. Mr Webster had come up to the Aberdeen office the next day.

[6] In relation to the first anonymous package said to have been received by the pursuers, the accountants AAB, who had been parties to the email chain contained in the package, had informed her that they did not consider that their email systems had been breached. She had seen a scan of the envelope containing the first package of material and noticed that it bore a stamp which had not been franked. Her research indicated that the stamp was one of a series entitled "Design Classics" issued in 2009 and long since out of general circulation.

[7] The second anonymous package included a draft business plan which had only been shared by her with her husband, by way of email from her personal account to his. It had not been printed. The envelope containing the second package had an underpaid stamp and a postmark showing it was posted on 20 May 2022 in the AB12 postal area.

[8] She had not been in the pursuers' offices since 10 May 2022, but on 19 May had had lunch in Dundee with some of her former colleagues. She exhibited her bank statement showing that on that day she had paid for the lunch at the Jute Café at the Dundee Contemporary Arts Centre. On the same day, one of her former colleagues, Kelly Pitcairn, had telephoned her and told her that Mr Webster had been in the Aberdeen office that morning and had told her that a copy of an email between Rory Matheson and an accountant had been found on a printer. While employed by the third pursuer,

Mrs McIntosh did not generally print things unless she was there at the printer to pick them up, and Mr Forde did not in any event approve of material being left on printers.

[9] Her husband Rob had discovered that his Gmail account had been the subject of unauthorised third party access between March and May 2022, but no further information was available. She would normally have accessed her personal email account using her own personal laptop, though she might occasionally have logged in using the work laptop issued to her by the third pursuer. She was unsure whether she would have fully logged out of her account after doing so; generally, she just closed the browser without logging out. She had previously purchased her personal laptop from the pursuers. It had had remote access software allowing the pursuers' external IT consultant to carry out remote maintenance and repair. That had happened frequently for two weeks in March 2022. Her colleague Rhea Shearer had also been able to access the laptop remotely if provided with a code by her. She was unsure whether any software left on the laptop could have allowed the pursuers to access data on it. The pursuers had given inconsistent accounts of how they had come by the anonymous material which they relied on.

[10] In cross-examination, Mrs McIntosh stated that she was not accusing anyone of having committed a crime. She had various qualifications in relation to the provision of financial advice, but none in IT. She had known Mr Matheson since 2001 and had a close working relationship with Ms Pitcairn. She had discussed the subject-matter of the hearing in general terms with Mr Matheson, but not the content of any witness statements.

Mr Matheson was paying, unconditionally, for the defence of the action directed against her.

[11] The email of 20 April 2022 which had come into the possession of the pursuers had not been sent or copied to her at the time; it had been forwarded to her by her husband (who was one of its original recipients) 6 days later. He was assisting her with some aspects

of her business plans, and had met AAB accountants with her. He was not qualified in IT either, but had been able to check the logins to her email account and had told her that there had been unauthorised access to it. The login records only went back 28 days from the point of inspection as a result of the webmail provider's policy. No documentary evidence of the intrusion existed, and no professional IT investigation had been instructed, since it was understood that any evidence of the intrusion would no longer be available. The pursuers had refused to make her work laptop available for examination.

[12] She and her husband had noticed together that the first anonymous package had an unfranked stamp. Counsel had assisted her internet researches into the date of issue of the unusual stamp on the package. The second package had contained a version of her business plan and a timeline, both of which she had drafted. She had sent those documents by email to her husband for revision and comment, although he had expressed a preference that she should find another employment position rather than set up her own business. She had not at that stage invited Ms Pitcairn to join her business, although she had hoped that at some stage that might happen. She had not been in contact with any other person working for the pursuers about working for her business either. She hoped that Mr Matheson might join her once his restrictive covenants were over. The timeline document showed the receipt of monies from Mr Matheson, but those sums were from reward schemes he had set up and committed himself to when he owned the third pursuer, and were not gifts provided for the purposes of her new business.

[13] She did not know the password to her husband's email account, and he did not know the password to hers. One could only print at the pursuers' office by connecting to their network. The printer was right outside her office. The laptop she had bought from the

pursuers had some programmes left on it. She was making no specific allegation about anybody, because she could prove no such allegation.

[14] **Robert McIntosh** (52), a solicitor since 1996, swore an affidavit in which he stated that he had seen the email in the first anonymous package which had been sent from Mr Matheson's personal account on 20 April 2022 to AAB accountants introducing Mrs McIntosh to two individuals there, together with a reply from one of those individuals. That email had been sent from Mr McIntosh's Gmail account to his wife's email account on 26 April at 10.53am. There was no obvious reason why either of them would have printed it. AAB had told him that they had multi-factor authentication and it was therefore unlikely that their email systems had been compromised. Investigations had revealed that it was likely that there had been unauthorised access to his account and that of his wife, but no further information was available. Mrs McIntosh may have used her work email account as a back-up to her personal account.

[15] The second anonymous package contained a copy of a draft business plan which had only ever been emailed from Mrs McIntosh's private email account to his private email account on 18 May at 17.44, so that he could proof read it. She had no longer been working in the pursuers' office at that time.

[16] In cross-examination, Mr McIntosh stated that he had no IT qualifications. He rarely printed out emails; his wife did so more frequently than he did. He would have helped her with her business had she gone ahead with her plans as intended. Clients would have come from her established following.

[17] Not long after these actions commenced, in July 2022, he had looked at the logs to his email account and had noticed what appeared to be unauthorised access taking place from locations in Milton Keynes and in the London area. He had no idea who might have

accessed his account or what might have been done. He had not taken any screenshots of what he had seen. He had known by then that there was a live dispute before the court. He had not contacted his internet service provider, Sky. He had approached Hotmail and Gmail shortly afterwards and again in September 2023, but they could (or at least would) not go back more than 28 days in looking at possible unauthorised access to email accounts. He was not aware of that time limit when he had first seen evidence of the unauthorised access. An IT professional who was a friend of Mrs McIntosh had been asked informally for his views, but did not think that much could be done at that stage.

[18] **Kelly Samantha Pitcairn**, who worked for the third pursuer until January 2023, swore an affidavit in which she stated that on 19 May 2022, Mr Webster had been in the pursuers' Aberdeen office and had raised with her the subject of Mrs McIntosh setting up a company. He had told her that a trail of emails had been left on the printer in the office and sent to Mr Forde. He explained that the emails indicated that Mr Matheson had introduced Mrs McIntosh to an accountant and that she had set up a company. He asked her what she knew about that, but she had said that all she knew was that Mrs McIntosh was considering her options, and that she did not know anything about the emails. She had had to leave the office then to travel to a working lunch in Dundee, so told Mr Webster that any further queries would have to wait until the next day. No further queries had been raised then. Jonathan Walkingshaw, another of the pursuers' employees, had been present during the conversation.

[19] When Mrs McIntosh was asked to go on gardening leave, she was asked to, and did, leave all her IT equipment on her desk. It was then taken to Dundee and had gone by 18 May. Mrs McIntosh had subsequently handed in an iPad and a computer monitor which she had used to work from home during the pandemic.

[20] When the dawn raids took place on 24 June 2002, Mr Webster had shown her and some other colleagues documents said to have been sent in anonymously, including an email trail and a business plan, apparently in order to explain why the raids were taking place. He had not said who he thought had sent in the anonymous material, but she and Rhea Shearer had been asked if they had done it, which they both denied.

[21] She had been notified in July 2022 that her personal Hotmail email account had been compromised, with attempts being made to log into it from various places in the world, including from Milton Keynes. She had had to change her password and turn on multi-factor authentication.

[22] In cross-examination, Ms Pitcairn stated that she was a colleague and friend of Mrs McIntosh. She had been aware in the first quarter of 2022 that Mrs McIntosh was considering the option of leaving the third pursuer's employment and setting up on her own. Mrs McIntosh had not asked her to join that business.

[23] When she worked for the third pursuer, incoming mail would be scanned to the relevant client file or emailed to the appropriate financial advisor. Envelopes would be put in the waste paper bin, or shredded. The hard copy correspondence might be sent to the relevant staff member, or else might also be disposed of in the normal or confidential waste bins.

[24] She recalled clearly her conversation with Mr Webster on 19 May, including that that was the date on which it happened. She had not told Mr Webster what she knew about Mrs McIntosh's business plans out of loyalty to her.

[25] The evidence of Rory Matheson, on his own behalf, was interposed at this point in the hearing.

[26] **Rory Matheson** (60) swore an affidavit in which he stated that on Wednesday 20 April 2022 he had emailed Brian McMurray at AAB, a well-known firm of accountants in Aberdeen, copying in Mr McIntosh and Derek Mitchell, also of AAB. The purpose of the email was to introduce Mrs McIntosh to AAB. It was not forwarded or copied to anyone else. He had not consented to anyone else accessing or using the email. Mrs McIntosh was put on garden leave from her employment by the third pursuer on 10 May 2022. When she left the office that day, she had left all of her electronic devices, including her computer, on her desk. They were to be uplifted, but he was not sure how long they were there before that happened.

[27] On 19 May 2022, Stephen Webster visited the Aberdeen office. Mr Matheson was out seeing clients that day and when he returned to the office Mr Webster was there. He came into Mr Matheson's office and without any introduction said, "I found this on a printer" and showed Mr Matheson a copy of his own email to AAB dated 20 April 2022, placing it on the desk in front of him. He did not say on which printer or in which office the email had been found. He asked Mr Matheson what he had to say about it. Mr Matheson read the email and confirmed it was from him. He explained that he had reached out to Mr Mitchell at AAB as Mrs McIntosh had asked him as a colleague if he knew a good accountant. Mr Matheson told Mr Webster that "I put her in front of one, that's what she asked. It will be public knowledge, it will be on Companies House" or words to that effect. Mr Webster was then briefly quiet. The conversation then progressed to the proposed changes to the future working model for the third pursuer, of which Mr Matheson was not in favour. The meeting ended with Mr Webster saying "you will spend the first two years of your retirement in court" as he walked out of the door.

[28] On further examination, Mr Matheson stated that he had not met Mr Webster on 10 May 2022; he had been out visiting a client in Ellon that morning and had not returned to the office in the afternoon. His conversation with Mr Webster had taken place on 19 May. Mr Webster had said that he had found the email from Mr Matheson to AAB on a printer, or at least that someone had found it on a printer. Mr Matheson had said that Mrs McIntosh's plans for a new business were public knowledge and the business could be seen on the Register of Companies. He might have said that the name of the business was Granite Wealth. He did not lie to Mr Webster. He was paying for Mrs McIntosh's defence to the action because he felt a responsibility to her in consequence of selling his business to Thorntons, forcing her to leave because of the unacceptable direction in which they wanted to take the business, and to stop Thorntons getting the revenge which they were seeking against her.

[29] In cross-examination, Mr Matheson said that he had reported the pursuers to the FCA because of what he felt were their unacceptable business practices. They should have appreciated that that was going to happen. He did not like Thorntons because of the way in which he and Mrs McIntosh had been treated. He had become aware of Mrs McIntosh's plans in March or April 2022. He did not routinely check what information was available on the Companies House website, but had assumed that the information about Granite Wealth could be found there. He was unaware that Mrs McIntosh intended to use money which had come from him to set up her business, or that she wanted him to join the business. She had asked about, and was thus aware of, the duration of his restrictive covenants forming part of the sale and purchase agreement for the third pursuer.

[30] He was unaware of any evidence of hacking into any email account. He had a clear recollection of his meeting with Mr Webster on 19 May 2022. The nature of Mr Matheson's

involvement with Mrs McIntosh was self-evident from the email which Mr Webster brought with him into the meeting. Mr Webster had been disappointed, perhaps upset. The email chain which Mr Webster had in his possession had been sent to Mr rather than Mrs McIntosh because Mr McIntosh had said that he was going to be involved in the financial side of the business. Mr Matheson had asked AAB to be discreet about Mrs McIntosh's plans because Aberdeen was a metaphorical village, and she wanted her plans kept quiet. He had mentioned that her employers would not want her to do what she was doing.

[31] Counsel for the pursuers having declined to offer any assurance that they would be called on their behalf, the evidence of Chris Forde and Stephen Webster was adduced at this stage on behalf of Mrs McIntosh and Granite Wealth.

[32] **Chris Forde** (42) swore an affidavit in which he stated that he was the Head of Financial Planning at the first and third pursuers, and an Independent Financial Adviser. On 6 May 2022, an envelope addressed to him had been delivered to the pursuers' Dundee office. He was working from home that day. The envelope was collected from the mail room by Victoria Winter, one of the pursuers' administrative support staff. At 10.34 on the same day he received an email from her. The subject of the email read: "new client enquiry". The body of the email stated: "Good morning Chris, please find attached which arrived in the post today for your attention. Many thanks Vicky". Attached to the email was a document which appeared to be a scanned copy of a series of emails between Rory Matheson and Derek Mitchell and Brian McMurray, both from the accountancy firm AAB, which had been forwarded to Mrs McIntosh by her husband Robert, who was also included in the chain. The subject of the emails in the attachment was also "New client enquiry". He scrolled down to the bottom of the thread to read the chain from the start.

When he first read the emails, it was not clear how this could be a new client enquiry for the pursuers, as Mr Matheson referred to "clients requiring tax advice". It soon became apparent that it was Mr Matheson introducing clients to somebody else. From the emails he inferred that a telephone conversation had taken place between Mr Matheson and Mr Mitchell. The individuals initially referred to as "clients" subsequently changed to "colleagues", and then to Mrs McIntosh by name. He wondered whether the pack had been sent to him in error and contacted Ms Winter to ask her to scan the envelope and send it to him by email, which she did at 11.00. The envelope was marked "PRIVATE & CONFIDENTIAL ADDRESSEE ONLY" and was clearly addressed to him. There was nothing on the envelope which identified the sender and there was no covering letter. He did not initially appreciate that the stamp on the envelope was not franked, but that was not uncommon. He had no reason to doubt Ms Winter's email stating that it had arrived in the post. It never occurred to him to ask that the original copy of the envelope be kept.

[33] He called Mr Webster, who was in the Edinburgh office that day, and told him that he had received a pack in the post which he thought Mr Webster should see. At 11.04, he emailed the scanned copy envelope and copy emails to Mr Webster. Ms Winter had put the actual envelope and its contents in the confidential waste bin to be shredded that day as part of the routine procedure for disposal of documents. He would have retained a copy of the envelope and its contents had he been in the office that day, as they would have been handed to him rather than being scanned.

[34] On 10 May 2022, he was scheduled to work in the Aberdeen office. After lunch, he, Mr Webster and Mr Matheson met, and they tried to find out from Mr Matheson, without expressly asking him, whether he knew anything about the contents of the package Mr Forde had received on 6 May. Mr Webster led the conversation with Mr Matheson,

which was quite general in its terms. No specific questions were asked about the package and nothing was shown to Mr Matheson; it was more of a fishing exercise in terms of what Mrs McIntosh was planning and doing. Mr Matheson did not say anything about the prospect of Mrs McIntosh setting up a new business and in fact said very little. It was decided that the information received in the package was inconclusive in relation to Mr Matheson's involvement and that he should be given the benefit of the doubt.

[35] On 27 May 2022, Mr Webster informed him that a further anonymous package had been sent to the Dundee office. Mr Forde assumed the second package was addressed to Mr Webster because it would have appeared to an outsider that no action had been taken on receipt of the first. He had no idea who the packages were from. He thought that the set of documents in the first package had perhaps been picked up off the printer from the office in Aberdeen, having been sent to that printer in error. If one was working from home and printed a document, it would print to the default office printer unless that was changed. The Aberdeen printer could not be printed to remotely so the next time one connected to the network in the office, the prints stored in the computer memory started to print out straight away. For this reason, he thought that the person who posted the package would have been someone in the Aberdeen office, or someone from the Dundee office who was visiting the Aberdeen office, and who had found the documents on the printer. However, he considered that someone from Dundee would have simply handed the information directly to him. The second package contained too much information to have been printed in error to the Aberdeen printer. He therefore thought that someone involved in Mrs McIntosh's business plan who did not feel comfortable with it had decided to whistle-blow on her planned actions.

[36] On further examination on behalf of Mrs McIntosh and Granite Wealth, Mr Forde stated that on receiving the anonymous package addressed to him, he did not notice anything odd about it immediately, but came to realise later, it having been brought to his attention, that the stamp on the envelope had no postmark. He could not remember if he had mentioned that to Mr Webster. There was no covering letter. He could not recall when Mrs McIntosh had been put on gardening leave; perhaps it was the end of April 2022. He recalled, from looking at his diary that the conversation which Mr Webster had had with Mr Matheson happened on 10 May, but accepted that he might be wrong about that. It had not been on 8 May, as he had previously mistakenly said. His legal advisors had pointed out that that was a Sunday. He did not think that Mrs McIntosh had been in the office on the day it happened. The conversation had been a fishing expedition on Mr Webster's part, to try to find out what Mr Matheson knew, but he was giving nothing away. Mr Webster had not become annoyed or irritated.

[37] In cross-examination on behalf of Mr Matheson, Mr Forde re-iterated that he thought that the conversation between Mr Webster and Mr Matheson had taken place on 10 May. Mr Matheson might have been out of the office that morning, but could have returned there later.

[38] The printer in the Aberdeen office only printed when the computer requesting the print was connected to the office Wi-Fi network.

[39] As to the second anonymous package, received by Mr Webster, he assumed that it must have come from someone involved in Mrs McIntosh's plans. He did not believe that the contents of that package had only ever been shared between the McIntoshes themselves. He had no idea whether their email accounts had been hacked or not. The two packages appeared to have been sent by the same person, as the name of the addressee on each

envelope had been asterisked at start and finish, which seemed unusual. The second package was postmarked on 20 May in the Portlethen area. Mr Webster had been in Aberdeen on 19 May.

[40] In cross-examination on behalf of the pursuers, Mr Forde stated that he assumed that the packages had come by post, and that he had no knowledge of who had sent them. He had never participated in hacking, and had no knowledge of any other employee of the pursuers having done so either.

[41] **Stephen James Nicholson Webster** (57) swore an affidavit in which he stated that he had been the Chief Executive of the first and third pursuers for nine years. On 6 May 2022, Mr Forde had received an anonymous package by post. Mr Webster was in the pursuers' Edinburgh office at the time and Mr Forde sent him an email at 11.04 which included the scanned copies of the envelope which had been received and what it contained. The package contained emails dated April 2022 between Mr Matheson, AAB Accountants, and Mr McIntosh. Victoria Winter, an administrative assistant who had joined the pursuers on 4 April 2022, had picked up the mail from the mailroom that morning and opened the letter addressed to Mr Forde in his absence. She then scanned the contents directly to Mr Forde and he forwarded them on to Mr Webster the same day. The emails indicated to Mr Webster that Mrs McIntosh might have been setting up her own business and that Mr Matheson was apparently assisting or advising her on that. It was clear from reading the emails that Mr Matheson was aware of Mrs McIntosh's plans. In fact, the wording was quite "cloak and dagger" by suggesting that any meeting should be held on "neutral ground". That did not seem to chime with the situation of someone who just looking for tax advice, as Mr Matheson had suggested in his first email to Mr Mitchell at AAB on 13 April 2022.

[42] Mr Webster immediately emailed Scott Milne, chairman of the board of the third pursuer, and copied Chris Byrne, a corporate solicitor with Thorntons Law LLP who had overseen the purchase of the third pursuer, into the email. That email was sent at 11.26 and at 11.36 Mr Webster emailed all the third pursuer's board members to draw the matter to their attention. At that time, the board felt that the information received was not conclusive about Mr Matheson's intentions and gave him the benefit of the doubt, trusting that his involvement amounted to no more than assisting a colleague whom he respected and who had contributed to the success of his business in a potential new venture.

[43] He met with Mr Matheson on 10 May, when he was attending a leaving lunch in Aberdeen. He had printed the scanned contents of the letter and taken them with him to Aberdeen. He read them over again and put them back in his bag and went with his notebook to meet Mr Matheson in his office. They would typically meet every time Mr Webster went to Aberdeen from his base in Dundee if Mr Matheson was present in the office, usually about 11am. Before receiving the first anonymous communication on 6 May, Mr Webster had hoped that Mr Matheson would be on side to protect the business from attempts by Mrs McIntosh to solicit the pursuers' clients in whatever new role she might secure. However, he now had material indicating that Mr Matheson was actively assisting her in setting up a company which appeared to be in direct competition with the third pursuer. That was the focus of his discussion on the morning of 10 May 2022. When he asked Mr Matheson questions on that day, Mr Matheson denied having any knowledge of Mrs McIntosh's intentions or of any plans that she might have had, said that he did not know what her intentions were, that he had not spoken to her, and that he did not know what she was doing. He said that he was not that close to Mrs McIntosh. Mr Webster knew

all those answers were lies. The meeting lasted around 20 minutes. Mr Webster was annoyed as he left the room and said "it's amazing what can get left on a printer".

[44] He had wondered who had sent the package. There was no covering note. He had considered whether it might be someone working in the office, such as Kelly Pitcairn, Andrew Park or Rhea Shearer. It had been Mr Matheson's personal email address on the enclosures. It was possible that Mr Matheson had printed the email in the office, forgotten about it and then someone in the office had picked it up from the printer. Mr Webster had assumed that whoever had picked it up and read it had decided to send it to Mr Forde. Neither Mr Webster nor Mr Forde had asked anyone specifically if they had sent it.

[45] The only way to get mail from Aberdeen to any of the other offices of the pursuers was by post or in person, there was no internal mail system. The envelope had no postmark, so it was either posted but had not been franked, or it was delivered by hand. If it had been hand-delivered it would probably have been handed into the reception of Thorntons Law LLP and sorted there.

[46] After the meeting on 10 May, he did not recall seeing Mr Matheson again or discussing the matter with him. The general view amongst the members of the pursuers' boards was that the package was not a smoking gun and that they would simply have to work hard on the relationship with Mr Matheson. Advice had been sought from Mr Byrne and from Debbie Fellows, an employment solicitor at Thorntons Law LLP, and they had been provided with the employment contracts of Mr Matheson and Mrs McIntosh for their assessment. Scott Milne had met separately with Mr Matheson to discuss Mrs McIntosh's departure.

[47] On 27 May 2022, Mr Webster was present in the Dundee office, and had attended a weekly operations board meeting and a planning meeting with Mr Forde. Following that

meeting, he returned to his office at around 10am to find that an envelope had been placed on his desk. Bethany Steven was covering the mail duties that day. She sorted the mail and put items addressed to Mr Webster on his desk given his presence in the office that day.

The envelope was marked "STRICTLY PRIVATE & CONFIDENTIAL/ADDRESSEE ONLY" and the postage had been underpaid by £1.50. The envelope was an A4 size and the Royal Mail had placed a note on the front outlining the underpayment. He opened the envelope and within it was a typewritten covering note, which did not identify the sender. The covering note stated:

"Stephen, You have rats in your midst, with plans well established to transfer clients purchased in good faith by Thorntons to a new entity, being set up, funded and staffed by current employees. Defend your business, before it disappears."

Also contained within the envelope were copies of emails between Mrs McIntosh, her husband and representatives of AAB, dated May 2022. There was also a 24-page document entitled "Business Plan" for a company called Granite Wealth Consulting Limited and a document entitled "Timeframe January 2022 to December 2022", which narrated the proposed steps to be taken in the setting up of Granite Wealth. Mr Webster did not know the source of the two anonymous packages.

[48] Having read the contents of the copy emails and documents, he asked for the documents to be scanned and at around 11.30am he shared the information with Mr Milne and copied in the other members of the first pursuer's board as well as Mr Forde and Mr Byrne. The information was discussed by the board on 15 June 2022. Litigation appeared to be pending, and he asked the pursuers' IT department to monitor the IT activities of Mr Matheson and Mrs McIntosh. He was made aware by IT that in around November 2021 both Mr Matheson and Mrs McIntosh had arranged for the telephone numbers of their work mobile phones, supplied to them by the third pursuer via 02, to be

transferred to personal mobile devices. That was done without the knowledge or consent of the management team. The mobile numbers belonged to the third pursuer and were used by clients to contact Mr Matheson and Mrs McIntosh. He could only assume that they had done that so that they could still receive calls from clients after they had left the third pursuer. IT had been asked to review their diaries to see who they had recently met with. It was standard procedure (as recommended by the FCA) to record the telephone calls of fee-earning staff. IT reviewed, at random, some calls from each of Mr Matheson, Mrs McIntosh and Kelly Pitcairn (who had been mentioned in the package) to see if they had said anything to any client about the plan. However, at no stage had there been any thought, discussion or intention to try to gain access to their computers. He had spoken to the pursuers' outsourced IT providers, who had confirmed that they did not use any software which allowed any of their clients to undertake that sort of activity or anything like it. The IT provider could have remote access for problem-solving purposes but only with the consent of the user as they sat in front of their computer. No tracking software was installed on the PCs. The only software used was for security and to ensure non-permitted websites were not accessed. When Mrs McIntosh bought her laptop from the third pursuer, all of the pursuers' software would have been removed by the outsourced IT provider.

[49] On further examination on behalf of Mrs McIntosh and Granite Wealth, Mr Webster stated that he had been surprised when Mrs McIntosh resigned on 4 April 2022, and was troubled about the future security of the business. Clients could leave with her, and she had not disclosed her intentions. He had first seen the email chain dated 20 April 2022 amongst Mr Matheson, AAB and Mr McIntosh at around 10am on 6 May. He had discussed it with Mr Forde and informed the chair of the board. The board members had wanted to meet as soon as possible, and to consult the lawyers who had advised in the acquisition of the third

pursuer. He, in conjunction with his HR manager, had arranged for Mrs McIntosh to be put on gardening leave on 10 May, as soon as she had completed some work in progress. He had routinely attended a leaving lunch for Julie Rennie, an employee of the third pursuer, on that day.

[50] The contents of the second package, received on 27 May, had been judged more serious in nature. It appeared to have been posted in a letterbox (because the stamp was underpaid) at Portlethen. He thought he had been in Aberdeen on 19 May. Mr Forde had recently reminded him of that; Mr Webster was not good at keeping diary notes. He had not been there between 10 and 19 May, nor between 19 and 23 May. He had not posted the second package to himself. After receipt of the second package, the board met, discussed various options, and decided to take legal action. The compliance manager had spoken to the regulator after Mrs McIntosh's suspension.

[51] In cross-examination on behalf of Mr Matheson, Mr Webster conceded that it could have been 19 May when he met with Mr Matheson. He was not aware of what Mr Matheson had been doing on 10 May. He considered that Mr Matheson was being dishonest with him during the conversation, although he was not an expert in body language. He had not said to Mr Matheson that he had found the email chain of 20 April 2022 on a printer, and indeed had never said that it had been found on a printer to anyone, including Ms Pitcairn, although that might have been his supposition at the time. He had not produced the email chain at the meeting. He had not been angry; that was not his style. He had not said that Mr Matheson would spend the first two years of his retirement in litigation.

[52] In cross-examination on behalf of the pursuers, Mr Webster stated that he had not sent either of the packages, and did not know who had. He had no idea how the sender had

obtained the material in the packages. He had not carried out any hacking, nor was he aware of anyone who had.

For the pursuers

[53] **Bethany Steven** (23) affirmed to a witness statement in which she said that she was a business support administrator with the first pursuer. As part of her normal duties, she collected the mail from the mailroom and distributed it to the relevant people. There was no formal written policy or procedure document to be followed in this regard; the process had just been explained to her. The usual protocol was that all mail would be opened, and if it was addressed to a specific person it would be scanned into the system and the scan sent to that person. If there was no name on the envelope, it was scanned in and sent to the general administration team.

[54] On 27 May 2022, at around 9.30am, she had routinely gone to the mailroom at the Dundee office to collect the pursuers' mail. In amongst the mail was an envelope addressed to Mr Webster marked "STRICTLY PRIVATE & CONFIDENTIAL/ADDRESSEE ONLY". Because of that wording, she treated the envelope differently to everything else. As Mr Webster was in the office that day, she took the envelope to his office and left it on his desk. Most mail went, after having been scanned, into the confidential waste bin, which was emptied monthly. However, this particular item did not go into that bin, but was left on Mr Webster's desk.

[55] **Victoria Winter** (32) likewise affirmed that she had been an office administrator for the first pursuer since April 2022. As part of her normal duties, she collected the mail from the mail room and distributed it to the relevant people. Bethany Steven covered for her when she was off. The general procedure with the mail was that when it came in, unless

told otherwise, she opened, scanned and emailed it to the relevant named person or to the administration team. There was, however, no rigid procedure to be followed and the process was down to common sense and discretion.

[56] At approximately 9.30am on 6 May 2022, she went to the mailroom to collect the mail. Amongst the mail was a brown envelope addressed to Mr Forde and with “Private and Confidential Addressee Only” handwritten on it. She opened the letter and scanned it. She emailed the document inside to Mr Forde at around 10.28am. It was a copy of an email trail named “New Client Enquiry”. She thought that it related to a new client query, which would go to Mr Forde in any event. At 10.53 she spoke to Mr Forde, who asked her to scan the envelope and send the scan to him, which she did at 11.00. She then put the envelope and the document into the confidential waste bin, which was normal procedure once something had been scanned and actioned. The confidential waste bin was emptied every month, but she had the key to the bin and so documents could be retrieved before they had been collected. She did not recall whether there had been any discussion about retrieving the envelope. Mr Forde had called her again at 11.08 and asked if there was anything else in the envelope; she replied that there was not. The scan of the envelope showed that the envelope had a stamp with a bus on it. She had not noticed at the time that the stamp had not been franked, although Mr Forde had mentioned that to her recently. She did not at the time consider that there was anything particularly unusual about the package.

Submissions

[57] On behalf of Mr Matheson, senior counsel submitted that the pursuers sought to found in evidence on (i) copy emails and other documents which they maintained were posted to them by an anonymous source and (ii) further documents recovered as a result of

the “dawn raids”. The copy emails said to have been received by the pursuers from the anonymous source included email correspondence between Mr Matheson (using his private email account) and AAB between 13 and 20 April 2022. Mr Matheson had copied Mr McIntosh into his email to AAB on 20 April. He had not provided copies of the email correspondence to any other person, nor had he consented to any other party having access to his email account or to the emails founded upon by the pursuers. It was evident that that the email chain in question had been extracted from the personal email account of one or other of the McIntoshes as the last email in the chain, dated 26 April 2022, was from Mr McIntosh to Mrs McIntosh only. Nor was it at all likely that the emails had been inadvertently sent by Mrs McIntosh to a printer at the pursuers’ Aberdeen office and printed when she was next in the office and had connected her laptop to the pursuers’ systems. That was an improbable occurrence given the confidential nature of the emails. Even if Mrs McIntosh had wanted to print copies of the emails, which was unlikely given that they simply effected an introduction to AAB, she would not have been so careless as to send them to the office printer by mistake and then, when they did not print out where she expected them, have failed to be present at the office printer to collect them when she next connected to the office network. Further, the contents of the second batch of documents sent anonymously could reasonably be inferred to have been obtained at a later date than the email chain in the first package since there would have been no reason for the sender, who evidently entertained a considerable antipathy to Mr Matheson and Mrs McIntosh, to have kept them out of the first package dated 6 May 2022 had they already been in his or her possession. However, the second package was not posted, according to its postmark, until 19 or 20 May, and Mrs McIntosh had been on gardening leave from 10 May, from which date she had not been connected to the office network and could not have triggered the

printing of documents inadvertently sent to the office printer. That left no realistic explanation for the provision of the documents in the second package becoming available to the pursuers other than that they had been obtained by hacking of one or other of the McIntoshes' computers, in breach of section 1 of the Computer Misuse Act 1990. The court should proceed on the basis that the documents in question had been obtained illegally. Further, it ought to find on the balance of probabilities that they had been obtained illegally by or for the pursuers. The two envelopes containing the documents were distinctively addressed, suggesting that the same person was responsible for both. The envelope containing the first package bore an unfranked stamp and thus did not appear to have been processed by the post office before being discovered in the pursuers' mailroom. It was probable that the envelope was simply deposited in the mailroom by the person who addressed the envelope. The mailroom had a secure entry system to which members of the pursuers' staff were allowed entry if they "buzzed". The writer of both envelopes knew the first names of both Mr Forde and Mr Webster and clearly identified strongly with the pursuers' interests. There was no evidence to suggest that it would have been possible to obtain all of the documents in question other than by hacking, and no evidence to suggest that some third party not connected to the pursuers would have had any motive for hacking to obtain those documents.

[58] Further, the court should also find that the pursuers had at all times been aware that the information contained in the documents in issue was confidential. That was immediately apparent from the terms of those documents. Certainly so far as Mr Matheson was concerned, the content of his email correspondence was plainly confidential and was material in respect of which he had a reasonable expectation of privacy.

[59] On ordinary common law principles, the court had a discretion whether to admit or exclude improperly obtained evidence having regard to whether it was fair in the circumstances to admit it. In assessing fairness the court had to look at the nature of the evidence, the purpose for which it would be used, and the manner in which it had been obtained, in order to determine whether its introduction would be fair to the party from whom it had been improperly obtained and also whether its admission would throw light on disputed facts and enable justice to be done: *Baronetcy of Pringle of Stichill* [2016] UKPC 16, 2016 SC (PC) 1 at [77]. In circumstances where the emails the pursuers sought to found upon had clearly been obtained in flagrant breach of Mr Matheson's right to confidentiality in respect of his private correspondence, the court ought to refuse to admit those emails in evidence as their admission would be grossly unfair to him.

[60] Further, and in any event, the admission of those documents in evidence would amount to an interference with the rights conferred upon Mr Matheson by Article 8 of the European Convention on Human Rights, which included the right to respect for his private life and his correspondence. It was important to recognise that the defender was engaging in email correspondence in his capacity as "an ordinary person" and not as a public official, and thus had a reasonable expectation of privacy in relation to his private correspondence: *BC v Chief Constable of the Police Service of Scotland* [2020] CSIH 61, 2021 SC 265 at [98]; *Sciacca v Italy* [2006] 43 EHRR 20. In determining whether the emails should be admitted in evidence the court required to balance whether allowing a determination of the parties' case on the basis of the evidence which might be available to the pursuers, however covertly obtained, out-weighed Mr Matheson's rights under Article 8. The admission of the emails in evidence would amount to a disproportionate interference with the Mr Matheson's Article 8 rights having regard to his reasonable expectation of privacy, the limited group within

which the emails circulated, and the fact that the emails had been obtained by covert means: BC at [114]. The court was a “public authority” for the purposes of the Human Rights Act 1998 and it was unlawful in terms of section 6(1) of that Act for a public authority to act in a way which was incompatible with a Convention right. In those circumstances the court ought not to exercise its discretion, contrary to Mr Matheson’s Convention rights, to admit the emails in evidence.

[61] For the same reasons, both at common law and by virtue of Article 8, the court should exclude from the action against Mr Matheson the further documents said to have been contained in the anonymously sent packages which bore to have been obtained from the email accounts of Mr or Mrs McIntosh and, if so, were extracted from their email records without their consent. Ultimately, the test was again one of fairness. It would be difficult to conclude that in fairness the pursuers should be entitled to adduce evidence which plainly had been obtained by a blatant breach of the McIntoshes’ reasonable expectation of privacy in relation to their private correspondence.

[62] In the event that the documents said to have been sent anonymously to the pursuers were excluded, it followed that any further recoveries made pursuant to the order granted by the court in the petition presented by the pursuers under section 1 of the 1972 Act should also be excluded. Those recoveries were only made possible because the pursuers obtained an order under section 1 of the 1972 Act in reliance upon the improperly obtained documents contained in the anonymous packages. That being the case, those recoveries were tainted by the prior illicit extracting of information from the email accounts of Mr Matheson or the McIntoshes. As a result, the question became whether it would be fair to Mr Matheson to allow the pursuers to rely upon that evidence at proof *et separatim* whether allowing the pursuers to do so would result in a fair trial within the meaning of

Article 6 of the ECHR: *Her Majesty's Advocate v P* [2011] UKSC 44, 2012 SC (UKSC) 108 at [18] and [27]. On either basis, the documents relied upon by the pursuers should be excluded, as should passages in affidavits lodged by them in which they founded upon the documents obtained by them in the circumstances already described.

Submissions for Margaret McIntosh and Granite Wealth Consulting Limited

[63] Mrs McIntosh and Granite Wealth objected to the admissibility of the documents in question, or any evidence which was derived from or relied upon that material, because it had been illegally obtained and was in any event not the primary or best evidence of the content of those documents.

[64] The first package from the anonymous sender contained an email from Mr to Mrs McIntosh sent on 26 April 2022. It was found in the mailroom of the pursuers' Dundee office on 6 May 2022. Anyone who worked for the pursuers could readily have gained access to the mailroom. The envelope had a stamp on it that was produced in 2009 and was no longer in general circulation. There were no postal markings on the envelope. It was reasonable in those circumstances to infer that it had not been posted and, instead, was placed in the pursuers' mailroom by someone employed by them. Given the similarities in style and handwriting on both envelopes, it was reasonable to infer that the first envelope was placed in the mailroom by the same person who posted the second envelope. That pointed to the material having been procured by someone who worked for the pursuers, most likely someone who worked at or was based in the Dundee office. Mrs McIntosh was placed on gardening leave from 10 May 2022, and returned her electronic devices to the pursuers at that time. After that date, there was no possibility that she could inadvertently have left any material on an office printer for anyone to find by chance. The second

anonymous package contained an email exchange, business plan and timeline. The email exchange ended with an email from AAB to Mr and Mrs McIntosh, copied to another member of staff at AAB, and sent on 13 May 2022. That email reported that Granite Wealth had been incorporated on that day. The business plan referred to Granite Wealth having been incorporated then. It was therefore reasonable to infer that the plan was prepared or at least revised sometime on or after 13 May 2022. Neither the business plan nor the timeline sent in anonymously bore to be attached to any particular email exchange. All the other material in the second package took the form of emails. It was reasonable to infer that this other material emanated from interception of emails. According to the McIntoshes, the business plan and timeline were only ever e-mailed under cover of a blank email from her to him sent on 18 May 2022 at 16.44. It was reasonable to infer that the second package could only have been sent sometime thereafter. The second envelope was postmarked in the environs of Aberdeen on 20 May 2022. The postage was underpaid, making it likely that it was posted in a letterbox. There was likely to have been some delay between posting and the envelope arriving at the sorting centre for franking and processing. It was therefore more likely than not that the envelope was posted on 19 May 2022, by someone in the Aberdeen area on that date. A person with both opportunity and incentive to procure and use that material was Mr Webster. He had said in his affidavit that he went to Aberdeen on 10 May 2022 and that he thought he only went there once between 27 May and 24 June 2022. It was only in cross-examination that he conceded that he was in Aberdeen on 19 May 2022 and that that was the only occasion between 10 and 27 May 2022 that he recalled having been there. The fact that he was in Aberdeen on 19 May 2022 was also spoken to Mrs McIntosh, Mr Matheson and Ms Pitcairn. That day was memorable to them firstly because it was the day of a leaving lunch in Dundee. It was unusual for Mr Webster to miss

such an occasion, but he was not there, although he generally made a point of attending such events. Further, 19 (rather than 10) May 2022 was the day that Mr Webster confronted both Mr Matheson and Ms Pitcairn in Aberdeen. The fact that Mr Webster was in Aberdeen on 19 May 2022 meant that he had the opportunity to have posted the second envelope. He denied that he had done so, but his account was not credible. The burden of the evidence was that it was the material in the second package which had particularly concerned Mr Webster and had caused him to confront Mr Matheson. That fitted with him having come into possession of the material in the second package shortly after the time of sending of the final email contained in it (namely 16.44 on 18 May 2022) and having posted it anonymously to himself when he was in Aberdeen on 19 May so as to provide an ostensibly good reason for his possession of it. Mr Webster had accepted that he had had concerns that Mrs McIntosh intended to compete with the pursuers from the moment that she resigned. He plainly had a motive or incentive to procure evidence to support his concerns so that he could do something to address them - particularly after the content of the first envelope was deemed inconclusive by the pursuers' board. On the hypothesis (which he accepted) that the first and second envelopes were addressed by the same person, it was reasonable to infer that Mr Webster also procured the content of the first envelope and planted it in the mailroom of the pursuers' office in Dundee, where he was based as a senior executive. How exactly he procured the contents of the envelopes did not matter. Whatever means were used to procure the content of these envelopes, it was reasonable to infer that they were means which were likely to have been illegal or at least underhanded. There was no need for the defenders to prove the precise mechanism by which the material was procured by Mr Webster. There were a number of offences or wrongs that could conceivably have been committed (see *Imerman v Tchenquiz* [2010] EWCA Civ 908, [2011] Fam. 116

at [90] - [105]), but what had happened certainly amounted to a breach of confidence.

It followed that the springboard for both the petition for an order under section 1 of the Administration of Justice (Scotland) Act 1972 and the consequent actions was material that had been illegally, wrongfully or at least irregularly obtained at the instance of the Chief Executive Officer of the pursuers. That was manifestly unfair, particularly in circumstances where the material was used to obtain one of the most intrusive forms of order that any court was entitled to pronounce.

[65] The material contained in the anonymous packages was plainly confidential. It was material in respect of which, objectively viewed, a reasonable expectation of privacy and, thus, a right to privacy at common law and under Article 8 of the European Convention on Human Rights arose: *BC v Chief Constable of the Police Service of Scotland* at [90] - [100]. It was plain that it had been obtained in circumstances which amounted to (at least) a breach of confidence and an interference with the right to respect for private and family life, home and correspondence guaranteed by Article 8(1). Confidence applied to information in which there was a reasonable expectation of privacy and which had been obtained without authorisation, regardless of whether it had been obtained intentionally or adventitiously: *Imerman* at [68]. The court was a public authority for the purposes of the Human Rights Act 1998: see section 6(3)(a). It was unlawful for a public authority to act in a way which was incompatible with a Convention right: section 6(1). Where evidence had been gathered in circumstances which could interfere with the right guaranteed by Article 8(1), the court might admit that evidence where to do so was in keeping with Article 8(2). There had to be a legal basis for doing so, it had to pursue a legitimate aim, and it had to be proportionate to that legitimate aim: *Martin v McGuinness* 2003 SLT 1424 at [13] - [14]. In carrying out that exercise, the court had to try to reconcile two competing public interests: the interest of the

public that in litigation the truth should be revealed and the interest of the public that the courts should not acquiesce in, let alone encourage, a party to use unlawful means to obtain evidence. Even if the evidence disclosed wrongdoing, two wrongs did not make a right:

ITC Film Distributors Ltd v Video Exchange Ltd [1982] Ch 431, [1982] 3 WLR 25; *Jones v University of Warwick* [2003] EWCA Civ 151, [2003] 1 WLR 954 at [28].

[66] The court also had to have regard to the domestic law governing the admissibility of evidence. It had a discretion at common law to admit or exclude evidence having regard to whether it was fair in the circumstances to admit it. Fairness was assessed by having regard to the nature of the evidence, the purpose for which it was to be used in evidence, the manner in which it had been obtained, whether its admission would be fair to the party from whom it had been obtained, and whether it would throw light on disputed facts and enable justice to be done: *Baronetcy of Pringle of Stichill* at [77]. Stricter standards ought to apply in civil as opposed to criminal proceedings, to avoid a party gaining an advantage from his own wrong: *Argyll*; Wilkinson, *The Scottish Law of Evidence*, p 118; Macphail, *Evidence* (1987), §21.14.

[67] Even if illegality did not operate as an absolute bar to admissibility in civil cases, the authorities relied upon by the pursuers were not directly in point and, in any event, pre-dated the development of the modern law of privacy and confidence and the European Convention on Human Rights or at least its incorporation into domestic law. In *Rattray v Rattray* (1897) 25 R 315 the judicial observations on the admissibility of a stolen letter were entirely obiter, and the judges all expressed different opinions. In *MacNeill v MacNeill* 1929 SLT 251 there was no suggestion that the letter in question had been illegally obtained. The same applied to *Watson v Watson* 1934 SC 374. In *Duke of Argyll v Duchess of Argyll* (No 3) 1963 SLT (Notes) 42, the defender's diaries were held admissible despite the fact that

they had been deliberately stolen because she had been in the habit of keeping them in places to which, when the parties had been living together, the pursuer had had access.

[68] In the present case, the court should exercise its discretion to refuse to admit any evidence of the material contained in the anonymous packages. It was material that was shared between husband and wife and between client and professional adviser. It was material in respect of which Mrs McIntosh enjoyed a reasonable expectation of privacy. The business plan and timeline in particular set out thoughts which Mrs McIntosh had kept to herself and her husband. The other material had been shared only with a very small group of professional advisers.

[69] If that material was held inadmissible, the court should also refuse to admit any further evidence that was derived from or relied upon it as “fruit of the poisoned tree”: *Her Majesty’s Advocate v P* at [18] and [27]. The further evidence in question was recovered under an order granted in terms of section 1 of the Administration of Justice (Scotland) Act 1972 which was obtained on the basis of the content of the anonymous packages. Fairness in any event required that evidence should be excluded if it had been recovered under the terms of a court order procured using irregularly obtained material, particularly in circumstances where the irregularity was known to the party seeking the order but was not fully disclosed to the court from which the order had been sought.

[70] Further, it was incompetent to establish the terms or tenor of material not produced by way of secondary evidence, such as parole evidence or copies: *Scottish & Universal Newspapers Ltd v Gherson’s Trs* 1987 SC 27, 1988 SLT 109. That manifested itself in the “best evidence” rule. The rationale of that rule was that, if there was or had been in existence better evidence than that actually adduced by one party, the other party was prejudiced in any attack on what was adduced and the proffering party gained an unfair

advantage: *Stirling Aquatic Technology Ltd v Farmoccean AB (No 2)* 1996 SLT 456. It was an equitable consideration in relation to the assessment of the state of proof when a party had either destroyed evidence which could have been adverse to his position, or failed to preserve evidence in breach of a duty to do so: *Hastings v Finsbury Orthopaedics Ltd* [2021] CSIH 6, 2021 SLT 187 at [75].

[71] Where material had been destroyed or lost, secondary evidence would be admitted only if it was shown that the evidence had been destroyed or lost without fault on the part of the party who had effective control over it. In this context, “fault” meant failure in a duty to take all proper steps or to use all due diligence to see that the material was preserved and remained accessible for use at proof. In determining whether such secondary evidence should be admitted, the court had to consider to what extent the absence of the material itself would obviously prejudice the other party. The greater the obvious prejudice, the more necessary it would be for the party who controlled the material to have taken whatever steps were required to see that it was not lost. For that reason, secondary evidence had not been admitted in *Gherson’s Trs, McGowan v Belling & Co* 1983 SLT 77, *Peacock Group plc v Railston Ltd* [2007] CSOH 26, 2007 SLT 269, *Scottish Water Business Stream Ltd v Automatic Retailing (Scotland) Ltd* [2014] CSOH 57, and *Tollerton v Highland Fuels Ltd* [2022] SC ABE 12. In each of those cases, the pursuer had control of material which was destroyed or lost in circumstances where it (or those for whom it was responsible) was at fault for failing to take proper steps to preserve that evidence. The pursuers in the present case maintained that they had shredded the anonymous packages, both envelopes and content, as part of their routine management of confidential waste. The defenders were seriously prejudiced by the absence of the original material and would be significantly hampered in

their ability to advance their case that the material in question had been obtained illegally by not having had access to the original material for examination.

Submissions for the pursuers

[72] On behalf of the pursuers, senior counsel submitted that the defenders' objections to the admissibility of the evidence in question were ill-founded as a matter of law and, in any event, that the objections lacked any factual basis. The evidence in question was very material and plainly admissible. It plainly disclosed that Mr Matheson and Mrs McIntosh had a plan to set up a business in competition with the pursuers, and that they stole the pursuers' confidential information and client data in order to do so. The court had already granted permission for the use of the material recovered by way of the "dawn raids" in the actions.

[73] The defenders had failed to put forward any material to vouch the proposition that the content of the anonymous packages had been illegally obtained. Indeed, the McIntoshes and Mr Matheson had each accepted that they had no material to demonstrate that there had been any unlawful access to their computers and documents, and were unable to state positively to the court that anyone (let alone any named person) had taken any such access. No expert evidence had been placed before the court. No relative investigations were ongoing. By contrast, the evidence of Mr Webster and Mr Forde that they had nothing to do with any illegal activity and knew of nobody who had, was absolutely clear, compelling and unchallenged.

[74] As a matter of general law, there was no absolute bar to a party making use of evidence that had been illegally or irregularly obtained. It was a consideration of the particular circumstances of each case that determined whether a particular piece of evidence

should be admitted or not. The circumstances which might have to be taken into account included the nature of the evidence concerned, the purpose for which it was to be used in evidence, the manner in which it was obtained, whether its introduction was fair to the party from whom it has been obtained and whether its admission would in fairness throw light on disputed facts and enable justice to be done: *Argyll; Rattray; MacNeill; Watson*. The pursuers did not accept that there had been any illegality in the obtaining of any of the evidence and the defenders had failed to aver or prove any such illegality; rather, it was clear that the material had come into the hands of the pursuers in wholly innocent circumstances.

[75] The asserted confidential nature of the material in question did not render it inadmissible. Any right of confidentiality in correspondence did not override the right of the pursuers to take steps within the court process to protect their contractual and property rights, or the right of society more widely to have parties kept to their civil law obligations: *Martin v McGuinness*.

[76] In respect of the defenders' contention that all or any part of the material in question was not "best evidence", and that they were seriously prejudiced by the absence of the original material, there was no such prejudice. The defenders did not dispute that Mr Matheson and Mrs McIntosh were the persons responsible for the creation of the substantive material anonymously supplied to the pursuers. Given this, there could be no prejudice to them.

[77] On the evidence before the court, there was simply no engagement of the "best evidence" principle. Nothing about the content of the documents in question was actually in dispute. None of the defenders could plausibly claim any prejudice arising from their

use. As to the envelopes, it was the defenders and not the pursuers who sought to make reference to them in evidence.

[78] The defenders' objections to the admissibility of the material in question should be repelled.

Decision

[79] The first question to be determined is what has been established about the circumstances in which the pursuers came to be in possession of the material contained in the anonymous packages. The first package contained an email chain culminating in Mr McIntosh forwarding the remainder of the chain to Mrs McIntosh on 26 April 2002. The sender of the first package obtained that document after it was so forwarded, making it unlikely that it was obtained from the earlier contributors to the chain, namely Mr Matheson and the staff of AAB. The theory that this document was inadvertently printed by Mrs McIntosh to the pursuers' office printer and was found there by someone who decided to pass it on to Mr Forde is entirely without support, direct or indirect, in the evidence and falls to be discounted. The second package contained, inter alia, a copy of a business plan for Granite Wealth which Mrs McIntosh was clear had only been shared by her with her husband by email on 18 May 2022. Although some scepticism was expressed on behalf of the pursuers about that claim, I see no reason to doubt it. Mrs McIntosh was well aware of the need for discretion about what she might choose to do after leaving the employment of the third pursuer. She had a specific reason for sharing the plan with her husband, namely so that he could check and revise it, but had no reason to disseminate it more widely. The others most likely to have been shown the plan, had it been shown to any others at all, were Mr Matheson and perhaps Ms Pitcairn, but they both denied any awareness of its contents

and I accept their evidence on that matter. It follows that both packages contained material emanating from the email accounts of either or both of the McIntoshes. They were both adamant - and I equally accept - that neither voluntarily afforded access to those accounts to any third party. It follows that on the balance of probabilities the content of both anonymous packages was obtained by way of unauthorised access to one or other of the McIntoshes' email accounts.

[80] I have not found it possible to determine how that unauthorised access was taken. It may be that one or other of the accounts was hacked, but the only evidence in support of that claim, given by Mr McIntosh, was vague in nature and not capable of forming the basis of any positive conclusion. Other possibilities exist - for example, Mrs McIntosh accepted that at least occasionally she accessed her personal email account on her work laptop, and that it was not her habit to log out of that account having accessed it, but that she rather merely closed the web browser she had been using. In those circumstances, anyone subsequently coming into possession of the relevant computer is likely to have had free access to the content of the email account. There may equally be other explanations which could be figured, but the evidence does not enable any one possibility to be preferred over any other.

[81] Who was responsible for taking the unauthorised access in question? The envelope of each package was addressed in handwriting and asterisks were deployed in a very unusual manner, making it likely that the same person addressed both envelopes. While that does not necessarily entail that only one person was involved in the exercise of gathering the contents of the packages, or that the same means were used in each instance, it does make those propositions more likely than not in the circumstances, and I proceed on that basis. It was submitted on behalf of Mrs McIntosh and Granite Wealth that the person

in question was Mr Webster, and in particular that he deposited the first package in the pursuers' Dundee mailroom on 6 May and then posted the second package to himself from the Aberdeen area on 19 May, subsequently concealing or pretending to forget that he had been in Aberdeen that day, and questioning others (eg Ms Pitcairn and Ms Shearer) as to whether they were responsible for the packages in order to divert any (then non-existent) suspicion away from himself. This is an elaborate theory, attended by a number of suppositions which depend at points more on hope than on evidence. The suggestion that Mr Webster deposited the first package in the Dundee mailroom on 6 May is at odds with his own evidence and that of Mr Forde that Mr Webster was in Edinburgh, rather than Dundee, on 6 May. I also have the firm impression that the pursuers' organisation was not one in which the Chief Executive Officer could have made an appearance in the mailroom, on whatever pretext, without his visit being remarked upon and recalled. I do not accept that it has been established that Mr Webster was responsible for sending the anonymous packages (and, by extension, for taking unauthorised access to the email accounts). I expect that modern Machiavellis do exist, but I hope that I do Mr Webster no disservice by doubting that he is one of them.

[82] I do find on the balance of probabilities that, as only a single sender appears to have been involved, both packages were sent by post, the envelope of the first simply missing the frank. I similarly find it probable that the first package was posted, as the second undoubtedly was, in the Aberdeen area. Beyond that it is not possible to proceed. The inference that the pursuers, as those with potentially most to gain from disclosure of the contents of the packages, were those responsible for obtaining the material in question, is not one that I am prepared to draw. The sender may simply have been someone who considered what he or she conceived Mrs McIntosh and Mr Matheson to be doing to be

morally wrong, and who felt it appropriate on those grounds to intervene. Equally, the sender may have been influenced by no such pure motive, but by enmity or jealousy towards Mrs McIntosh or Mr Matheson arising out of a work connection. It is not unknown for colleagues to harbour resentment or other ill-feeling, whether openly or otherwise, towards those with whom they work or have worked. It is simply not possible to determine what may have motivated the person in question to collect and forward the material contained in the anonymous packages, or to infer that, one way or another, the pursuers ought to be regarded as responsible for his or her actions.

[83] I proceed, then, on the basis that the contents of each of the anonymous packages received by the pursuers were obtained by the taking of unauthorised access to one or other of the McIntoshes' email accounts, but that it has not been established that the pursuers ought to be regarded as responsible for that activity. I do accept, however, that both the person responsible for obtaining the material and, once it was in their hands, the pursuers, ought to have recognised its confidential nature and treated it accordingly (cf. *Lord Advocate v The Scotsman Publications Ltd* 1989 SC (HL) 122, 1989 SLT 705; *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, per Lord Goff of Chieveley at 281).

Admissibility at common law

[84] Addressing firstly the question of how those findings affect the exercise of the court's discretion at common law to exclude on the ground of fairness evidence which has been irregularly obtained, and adopting in general terms, so far as applicable to the facts of this case, the approach set out in *Baronetcy of Pringle of Stichill*, it is first and foremost clear that the material in question is potentially of very significant import for the outcome of these litigations, in that it may establish that Mr Matheson and Mrs McIntosh were indeed

engaged in activities which breached the various obligations to the pursuers to which they had chosen to subject themselves. I stress that that is by no means an inevitable conclusion from the material; there may well be explanations (some of which were lightly touched upon in the course of the hearing) which cast a very different light on what, if anything, it is that the material actually establishes. However, the potential significance of the material in enabling the court to reach the correct and just conclusions in the litigations is clear and obvious. This factor supports the view that it might well be disproportionate to exclude material of such potentially probative quality from the court's consideration.

[85] A further factor pointing in the same direction is that the material was not obtained by any act for which the pursuers have been shown to be responsible. One argument in favour of excluding unlawfully-obtained material is that the court may, by admitting it, enable a person to benefit from his own unlawful act (see *Rattray*, per Lord Young at 319 - 320). No such consideration applies in the circumstances of the present case. The pursuers may be the beneficiaries of the wrongful act of another, and it may be that that wrongful act was not actuated in whole or in part by the pure motives claimed by that other, but the fact remains that this is a case, unlike many others where the pursuers come to court with what have not been shown to be anything other than clean hands, at least in the context of the acquisition of the relevant material.

[86] Considering next the issue of unfair prejudice to the defenders if the material in question is to be admitted in evidence, it must be borne in mind that that material was, by common consent, voluntarily created by the defenders for their own purposes, rather as a result of the trickery or instigation of others. As Lord Trayner observed of the facts in *Rattray* at 318:

“The mode in which the letter is obtained does not alter the letter in any way, — the letter admittedly was written by the defender, and what it may or can prove is not affected to her prejudice by the manner in which it was got.”

Although it may be that the admission in evidence of the material in issue in the present case will transpire to be prejudicial to the defenders, there is nothing about either the circumstances of its creation or the way in which it came to be in the hands of the pursuers which supports the suggestion that such prejudice would be manifestly unfair.

[87] On the other hand, in modern law the concept of a right to privacy and the related notion of a right to maintain the confidentiality of one’s private papers and correspondence is much more developed, and falls to be accorded much more significance, than was the case when decisions such as those in *Rattray* and *Duke of Argyll* were made. That was not an issue which arose on the particular facts of *Baronetcy of Pringle of Stichill*. It remains for now uncertain whether there is such a thing as a common law right to privacy in Scots law (*BC v Chief Constable*) but the analysis of the general direction of travel of the law in this regard which was carried out by the English Court of Appeal in *Imerman* at [54] - [71] is instructive and supportive of the conclusion that a person’s right to be able to enforce the right to confidentiality which he enjoys in any material is in itself a weighty consideration to be entered into the balance when the common law exercise at hand is being carried out.

[88] As the Court in *Imerman* put it at [69]:

“It is of the essence of the claimant’s right to confidentiality that he can choose whether, and, if so, to whom and in what circumstances and on what terms, to reveal the information which has the protection of the confidence. It seems to us, as a matter of principle, that, again in the absence of any defence on the particular facts, a claimant who establishes a right of confidence in certain information contained in a document should be able to restrain any threat by an unauthorised defendant to look at, copy, distribute any copies of, or to communicate, or utilise the contents of the document (or any copy), and also be able to enforce the return (or destruction) of any such document or copy.”

[89] Very similar comments could properly also be made in the context of Scots law, and provide a powerful counterweight to the factors in the balance in favour of the admissibility of the irregularly obtained material. However, with some hesitation, I consider that that balance remains to be struck in favour of the admissibility of the material in question. The risk of the court being led to a wrong and unjust result as between the parties should that material be excluded is the consideration which carries most weight, and prevails against the defenders' confidentiality rights because those rights do not concern any particularly sensitive or personal issue and because the pursuers have not been shown to have infringed those rights directly, but only in the secondary, *Attorney General v Guardian* manner. I accordingly hold the contents of the anonymous packages admissible at common law.

Impact of the European Convention on Human Rights

[90] Article 8 of the ECHR is in the following terms:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

[91] I have already indicated (and do not understand it to be disputed) that the defenders had a reasonable expectation of privacy in the contents of the emails and business documents which found their way into the anonymous packages. In those circumstances the court could only, in conformity with its duties as a public authority in terms of the Human Rights Act 1998, countenance that material being used as evidence in the actions if certain conditions are met. Firstly, such use would have to be necessary for one of the

purposes set out in the second paragraph of the Article. That the proposed use is necessary for the protection of the rights and freedoms of others, namely the pursuers, emerges clearly from the potential materiality of the items in question to the proper resolution of the parties' disputes, as already set out. Secondly, such use must be fair, and proportionate to the protection of the rights and freedoms of those others. Those questions are, in essence, resolved by the discussion and determination of those issues in the common law context. There is no separate matter touching upon their resolution in the context of their consideration for the purposes of Article 8. The third and final question which requires to be answered affirmatively in order for the material in question to be admissible in terms of Article 8 is that there is a clear and accessible legal basis upon which the court proceeds in allowing their use. Further, if that basis is some aspect of the public interest - as it is in the present case, namely the public interest in the proper administration of justice - that interest must not be too "vague or amorphous", or else it risks failing to provide the clear and accessible basis necessary (*BC v Chief Constable*, per the Lord Justice Clerk at [108]). It is this aspect of the Article 8 considerations which has given me most pause for thought. Although the existence and nature of the public interest in the administration of justice is clear enough as a concept, it may not be particularly easy to forecast with the requisite degree of accuracy how its needs will be interpreted in any particular case, particularly if - as I have held - the growing importance of a public interest in the recognition of rights to confidentiality and privacy now falls to be taken into account. However, ultimately I have concluded that the elements which fall to be considered in determining the question of the admissibility of evidence at common law are sufficiently clear to enable a suitably-experienced legal practitioner to assess and advise a client who requires to deal with that question what the likely outcome may be, or at least how likely any particular outcome is. Given that, in

domestic law at least, the hurdle to be crossed in order for a set of legal principles to be assessed as representing a clear and accessible legal basis for inroads to be made on Article 8 rights is a comparatively low one, I consider that that suffices for this issue, too, to be determined in favour of the pursuers. It follows that there is no bar to the admissibility of the material in question in the form of Article 8 of the ECHR. Nor do I consider that any separate issue arises under Article 6; the only applicable requirement in that Article to the present case is that the proof should be “fair”, and given that that criterion has already been considered and determined in the context of the common law position, no further or separate consideration under Article 6 is required.

Fruit of the poisonous tree

[92] Given that I have determined that the contents of the anonymous packages are admissible at common law and in terms of the ECHR, the question of the admissibility of further evidence acquired in consequence of the use of that material to obtain orders for “dawn raids” under section 1 of the Administration of Justice (Scotland) Act 1972, and said to be tainted by the fact of that material having been unlawfully obtained, does not arise. The contents of the anonymous packages have been determined to be admissible in evidence (and equally admissible for consideration by the court in the context of the application for the section 1 orders), so no relevant such taint exists.

[93] Had the question been a live one, I would not have acceded to the defenders’ suggestion that the material acquired in consequence of the “dawn raids” was so closely associated with any illegality pertaining to the acquisition of the content of the anonymous packages as to render it inadmissible. The evidence seized by the commissioners from the homes of the Mathesons and McIntoshes existed (and was thus there to be discovered) quite

independently of any illegality attending that acquisition, and any link between that illegality and the seizure of the further evidence by way of the “dawn raids” was sufficiently attenuated by the independent intervention of the court in granting the section 1 orders as to render it too feeble to bear the weight which the defenders require of it. In other words, the “dawn raids” fall for these purposes to be regarded as the occasion, rather than as the cause, of the discovery of the additional material. While it may well be that the considerations which fall to be taken into account in this regard in the context of civil litigation differ for various reasons from those of relevance in the criminal context, I add that I do not regard the approach I have adopted in the present case, or the result arrived at, as differing from the approach taken or the result reached in *Her Majesty's Advocate v P*.

Best evidence

[94] The general rule against the admission of secondary evidence in the absence of satisfactory explanation for the lack of better evidence has, perhaps, never been quite as far-reaching or implacable as is often imagined. There will be obvious cases where the absence of primary evidence plainly gives rise to issues of potential prejudice to a party, or else imperils the ability of the court to determine the dispute correctly, for example where matters turn on the state of some object, or on the content of documentary material, which has not been made available for inspection. In such cases, as explained in *Gherson's Trs*, the admission of secondary evidence as to that state or those contents is likely to depend on the furnishing of a cogent explanation as to the absence of the primary material, cogency being determined by reference to the importance of the missing material and the circumstances of its non-availability to the court.

[95] The present case is in a rather different category. There is no dispute that the material produced to the court as representing the content of the anonymous packages is a perfect facsimile, produced by means of electronic scanning, of the papers contained in those packages, or that those papers were in turn accurate printed versions of documents created in digital form by the defenders and others. This is not a case where, for example, documents were received by the pursuers in digital format, but printed and produced by them to the court in paper form, with the digital versions permanently deleted, resulting in the loss of at least possibly significant metadata. What has been produced to the court as representing the content of the packages is in every relevant sense as good as that content itself. It may be that it does not in such circumstances fall to be regarded as secondary evidence at all, and may properly be treated as one physical manifestation of an essentially digital entity which is as valid as any other such manifestation, but even on the assumption that it is secondary evidence, its use presents no risk of prejudice to the defenders or to the proper administration of justice by the court, and the best evidence rule is, thus, not engaged.

[96] Slightly different considerations attend the production of scanned copies of the envelopes containing each of the anonymous packages. The envelopes in question originally had an existence in the physical rather than digital world, and it is at least conceivable that the scanned versions provided to the court deficiently represent some aspect of that original physical item. The potential for prejudice to the defenders or to the proper administration of justice thus exists, and creates room for the engagement of the best evidence rule. I do not accept the submission for the pursuers that, because they seek to draw nothing from the envelopes, the secondary nature of the evidence as to their state is

not their concern. The better view is that each package falls to be regarded as an unum quid, so that an evidential problem with one aspect of a package is capable of affecting the whole.

[97] However, the only possible prejudice arising out of the secondary nature of the evidence about the envelopes which could be figured by the defenders was the suggestion on behalf of Mrs McIntosh and Granite Wealth that the production of the original envelope containing the first anonymous package might have enabled a close examination to determine whether it was indeed unfranked, as the scanned version appears to be. I accept that relevant prejudice to a party for these purposes might include a disadvantage in arguing about the admissibility of a piece of evidence, and is not restricted to disadvantage in dealing with its probative value once admitted. However, an examination of the first envelope could only have had one of two results. Firstly, it might have revealed no sign of any frank, in which case the state of the evidence would stand exactly as it now does (and, in particular, would not necessarily lead to the conclusion that the package had not been posted), or alternatively it might have revealed some trace of a frank not apparent from the scanned version, in which case the conclusion at which I have arrived by a consideration of the other evidence in the case, that the package in question was indeed sent through the post rather than being deposited at the pursuers' Dundee office, would be bolstered. In either event, there is no material prejudice to the defenders or risk to the administration of justice, and thus no room for any balancing exercise as might otherwise be required by the best evidence rule.

Conclusion

[98] I shall repel the defenders' objections to the admissibility of the anonymous packages and of the material recovered in the "dawn raids" and continue the cases to diets of proof accordingly.