SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES & GALLOWAY

AT HAMILTON

[2025] SC HAM 22

HAM-B856-24

JUDGMENT OF SHERIFF LINDA NICOLSON

in the cause

THE SECRETARY OF STATE FOR BUSINESS AND TRADE

Minuter and Pursuer

against

GARRY PETTIGREW

Respondent and Defender

Minuter and Pursuer: Mr Maciver; Womble Bond Dickinson LLP
Respondent and Defender: Ms S. Munro, Livingstone Brown Ltd

Hamilton, 7 March 2025

The sheriff, having resumed consideration of the cause, finds the following facts admitted or proved:

1. The minuter is the pursuer in an action against the respondent for disqualification from the office of directorship. The application was set down for an evidential hearing at Hamilton Sheriff Court Civil Building, Birnie House, Caird Park, Hamilton Business Park, Caird Street, Hamilton, ML3 0AL on 29 April 2024.

2. The evidential hearing was adjourned on 29 April 2024 and the cause has since been remitted to the Court of Session.

3. The respondent attended Hamilton Sheriff Court Civil Building on 29 April 2024. He entered the waiting room for pursuers' witnesses. Witnesses due to be called by the minuter

to give evidence were present in the witness room, having been directed there by court officials. They included Robert Clarke of the Insolvency Service, Fiona Daly of NHS England, and John MacKintosh of HSBC UK Bank plc.

4. It was not intimated to the respondent that Ms Daly and Mr MacKintosh were witnesses for the minuter until 13 May 2024, after the date of the hearing on 29 April. They had been called upon by the minuter to attend court on 29 April 2024. On that date the respondent knew and could identify Fiona Daly and John MacKintosh as being persons who had dealings with him and the company of which he is a director, Healthcare Environmental Services Limited. Ms Daly and the respondent briefly acknowledged one another in the witness room, and Ms Daly and her companion Ms Hughes briefly communicated with each other on their mobile phones when Ms Daly identifed the respondent to Ms Hughes. Ms Daly and Ms Hughes did not communicate with each other by mobile phone when the respondent was not in the witness room.

5. On 29 April 2024 at least one notice was posted in the court building, visible to the public, informing of a prohibition on the taking of photographs in the court building.

6. Photographs were taken by the respondent on his mobile phone of Fiona Daly and of John MacKintosh while they were in the witness room. The respondent disseminated the photographs so that they were posted by an account on the social media platform X (formerly known as Twitter) with the username @HealthcareENV. The account is associated Healthcare Environmental Services Limited.

7. The respondent operates a social media account on the platform X (formerly known as Twitter) with username @GarryPettigrew.

8. On 29 and 30 April 2024 a series of posts were made on the social media platform X (formerly known as Twitter) from the account with username @HealthcareENV, including the following posts pertaining to the present case:

9. April 29: a post comprising photographs of Fiona Daly and John MacKintosh in the witness room and the following comment:

> "So our MD @GarryPettigrew was in court fighting @ScotSecofState bullshit today and look who turned up in the witness room even though it was a proof hearing and they are not prosecution witnesses yet? Lets hope they are @NHSEngland @DalyFionadaly1 #johnmackintosh @HSBC ..." [page 16 of the Inventory of Productions for the Minuter]

10. April 29: a post replying to the previous post and comprising a stock animation of an unidentified female blowing a kiss and the following comment: "Why is it the fatties always have a skinny friend, this blow hard has told more lies that billy liar can someone let the air out, please" [page 17 of the Inventory of Productions for the Minuter];

11. April 29: a post comprising a photograph of Fiona Daly in the witness room and the following comment: "You would need a bigger pie to cover that face boss and she knows her pies" [page 20 of the Inventory of Productions for the Minuter];

12. [no date reference]: a post comprising a photograph of Fiona Daly in the witness room and the following comment:

> "Hestill [sic] has it @GarryPettigrew knows how to piss off the establishment when they entered the room seemingly the trougher nearly dropped her load, she quickly exchanged texts with her gopher to tell her the bad boy was in the room [laughing emojis] keep it up boss. They didnt [sic] have the gumption to talk in the same room pathetic #bringiton they had there [sic] little power talk with the legals planning there [sic] incompetent plan to try and topple him wont [sic] happen drawers will be pulled down even balloon drawers like this muppets @nhse more tax payer wasted money" [page 27 of the Inventory of Productions for the Minuter]

13. April 29: a post commenting upon or replying to the post just mentioned with photographs of annotated copies of the minutes of the Emergency Preparedness Resilience

and Response meeting on 20 August 2018 referred to in Article 7 of condescendence in the summary application and the following comment:

> "If this wildebeest [a reference to Fiona Daly] comes near your business close the barn door quickly. She will lie for the government steal your business and do everything in her power to make sure the media don't report the truth happened to us?" [page 27 of the Inventory of Productions for the Minuter].
>
> These minutes have been shared previously on the @HealthcareENV account,
>
> including on 5 May 2022;

14. [no date reference, with repost on 30 April]: a post comprising photographs of Fiona Daly and John MacKintosh in the witness room and the following comment:

> "The story of @HSBC_UK bank manager and a fat trougher doing well from the FM industry @SodexoUK_IRE @mitie @SkanskalUKplc @NHS England in Scotland 29/4/24 for a strike off court case by @ScotSecofState the road gets murkier by the day, they know we will never give up on there backhandersall [sic] the way from #England at taxpayers expense all over again lost over £2m on last failed case now grasping [sic]" [pages 38 and 68 of the Inventory of Productions for the Minuter].

15. On 29 April 2024, in response to the post at paragraph 12 above, a post was made by the respondent on the social media platform X (formerly known as Twitter) from the account with username @GarryPettigrew, comprising a stock animation of an unidentified female being hit in the face with a cream pie and the following comment: "You never have a pie on you when you need one" [page 84 of the Inventory of Productions for the Minuter; the stock animation used in this post is available at https://gifer.com/es/3Qr].

16. On 29 April 2024 the respondent posted from @GarryPettigrew, replying to @HealthcareEnv among others:

> "Thanks Guys yes interesting day good to see @nhse and @HSBC_UK still working together to try and hide the £3b (sic) coverup what they are sacred (sic) off. Yes the truth see you all soon".

17. On 29 and 30 April 2024 the posts at paragraphs 9, 12, 13, and 14 above were reposted without comment by the respondent from the account with username @GarryPettigrew [pages 83 to 85 of the Inventory of Productions for the Minuter].

18. A number of other users were 'tagged' by @HealthcareENV in the posts. Tagging operates by including another username, denoted by blue text preceded by the "@" symbol. Tagging results in that username receiving a notification indicating that they have been tagged in the post when it is posted. The other users tagged included: Fiona Daly [@DalyFionadaly1; post at paragraph 9 above]; NHS England [@NHSEngland; posts at paragraphs 9 and 14 above] and HSBC [@HSBC_UK; posts at paragraphs 9 and 14 above].

19. On 9 May 2024, NHS England caused its solicitors to issue a letter to the respondent, enclosing copies of some of the posts, and asking him to undertake to cease and desist from publishing images of Fiona Daly or other similar offensive content directed at Fiona Daly and to delete the posts [page 187 of the Inventory of Productions for the Minuter pdf];

20. On 14 May 2024, the respondent responded by email to NHS England's solicitors. The respondent denied that he was responsible for the posts [page 196 of the Inventory of Productions for the Minuter pdf].

21. The minuter considered the evidence of the witnesses Fiona Daly and John MacKintosh to be essential to the success of their application. The witnesses reside out-with Scotland.

22. The derogatory comments in the posts offended the witness, Ms Daly, and left her apprehensive about giving evidence at any adjourned hearing.

Findings in fact and law

23. The respondent took photographs of Fiona Daly and John MacKintosh in breach of a prohibition by the court.

24. The respondent disseminated the photographs when there was a potential for misuse of the photographs.

25. The respondent misused the photographs by reposting posts of the photographs and offensive comments on social media.

26. The respondent intended to photograph Fiona Daly and John MacKintosh and the respondent intended to disseminate the photographs and derogatory comments.

27. The respondent's actions infringed the witnesses' privacy and dignity and had the potential to intimidate witnesses. The actions had the potential to prejudice the proper administration of justice.

28. The conduct of the repondent challenged the authority of the court.

Finding in law

29. The respondent is in contempt of court.

Accordingly, upholds the minuter's plea in law, repels the respondent's pleas in law, grants the minuter's second crave and in terms thereof finds the respondent in contempt of court, and directs the Sheriff Clerk to identify a suitable date for a hearing, to be hereinafter assigned, on punishment of the respondent and on expenses.

NOTE

Evidence

[1] A joint minute of agreed facts, including that of the content and source of the posts on X, referred to in the findings in fact, was lodged. Affidavits by each witness were also lodged and adopted in their oral evidence.

Evidence for minuter

[2] The minuter's witnesses gave evidence remotely.

Nazia Aslam

[3] Ms Aslam is a senior paralegal with the Insolvency Service, confirmed that the service instructed solicitors in the application for director disqualification with the Secretary of State as minuter. The application concerns an alleged breach by the respondent of his fiduciary duties as director. The alleged breach involved transferring the company's assets out of reach of creditors at a time when the respondent knew or ought to have known that the company was in difficulty. Fiona Daly, John MacKintosh, and Robert Clarke were asked to give evidence for the minuter at the evidential hearing on 29 April 2024. Fiona Daly speaks to discussions about the issue prior to transfers being made and John MacKintosh speaks to assets being transferred without the consent of the bank, which held a floating charge over the assets. They were essential witnesses for the minuter as pursuer in the application. Ms Aslam conceded that a witness list sent to the respondent in advance of 29 April did not have the names of Fiona Daly or John MacKintosh on it and that a witness list that included their names was sent to the respondent on 13 May 2024.

[4] Photographs of Fiona Daly and John MacKintosh in the witness room at Hamilton Sheriff Court were posted on the respondent's X account and the account of his company, Healthcare Environmental Services Limited. Posts from the latter were reposted on the respondent's personal account. Comments on the posts about Ms Daly were derogatory and there was a comment to the effect that NHS England and HSBC were attempting to hide a: "£3b (sic) coverup". The matter was reported to the service by NHS England, Ms Daly's employers. A response to an email enquiry sent the the Sheriff Clerk's office at Hamilton Sheriff Court, was at number 5 of the minuter's productions (page 184). The response advised that persons attending the court building would be directed to the appropriate witness room or court room when they arrived. Records of those attending are kept for use on the day, including for health and safety purposes, however such records are destroyed at the end of each day for data protection purposes. Court staff had no recollection of whether the respondent attended on his own or with any witness on 29 April 2024.

Robert Clarke

[5] Mr Clarke is a chief investigator with the Insolvency Service. On 29 April 2024, he attended at the court to give evidence. Court staff ascertained that he was a witness for the pursuer and then directed him to a witness room. The seats in the witness room were laid out in two rows forming an L shape. A plan of the witness room, which forms production number two of the minuter's second inventory, shows the layout. He sat on the end of a row and used his laptop. A woman who he now knows to be Fiona Daly entered the room, accompanied by another woman. They sat immediately to his left. The respondent entered and sat diagonally across from him. He was not accompanied by anyone. The witness was not sure which of the two entered the room first. People were using the mobile phones in

the room, including Ms Daly. There were two other men in the room and two people standing against a wall. He has since learned that one of the men was John McKintosh. Robert Clarke recalled being in the witness room for around two hours while the respondent was in the room for around 30 minutes. The respondent used his mobile phone while in the witness room. He could not say if the respondent was taking photographs with his mobile phone. A photograph of Ms Daly in a tweet shown at page 20 of the minuter's production number one of the first inventory shows his arm at the left of the shot. The angle of the photograph suggested it was taken where the respondent was seated. Mr Clarke recalled seeing signage in the building prohibiting photography. He thought he also saw signs prohibiting the use of mobile phones.

Fiona Daly

[6] Ms Daly is the Director of Sustainability and Estates of NHS England. She had been asked to be the single point of contact for NHS England when an incident arose involving Health Care Environmental Services and their provision of waste services. She received a citation to attend at the court as a witness. She was accompanied by a colleague, Natasha Hughes, for moral support. She was directed to the pursuers' witness room after she was asked at reception if she was there for the pursuer or defender. The respondent was in the pursuers' witness room. Ms Daly and the respondent acknowledged each other in the witness room but did not engage in further conversation. She knew the respondent from previous encounters on behalf of NHS England. In 2020 he had made some derogatory posts about her. The respondent was sitting diagonally across from her, to her left, at or near the end of a row of seats. A man and woman were sitting to his right. There was a man sitting with his laptop to her right. Two men were standing against a wall in front of

her. There was another man who stood with a coffee in the entrance passageway to her right. At one point two legal representatives came into the witness room. The respondent spent much of his time on his mobile phone. She saw him hold it upright. She did not know whether the respondent took photographs with his phone. She did not recall the respondent being replaced at one point by a woman and was almost certain that he was not. She recollected that he was in the room for the whole time that she was.

[7] She later discovered tweets showing photographs of her in the witness room. She was referred to the minuter's productions and confirmed these were the tweets. One showed her bending down to reach into her bag. There were comments to the effect that she was a liar and corrupt. This went against her values and she had spent a long time building her career. There were derogatory comments about her weight and an animated GIF showing a woman having a cream pie thrown in her face. She would not agree with a suggestion that this was funny and she felt hurt by the posts. She considered that she was targetted simply for doing her job. She was apprehensive about returning to court to give evidence.

Natasha Hughes

[8] Ms Hughes is the Director of Commercial Operations at NHS England. She was asked by her line manager to accompany Ms Daly to court on 29 April 2024 as Ms Hughes lives locally. The respondent sat diagonally across from her in the witness room, at or near the end of the row of seats to her left. She and Ms Daly communicated by using their mobile phones at one point near the beginning of their wait, by typing messages out on their phones. This was because Ms Daly was telling Ms Hughes where the respondent was sitting. Ms Hughes did not know the respondent at the time. She and Ms Daly

communicated in this way as the room was small and they didn't want to be overheard. She thought the respondent arrived after them and that he was then in the room for the same duration as them, leaving only for a short time. She thought that less than six people came in and out of the room. She did not think that anyone else sat in the seat which the respondent vacated. She was referred to the tweets in the minuter's productions. The angle of the photographs in the tweets were such that they seemed to have been taken from where the respondent was sitting. She took it that the reference in the comments to her and Ms Daly exchanging texts could only be known to someone who was in the room when that happened. The reference to the gopher in the comments seemed to be about her. She thought that was quite rude. She felt uncomfortable about attending court in person in the future.

Lucy Williams

[9] Ms Williams is a trainee solicitor with the firm of solicitors instructed by the minuter. She was tasked with preparing two documents, extracting tweets from the account of @HealthcareEnv and @GarryPettigrew for the period 28 April to 1 May 2024. They now form production numbrs one and two of the minuter's first inventory. She explained that if an account was tagged in a post then that account would receive a notification of the post. The effect of reposting means that the post will show on the account reposting the tweet. Any member of the public who followed the respondent's account or who looked at the account profile, as she did, would see the tweet. She has no connection with the respondent and did not follow him. A reposting by the respondent meant that he drew attention to the original tweet. There were only four original posts made by the respondent's account within the productions. Looking at two of them, on pages 83 and 84 of the inventory, they

had drawn four and two likes respectively and had each been retweeted once. They seemed to have been viewed 115 and 72 times respectively.

Submission of no case to answer

[10] At the conclusion of the minuter's evidence, the respondent moved the court to find that there was no case for the respondent to answer. It was said that there was no evidence that the respondent had committed the acts complained of in that no-one spoke to him taking the photographs or disseminating them.

[11] The respondent was unable to point to any authority which supported that such a submission and finding was competent at this stage but invited the court to follow the procedure which would be adopted in criminal proceedings.

[12] The minuter submitted that it would be incompetent to make such a finding at this stage. A submission of no case to answer at this stage was a creature of statute, now set out in the Criminal Procedure (Scotland) Act 1995 at sections 97 and 160. Contempt proceedings are sui generis. Reference was made to *Robertson & Gough* v *HM Advocate* 2008 JC 146 at paragraph 31, in which Lord Emslie said, "....contempt of court is not a crime *per se*. It is a *sui generis* offence committed against the court itself….". The present procedure is in fact far from being criminal. While the standard of proof is the same as in criminal proceedings, there is no requirement for corroboration. That example shows that contempt procedure need not and does not exactly mirror criminal proceedings. Therefore, because there is provision for a "no case to answer" submission in criminal procedure, it does not follow that there must be such provision in contempt proceedings. *Robertson & Gough*, in setting out a series of procedural safeguards at paragraphs 83 and 92 to 94, makes no reference to a submission of no case to answer. The role of the court was to be inquisitive, i.e. to draw out

the full facts and make findings on them and in law. A finding of no case to answer at the conclusion of the minuter's evidence would curtail that exercise. McPhail's *Sheriff Court Practice*, fourth edition at paragraph 2.36 says that the procedural safeguards set out in *Robertson & Gough* should be followed.

[13] If the court were not with the minuter on the question of competency, then there was ample evidence of contemptious behaviour by the respondent. Three witnesses spoke to the respondent being in the room and seated in the corner from which the photographs were taken. Each said that no one else sat there. The respondent was holding his phone. He held it upright. It was a fact that photographs were taken. The court could infer that the respondent took the photographs. There was also evidence that the respondent disseminated the photographs in that they appeared online with commentary known only to someone in the room, eg that texts were exchanged between Ms Daly and Ms Hughes. His personal account reposted tweets which contained the photographs and derogatory comments and his account posted tweets adding to those insulting comments.

[14] For the reasons argued by the minuter and in the absence of any authority to the contrary, I concluded that a submission of no case to answer, and a finding of such, are not competent in contempt proceedings.

[15] I observed however that, if I had been persuaded that they were competent, there was sufficient evidence of the acts complained of and that the respondent was the person who committed at least some of the acts. It was not contended by the respondent that there was an insufficiency of evidence that the acts complained of were committed, i.e. that photographs were taken of the witnesses in the witness room, disseminated along with derogatory comments on social media and reposted, were committed. The facts were encapsulated in the joint minute.

[16] There was evidence that the respondent was in the room at the time the witnesses were there, that he had his mobile phone out, and that the photographs were taken from the position in which he was sitting. The photographs were posted from an account linked to the respondent and were accompanied by comments which were likely to be known only by a person in the room, eg, a commentary on what Ms Daly and Ms Hughes were doing in the room. Other comments were consistent with what the evidence tended to show was the respondent's knowledge. Photographs showing Fiona Daly and John MacKintosh within the witness room were posted as well as tags which identified both witnesses and comments referring to their involvement with the respondent's company and their association with the court action. These strands of evidence, taken together, would allow the court to infer that the respondent was the person who took the photographs and, being in possession of the photographs, disseminated them so that they came to be posted online.

Respondent's evidence

Anna Opacian

[17] Ms Opacian is a beautician and the partner of the respondent. She had been his partner when he faced earlier criminal proceedings and now the application for director disqualification. She said that she attended court on 29 April 2024, arriving separately from the respondent to avoid press attention. She and her partner had suffered from press coverage previously. When asked if it would not have been better that she did not go to court to avoid press coverage, she replied that she was nosey.

[18] She went into the court room when she entered the court building. She said that there was no one at reception and she did not explain how she knew which court room to enter. The respondent was in the witness room. He sent a message on a group chat which

she was a member of saying: "Guess who is in the witness room?" She understood that to mean that someone was there that shoudn't be. The respondent then came into the court room and she left the court room without speaking to him and went into the witness room. They did not speak together as they did not want to be seen together.

[19] In answer to a question as to how she knew which witness room to go in she said that she just went into the first room. She wanted to see who was in the room. She was not a witness but considered it her business to go into the room as she was curious as to who was in there. She sat in the middle of the row of seats against the wall. She recognised the witness John MacKintosh standing at the wall to her left. On the row of seats diagonally to her right she saw Fiona Daly.

[20] She saw Ms Daly messaging with her colleague and found this really suspicious. In cross examination she could not understand why, applying the same logic, it would be suspicious if someone saw that the respondent messaged her in court, as he had. That should be the business only of her and the respondent. She said she was suspicious about Fiona Daly and John MacKintosh being in the witness room as they were not witnesses in the case. Her suspicions were the reason she took pictures of them. She could not explain why her being suspicious would be a reason for her taking photographs of the witnesses.

[21] She took the photographs with her mobile phone. She did not know if anyone saw her doing it. She did not see any signage that mobile phones were not allowed. It was only yesterday, when she attended court in respect of this minute, that she noticed signage which said that photography was prohibited.

[22] While in the witness room she posted the photographs on a Healthcare Environmental group chat. She accepted she may have said: "Look who is in the witness room?". She denied that she asked in the group chat who the people in the photographs

were. There are about 20 people on that group chat. She doesn't know their real names as they all use pseudonyms. They are all people who have been adversely affected by the action against the respondent and his respondent's company. They have lost jobs and pensions. The respondent did not ask her to take or post the photographs. The photographs on the group chat were posted in a tweet on Healthcare Environmental's X account. A lot of people are administrators on that account. The respondent is one of them. After she posted the photographs to the group chat she left the court building.

David Brown

[23] Mr Brown is a mill technician and has known the respondent for 45 years. They have been friends since their school days. He also worked for Healthcare Environmental for 18 years. When the company ceased trading in 2018, he was made redundant. The press coverage at the time was massive, totally negative, and unjustified. He was still bitter about it all. He follows the court cases which the respondent has been involved in, as do others. There is a WhatsApp group chat called "Friends of Healthcare". Many people in the local area were adversely affected by what happened to the company. People use nicknames on the group chat and he doesn't want to know their identities. He was sent some photographs on the group chat on 29 April 2024. The person who sent the photographs said they were at the respondent's court case and asked if anyone knew who the people in the photographs were. He did not recall the nickname of the person who sent it.

[24] He recognised John MacKintosh from meeting him once and Fiona Daly from an internet search. He posted the photographs on Healthcare's X account. He is an administrator for that account along with 10 to 20 other people. He made comments on the posts, which he meant as banter but which he now accepted perhaps went too far. He was

angry about everything. The WhatsApp messages are set to delete after 24 hours and were no longer available. He was not at court on 29 April and he did not speak to the respondent or anyone who was at court that day. When he described Fiona Daly as a: "trougher dropping her load" he was simply making a statement of what he was thinking. He referred in the tweets to an exchange of texts between Fiona Daly and her colleague because someone on the group chat must have put that on there. He denied that it was the respondent who had taken the photographs and put the posts on the Healthcare X account.

Submissions

[25] For the minuter it was submitted that the respondent should be found in contempt of court. As had been submitted earlier, the evidence supported the inference that the respondent took the photographs and that he disseminated them, both on the Healthcare Environmental X account and by reposting them on his personal account. The alternative culprits were Anna Opacian and David Brown but their evidence should be discounted. The comments were insulting, and the tweets caused offence and alarm. The witness Fiona Daly was hurt. This occurred around the context of a court hearing designed to get at the truuth of matters. The publication of the photographs and comments calls into question the integrity of the court. It undermines the delivery of impartial justice.

[26] Examples of contempt were given in *Robertson & Gough* at paragraph 32, one being the taking of a photograph of a judge, accused or jury. At paragraph 34 another example of contempt, committed in the presence of the court, was the molesting of a juror or witness in the precincts of the court. Both examples were engaged in this case. In *Robertson* v *Gough* the case of *R* v *D* (Contempt of Court: Illegal Photography) [2004] EWCA 1271 was referred to. That case involved broader examples. It included a photograph being taken outside the

court room but in circumstances where it amounted to a disincentive to witnesses to cooperate. The case of *Solicitor General* v *Cox* [2016] Cr App R 15 involved photographs being taken on mobile phones, in the courtroom during proceedings, in the face of notices posted at the doors of court prohibiting photography, and photographs being published on social media with derogatory comments. The court's authority was obvious from notices. The court's intention and entitlement was to regulate its own premises. The notices were equivalent to orders of court. In this case there were notices in the foyer and witness rooms. *Mens rea* is present if the photography is deliberate. The taking of photographs itself gives rise to the potential for dissemination and the attaching of derogatory comments. While photography was seen a minor contempt in *Robertson & Gough*, *R* v *D* suggested that the contempt in that case was not minor as the penalty imposed was high.

[27] For the respondent, it was submitted that the factual basis of the minuter's case was not made out. None of the three witnesses in the room saw the respondent take photographs nor post them. Their evidence was rendered unreliable by discrepanies between them. The evidence fell far short of satisfying the standard of proof. The evidence was that a number of people came in and went out of the room that day. Evidence has been led that the photographs were taken and disseminated by someone else and that another posted them on the Healthcare X account. The same inferences could be made about them as had been made about the respondent. Even if the court was satisfied on the facts alleged by the minuter, it was submitted that they did not amount to contempt. The minuter's averment that:

> "The taking and publishing of photographs (particularly of a witness) in any sheriff court building or its precincts without the consent of the sheriff principal is prohibited and unlawful. "

is disputed. There is no statutory prohibition. At best the minuter had produced a screenshot of the SCTS website page giving guidance for coming to court. The guidance refers to photographs not being taken in the court room. That was not the complaint in this case. *R* v *D* is an English case and the SCTS guidance should be preferred. *Robertson & Gough* did not identify photography of a witness as a contempt.

[28] Further, Ms Daly and Mr Mackintosh had not been identifed to the respondent as witnesses and should not be classified as witnesses at that time. Photography of them did not therefore challenge or affront the authority of the court and could not create a substantial risk that the course of justice would be seriously impeded or undermined. The Court's attention was drawn to the comments of Lord President Normand in *Milburn* 1946 SC 301 at page 315, that: "…the greatest restraint and discretion should be used by the Court in dealing with contempt of Court…".

[29] It could not reasonably be said that the proceedings were necessary, since measures such as evidence by video conferencing could be deployed, as had been the case in this cause, to ensure individuals' evidence was captured.

Law

[30] Contempt of court is described in *HM Advocate* v *Airs* 1975 J.C. 64 at 69 as:

> "…conduct which challenges or affronts the authority of the Court or the supremacy of the law itself, whether it takes place in or in connection with civil or criminal proceedings."

The court went on to say:

> "The offence of contempt of court is an offence *sui generis* and, where it occurs, it is peculiarly within the province of the Court itself, civil or criminal as the case may be, to punish it under its power which arises from the inherent and necessary jurisdiction to take effective action to vindicate its authority and preserve the due and impartial administration of justice."

[31] The standard of proof is proof beyond reasonable doubt.

[32] In *Robertson & Gough*, it is said that contempt in its minor forms may relate only to good order in court and gives the example of a spectator taking a photograph of the judge, accused or jury (paragraph 32). In giving the example, the court referred to the case of *R* v *D*. That case involved photographs being taken of the accused in the dock, a witness giving evidence and the judge as well as one taken in the precincts of the court. Concern was expressed at the potential that individuals might be identified if the poor quality of the images were enhanced (paragraphs 7 and 8). The court appears, in 2004, to recognise what was then the growing use of mobile phones to not only take photographs but also to disseminate them. The Lord Chief Justice of England and Wales commented at paragraph 15:

> "It is well known that taking photographs using mobile phones in court has become a major problem and concern in both the Magistrates' Courts and the Crown Courts of England and Wales. It is also of concern in the civil courts. The reason for this concern will be obvious after a moment's thought. Intimidation of juries and witnesses is a growing problem generally in criminal cases."

He goes on at paragraph 16:

> "The particular concern is not confined to the intended purpose of the person taking the photographs. Photographs can easily be passed on to others by electronic means. Once in the hands of others, the potential for misuse by others is very great. That is a matter which the courts must take into account if faced with a case of illegal photography in court."

Clearly the issues involved in that case were more serious, in terms of the nature of the charges and security, than those in the proceedings which form the background in this instance. In *R* v *D* the contemnor was sentenced to 12 months imprisonment. However, the court highlighted a concern about the potential use of photographs to intimidate witnesses, including in civil cases.

[33] In *Robertson & Gough* at paragraph 32 the court said: "In more serious cases there is a direct challenge to the authority of the court and the integrity of its proceedings". The case was concerned only with contempt committed in the presence of the court and directed at the administration of justice. At paragraph 34 it is said:

> "Contempt of this kind occurs in most cases during the proceedings and in front of the judge; but there may be cases where the offending conduct is so closely related to the proceedings in time and place as to be considered part of them; for example, where a party molests a juror or a witness in the precincts of the court."

Of the conduct in the case it was said at paragraph 74:

> "It can offend, upset or alarm those present. It can distract those engaged in the trial from the essential issues. It adds to the difficulties of the presiding judge or sheriff. In all of these ways it impairs the administration of justice."

Mens rea was established if the alleged contemnor intended to do that which amounts to contempt. It could not be said that there was no *mens rea* if the alleged contemnor sincerely believed his conduct was not contemptious (paragraph 75).

[34] While *Robertson & Gough* described molesting of a witness in the precincts of the court as a contempt in the face of the court, in *Solicitor General* v *Cox* at paragraph 74, the court considered that posting of photographs on social media may not be a contempt in the face of the court albeit it was nevertheless a contempt. In Scotland there is not an equivalent prohibition on photography in court or publication of photographs as there is in the Criminal Justice Act 1924 at section 41. Breach of that prohibition is a criminal offence. However, in *Solicitor General* v *Cox*, it was said at paragraph 23:

> "…the statutory prohibition on photography in court is also a reflection of the serious risk to the administration of justice necessarily inherent in photography in court without the permission of the court … ".

[35] The court went on to say what should be taken from the posting in the court building of notices prohibiting photography:

> "This prohibition is underlined by the notices forbidding the use of mobile phones and photography in court buildings. These were plainly worded as orders, obviously made to protect court proceedings and clearly made with the approval of the court to protect its proceedings from interference." It went on "Such photography inevitably poses serious risks to proceedings or participants in them; those serious risks may be continued or enhanced by the use made of illegal photographs, whether by publication or some other use."

At paragraph 26 it was said:

> "The publication of an illegally taken image … was by obvious and necessary implication contrary to the orders posted in the court building which forbad the images being taken at all. Any such publication shows, even boasts, that the … authority of the court, in its orders, has been successfully flouted, diminishing its necessary authority over the conduct of its proceedings and its role in upholding the rule of law."

Analysis of evidence

[36] I found the evidence of the pursuer's witnesses to be credible and reliable. They gave their evidence in a straight forward manner and without exaggeration. Although there were some minor discrepancies in the pursuer's evidence, this was no more than would be expected in the normal course of three witnesses giving accounts of the same situation. They were all clear that the respondent was in the room and they were consistent in their evidence as to what area of the room he sat in, that he had his mobile phone out and that the angle that the photographs were taken from placed the photographer in the same place as the respondent. It is also apparent from the floor plan and photographs produced that the photographer would be in the area which the witnesses described the respondent as being in.

[37] I accepted their evidence. While there were some discrepancies in their evidence about who entered the witness room first, how long they were there, and what other people were in the room apart from the respondent and the minuter's three witnesses, these were

minor discrepancies which would be expected and did not detract from the witnesses' credibility or reliability.

[38] The respondent's witness, Anna Opacian, was unimpressive. She was arrogant in her manner in that she was curt, dismissive, and defensive in answering questions in cross examination.

[39] Her account also revealed an arrogance in that while she saw nothing suspicious in her receiving messages from Mr Pettigrew in court, she professed that she found it highly suspicious for two other people to exchange messages in court. She either did not see or did not admit the irony in that position. There was also irony in her claim that she was exercised by the fact that two people who she understood not to be witnesses were in the witness room. She claimed to have entered a witness room when she was not at court to give evidence and nor was she intending to sit with Mr Pettigrew who she knew not to be in the witness room. She had not been shown to that room nor given permission to enter it. In her evidence on this she betrayed a sense of entitlement which was misplaced.

[40] When she claimed to have taken photographs there was no hint of regret on her part nor any evidence from her to explain why she would think it was permissible for photographs to be taken within the court.

[41] I did not believe her that she was in the witness room nor that she took the photographs. She said that she went into the room when Mr Pettigrew left it. She did not explain how she knew to go in to that particular witness room, i.e. the pursuers' witness room. She claimed that she saw the witnesses were exchanging texts. The witnesses gave evidence that they communicated with each other using their phones when Ms Daly was telling her companion that the person sitting in the room was Mr Pettigrew. They did not want to be overheard about that. There was no evidence that they messaged each other on

an extended basis and I concluded that they did not message each other at a time when Mr Pettigrew was out of the witness room. Therefore Ms Opacian's evidence contradicts that. I do not accept Ms Opacian's evidence that she posted the photographs onto the group chat. Her evidence does not cause a reasonable doubt to arise in my mind as to the inference which I draw that it was the respondent who took the photographs.

[42] Mr Brown's evidence is contrary to Ms Opacian's in that he said in his affidavit that the person who sent the photographs to the group chat asked who the people in the photographs were. Ms Opacian denied that she asked this and explained she knew who the people in the photographs were. There would have been no need to ask such a question if the photographs were indeed taken by Ms Opacian. It does raise the question as to why the photographer would have singled out the two witnesses in that room if they were not known in some way to the photographer.

[43] I do not accept the evidence of Mr Brown on that point. The defender's witnesses lacked credibility and were inconsistent with each other on this material point. I am not persuaded by Mr Brown's evidence that he was the person who posted the photographs and comments on the Healthcare Environmental X account. However, his evidence does raise a reasonable doubt as to whether the respondent was the person who made those posts. This is because I cannot rule out that the photographs were first posted to a group chat by the respondent from where they could be further disseminated by publication on social media, rather than that the respondent posted them directly onto the Healthcare Environmental X account. The latter is the most likely version. However, I cannot rule out that Mr Brown or one of a number of others who have an interest in the case and a grudge, might, as an administrator, have posted from the Healthcare Environmental account and so I have a reasonable doubt.

[44] I rejected the evidence that Anna Opacian was in the witness room. I inferred from the evidence I accepted that the respondent took the photographs and disseminated them from his mobile phone along with a narration of events from his perspective formed from his being in the witness room and from his being the defender in the case. The evidence of the respondent's position in the room, that he was handling his mobile phone, the angle the photographs were taken from, his knowledge of and interest in the witnesses in the case, and the sentiment I infer that he holds about them (from the evidence of the respondent's witnesses and Ms Daly's evidence of previous derogatory posts) led to this conclusion.

Decision

[45] From the evidence of Mr Clarke, I found that there was at least one notice posted in the court building on 29 April 2024, prohibiting photography. The taking of photographs, on its own, would be a flouting, albeit minor, of the court's authority. However, I concluded that the taking of photographs cannot be viewed in isolation from their potential use. I considered the Protocol on Recording in Scottish Court Buildings, published on the Judiciary of Scotland website. While, on reflection, the protocol concerns the recording of moving images as opposed to photography, it provides that: "No recognisable image of any individual may be broadcast without their … express consent." This gives an indication of the court's concern to ensure the privacy of persons within court buildings. In criminal proceedings it is recognised that the proper administration of justice includes the appropriate protection of a complainer's dignity and privacy (section 275(2)(b) of the Criminal Procedure (Scotland) Act 1995) and that protection is something which courts strive to ensure for all witnesses in criminal and civil proceedings.

[46] The English authorities of *R* v *D* and *Solicitor General* v *Cox*, while not binding, do highlight the concern caused by the potential for misuse of images to intimidate witnesses and the consequential impact on the court's authority and the adminstration of justice. In this instance, there was, in fact, misuse of the images, and the dissemination by the respondent of the images allowed that. The tweets were grossly insulting to the witness Ms Daly, both in terms of her personal appearance and in terms of her integrity.

[47] The initial dissemination was compounded by the reposting by the respondent of the posts containing the images and derogatory comments, which itself amounted to further dissemination by publication.

[48] I did not accept the argument that Fiona Daly and John MacKintosh were not witnesses on the date in question. Fiona Daly was sent a citation and I inferred that John MacKintosh was there because he was also. Their names had not been intimated to the respondent before the evidential hearing, which may have been a failing on the part of the minuter. However, the interlocutor assigning the evidential hearing was warrant for witnesses to be cited and Ms Daly and Mr MacKintosh had been called to attend at court and had complied. They were, therefore, witnesses. The respondent did not give evidence to explain his intent and the only evidence came from the respondent's witnesses who spoke of anger and resentment lying behind what they claimed to have done. There was no evidence of humour and clearly the posts could not be categorised as humourous. In any event, *mens rea* was satisfied from the fact that the respondent intended to take the photographs and disseminate them.

[49] I was not persuaded either by the argument for the respondent that a finding should not be made where vulnerable witness measures or other steps might resolve any difficulty

in securing the witnesses' evidence. If conduct is contemptious, it cannot be excused by the existence of remedial measures put in place to mitigate its effect.

[50] The actions of the respondent infringed the privacy and dignity of Fiona Daly and John MacKintosh. A witness would be right to expect that their privacy and dignity would not be infringed within what might be thought to be the security of a witness room, by having photographs of them taken without their knowledge and consent and then disseminated along with insulting comments about them, directed at their involvement in the case. If a witness was to find that such an event has occurred, there is a real possibility that they would no longer wish to give evidence and withdraw their cooperation with the process. In this case, Ms Daly certainly had apprehension about further cooperation in providing evidence. Neither she nor Mr MacKintosh could be compelled to attend on being called to, as they are furth of Scotland.

[51] Where the court is prevented from ensuring a witness' dignity and privacy, that in itself is a challenge to the authority of the court. Where that infringement then has the potential to form an obstacle, or is an obstacle, to capturing all relevant evidence in proceedings, that is also a challenge to the authority of the court. If such an infringement went unchecked, it may well lead to a repeat of such conduct by the respondent or others, which would further challenge the authority of the court.