

Friday, May 12.

FIRST DIVISION.

[Lord Dundas, Ordinary.]

JOHN HENDERSON & SON, LIMITED
v. ALEXANDER MUNRO &
COMPANY.

*Process—Interdict—Interim Interdict—
Misleading Trade Circular.*

A company, which had taken over the business of an old established firm of artesian well-borers, presented a note of suspension and interdict against, *inter alia*, the publishing and circulating of a circular by a newly constituted firm of which the only known partner had formerly been a managing director of the company. The terms of the circular were calculated to convey the impression to the general reader that certain works specified in it had been executed by the respondents, although in fact these works had been executed by the complainers. The Court granted interim interdict against the respondents publishing the circular.

John Henderson & Son, Limited, artesian well engineers, having their registered office at General Terminus, Paisley Road Toll, Glasgow, presented a note of suspension and interdict against Alexander Munro & Company, artesian well engineers, Atlantic Chambers, 45 Hope Street, Glasgow, and Alexander Munro, the only known partner thereof, in which they sought to have the respondents interdicted from, *inter alia*, "publishing, issuing, or circulating a circular titled as follows, and recently published, issued, and circulated by the respondents:—'To consumers of town's water and others. On the economic value of artesian well water supply, Alexander Munro & Company, artesian well engineers and mineral boring prespectors, Atlantic Chambers, 45 Hope Street, Glasgow,' and in particular, from publishing, issuing, or circulating the said circular among any of the persons, companies, firms, and corporations named in said circular, or among any other persons who are or have at any time been, customers of the complainers." Interdict was also craved against the respondents publishing and circulating among the present and former customers of the complainers, and among the public generally, any business circulars, &c., in such terms as to be calculated to mislead said customers or members of the public into the belief that Alexander Munro was the expert on whose skill the complainers had relied in carrying out their contracts. There was a crave for interim interdict.

The circular in question, after giving some account of the advantages claimed for the Artesian Tube Well System, continued:—"Our Mr Munro has had extensive experience as managing director for many years with the largest artesian well engineers in Scotland, and is an expert in this class of work.

The circular in the next paragraph proceeded—"The following is a list of some of those for whom Artesian Tube Wells have been put down, a special visit having been made by him in each case to the different localities and positions fixed for the wells, all of which have been successful, the yield being from 5000 to 400,000 gallons of splendid water per day." There followed a list of thirty-two names of individuals, companies, and local authorities.

In the following paragraph the circular proceeded—"He has also had the following boring work under his personal supervision." There followed a list of twenty-one names of companies and local authorities.

The circular next contained a statement in these terms—"The following are some of the contracts completed under his directorship." There followed another list of thirty-six names.

The circular afterwards gave another statement of the advantages of the system, and of various applications of borings, with a note—"Arrangements made for undertaking all such work abroad," and the name, designation, and address of Messrs Alexander Munro & Company.

The complainers in the note stated that their company was incorporated on 10th December 1896; that it took over the business of the old firm of John Henderson & Son, which had the largest artesian well engineering business in Scotland; that since the incorporation of the company Mr John Henderson had been chairman and managing director; and that Alexander Munro, who had previously been in business as a grocer, and also as a tailor, was a managing director from the incorporation of the company till 6th December 1904. They stated that Mr Munro was not a practical artesian well or mineral boring engineer, and that his duties as managing director were limited to the conduct of the office work, though he occasionally saw that the workmen were working in accordance with the directions given by Mr Henderson and the practical foreman under him.

They further averred that the first paragraph of the said circular, as above quoted, "is calculated to mislead the complainers' customers and the public into the belief that the respondent Alexander Munro was, during his employment by the complainers, the managing director upon whose practical skill and experience the complainers entirely, or at least chiefly, relied for the successful execution of orders received by them, and that in consequence of said respondent having ceased to be employed by the complainers and having joined the respondents' firm the complainers have lost the benefit of the skill and experience which gave their business the success it has achieved, and that the respondents have now acquired the benefit of said skill and experience, with the result that the complainers' customers and the public generally should now transfer their orders for work in the complainers' line of business from the complainers to the respondents."

With regard to the second paragraph

and accompanying list they averred that it "falsely and fraudulently represents that the success of said operations was due to said respondent. They were entirely due to the skill and experience of the said John Henderson and the trained foreman employed under him. Further, the terms of the circular are such as to induce the belief on the part of the persons receiving it that the parties named in the said list were the private customers of the said respondent, and not, as the fact is, the customers of the complainers."

With regard to the third paragraph and list, the complainers averred that it "is calculated to induce the belief that said respondent was the man of skill upon whose personal supervision said parties relied for the execution of the boring works done for them. In point of fact, the said respondent had no supervision of any part of said boring works as a skilled engineer, and the said statement is false and fraudulent, the person who actually supervised having been the said John Henderson."

With regard to the fourth paragraph and list, the complainers averred that it "is calculated to induce the belief that the said Alexander Munro had the practical direction and oversight of the contracts mentioned, whereas the only element of truth in the statement is that he was managing director in charge of the office work of the complainers at the time when the said contracts were completed by them. The representation in said statement that said respondent had the practical direction of said contracts is false and fraudulent. They were under the direction of Mr Henderson."

They further averred that in communicating to his firm the lists of the complainers' customers Alexander Munro had been guilty of a gross breach of confidence, and generally that unless the respondents were immediately restrained the complainers would suffer serious loss, injury, and damage.

The respondent in his answers stated that the names of the complainers' customers were not communicated to him in confidence; that the statements in the circular were true; and (Ans. 3)—"It is explained that the respondent Alexander Munro in the year 1896 became a managing director of the complainers' company under agreement by which he bound himself to devote his whole time and attention to the business for a period of seven years, and to refrain from any connection, direct or indirect, with any other occupation, trade, or business during said period. It was further provided under said agreement that the said John Henderson should devote such time as might be necessary to the prosecution of the business, and should disclose the whole details and working of the business to the respondent Alexander Munro, and to make him acquainted with all the secrets thereof. In implement of said agreement the respondent Alexander Munro proceeded to make himself further acquainted with the business car-

ried on by the complainers' company, and made a study of geology and mineralogy for this purpose. Within a few months of his entering upon his duties he regularly undertook and carried out the practical working of the business, and thereafter the said respondent did the prospecting work for almost all of the bores which were made by the complainers' company, and also in many instances supervised the actual work of boring. After the introduction of the said respondent to the business the said John Henderson took very much less part in the work than he had previously done, and he left its conduct in considerable measure to the said respondent."

The Lord Ordinary (DUNDAS) on 24th February 1905 passed the note but refused interim interdict.

The complainers reclaimed, and argued—The complainers were entitled to interim interdict at least against the publishing and circulating of the present circular. It was intended to induce customers to leave the old firm and come to the new one, and was a breach of confidentiality. Anyone reading the circular, which was certainly disingenuous, would be deceived, and it should therefore be stopped until inquiry was made into the facts—*Glening v. Smith*, 1865, 13 L.T. 11. The balance of convenience was in favour of this course, for little harm could be done to the respondents by a postponement, while the complainers were every day suffering loss.

The respondents argued—The complainers, to entitle them to interim interdict, must show (1) a strong *prima facie* case, and (2) a balance of convenience. There was no *prima facie* case, and the balance of convenience was the other way, as the postponement of the circular would mean a great loss of business to the respondents, and its circulation could do little harm to the complainers, as the character of the artesian well business was such that it could not be said that there were "clients" or customers in it—*Boswell v. Mathie*, July 10, 1884, 11 R. 1072, 21 S.L.R. 727, was referred to.

LORD PRESIDENT—In this case John Henderson & Sons, Limited, artesian well engineers and mineral boring prospectors, have brought a note of suspension and interdict against Alexander Munro & Company, who are also artesian well engineers and mineral boring prospectors, and they seek to have interdict against the publishing, issuing, and circulating of a certain circular sent out by the respondents. The complainers ask for interdict of this circular in particular, and then, as is usual, the prayer of the note goes on to ask for interdict against various things which the complainers say the respondents ought not to be allowed to do in future circulars. The case is in the Bill Chamber, and it is only before your Lordships on the question of interim interdict. No one disputes that this is a proper case for trial, and that the note has been properly passed. But the complainers

maintain that they are entitled to interim interdict. I confess that the only real difficulty which I have had has arisen from the pleadings of the complainers. It is perfectly clear that the true case for interim interdict is not properly raised. But technically it is before your Lordships, because it is raised by the crave for interdict of the particular circular which has been published by the respondents.

Now, it is plain that the object of this circular was to attract customers to Munro & Company. It is headed "Artesian Tube Wells." It contains a statement of how to obtain water by artesian wells. It commends the quality of the water so obtained, and alleges that the cost is moderate as compared with a pipe supply. On the second page the circular goes on to say—"Our Mr Munro has had extensive experience as managing director for many years with the largest artesian well engineers in Scotland." That refers to a fact which nobody denies. Munro was admittedly managing director with the complainers. The circular then says that Munro "is an expert in this class of work." That in one sense is a matter of fact, in another it is a matter of opinion. Some "experts" are only experts in their own opinion. No legal objection can be taken to this statement. But then the circular goes on to say—"The following is a list of some of those for whom artesian tube wells have been put down, a special visit having been made by him," *i.e.*, our Mr Munro, "in each case to the different localities and positions fixed for the wells." Then follows a long list of names. It is explained that none of this work was done by Munro & Company, but that it was all done by the complainers during the time Munro was their managing director. It would have been easy to make a statement which would have made this quite clear. As it is, I do not think I am pressing anything unduly when I say that many people would think on reading the circular that Munro & Company had executed this work. If they took that meaning out of it, it would be misleading and untrue, and the natural result would be that they might go to Munro & Company upon seeing their large experience in the past. If they did so, injury would result to the complainers because of the attribution of the experience of Henderson & Son to Munro & Company.

This circular must be taken, not on a minute examination of its terms by a trained tribunal, but on its effect upon the general reader. So viewed it is likely to prove misleading, and if so, the respondents ought not to be allowed to publish it. I am therefore in favour of granting interim interdict against the publication of this particular circular.

I am not inclined to say anything more. A record has not been made up. We grant interim interdict against the circular as it stands. I say nothing as to any other circular which Munro & Company may see fit to issue pending the decision of the case.

LORD ADAM concurred.

LORD M'LAREN—In questions of interim interdict where the action is founded on representations, I think the Court would not, unless under very exceptional circumstances, grant interim interdict, except against the particular representation complained of. That would, of course, prevent the issue of any other representation which was a mere paraphrase or colourable variation of the circular complained of. I therefore agree that if interim interdict is to be granted here it should be limited to an interdict against the issuing of the particular circular which is complained of.

In that view of the case the question we have to consider is whether this circular amounts to a misleading statement, or at all events to such an ambiguous statement that it may mislead the public and so cause injury to the complainers' business. It may be true that, on a critical examination of the phraseology of this document, it will be seen that it never really says that these works were executed by the respondent firm, and indeed an astute reader might from that very circumstance draw the inference that they were not so executed, for, if they had been, the fact would have been more clearly stated in the circular. But then there are members of the public, to which this circular is addressed, who might read it in an uncritical spirit and would be impressed only by the general effect conveyed, and if so read, I think the circular is calculated to lead such a reader to the conclusion that the respondents' firm had executed the specified works. I think, therefore, that the complainers are entitled to an interdict against a circular which may be read as representing that the respondents had executed all these important works which were in reality carried out by the complainers. In issuing such a circular the respondents owed a duty to the complainers, to see that it was made clear that Mr Munro only acted as assistant and not as principal. Now, the respondents' circular does not clearly show that Mr Munro was only acting as an assistant, and I agree that interim interdict should be granted in the terms your Lordship has proposed.

LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"The Lords having considered the reclaiming note for the complainers against the interlocutor of Lord Dundas, dated 24th February 1905, and heard counsel thereon, Recal said interlocutor, and remit to the Lord Ordinary to pass the note and grant interim interdict against the respondents publishing, issuing, or circulating the circular."

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