SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 31
A270/21

Lord President
Lord Malcolm
Lord Armstrong

OPINION OF THE COURT

delivered by LORD MALCOLM

in the Appeal

MARTIN McGOWAN

Pursuer and Respondent

against

SPRINGFIELD PROPERTIES PLC

Defender and Reclaimer

Pursuer and Respondent: Party
Defender and Reclaimer: Webster, K.C.; Davidson Chalmers Stewart LLP

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20 August 2024

Introduction

[1] This reclaiming motion (appeal) raises two questions. First, does the five year negative prescriptive period for any damages claim based on an interim interdict having been wrongfully obtained run from the date when the order was granted or from when it was recalled? Secondly, when is recall of an interim interdict conclusive evidence that it was wrongful, and in particular is a judicial determination which has actively addressed and resolved its merits a precondition of such? The Lord Ordinary held that the respective

answers are (1) the prescriptive period begins on recall and (2) absent such a judicial determination the onus remains on a claimant to prove wrongfulness. Immediately after the submissions at the appeal hearing the court refused the challenge to the first decision but upheld a cross-appeal against the second. We now give our reasons for that outcome.

The background circumstances

[2] The context for her decisions are set out in the Lord Ordinary's opinion, see [2023] CSOH 12. They can be summarised as follows. Springfield Properties plc are house builders. In 2012 and 2013 companies owned by Mr McGowan carried out certain work for Springfield. Subsequently he made allegations concerning unsafe practices at Springfield sites concerning asbestos, crude oil and other hazardous materials. He intended to inform the authorities and people who had purchased homes from Springfield. Springfield raised an action seeking interdict preventing a repetition of these claims. Interim interdict was granted *ex parte* (in Mr McGowan's absence) on 5 February 2016.

[3] In October 2020 Springfield pled guilty to an offence under the Health and Safety at Work etc. Act 1974 in relation to risks to workers caused by asbestos at one of their sites. On 2 September 2020 Mr McGowan undertook that he would not make any false or misleading statements about Springfield's business. (The undertaking made no reference to the allegations which prompted the interdict action.) On 26 May 2021 the court issued an interlocutor in terms of a joint minute of the parties which asked the court to recall the interim interdict, grant decree of absolvitor in favour of Mr McGowan, and find no expenses due to or by either party. That interlocutor was final; if Springfield wished to leave the matter open the appropriate decree would have been dismissal, not one which absolved Mr McGowan. The interim interdict had been extant for almost five years and three months.

In the present action, which was raised on 2 November 2021, Mr McGowan seeks damages for wrongful interdict. He claims that it had the effect that he and his companies were blacklisted by employers in the construction industry.

The Lord Ordinary's decisions

[4] The Lord Ordinary repelled Springfield's plea that because the action was raised more than five years after the grant of interdict any claim had been extinguished by operation of the five year negative prescription. The interim interdict was a continuing act within the meaning of section 11(2) of the Prescription and Limitation (Scotland) Act 1973, thus the prescriptive period began on its recall which occurred just a few months before the action commenced. It was noted that damages are given for the consequences of an interdict and that they continue until it is recalled. It was always open to Springfield to seek its recall. "A petitioner is not permitted to wash his hands of responsibility for the continuing interdict simply because the court has intervened to grant it" (paragraph 19). The decision in the case of *Johnston* v *Scottish Ministers* 2006 SCLR 5 could be distinguished.

[5] Mr McGowan has cross-appealed against the Lord Ordinary's rejection of his submission that Springfield had pled no defence to the merits of the claim of wrongful interdict. He had contended that the recall was conclusive, or at least presumptive, of its wrongful nature. The court should order a proof limited to quantification of damages for any loss caused. Springfield argued that the onus remained on Mr McGowan to prove that the interim interdict should not have been granted. It was recalled because of a change of circumstances, namely the undertaking and the joint minute.

[6] The Lord Ordinary referred to the opinions of Lady Dorrian and Lord McGhie in *Mirza* v *Salim* 2015 SC 31 at paragraphs 67 and 75 respectively. They indicated that, other

than on a change of circumstances, recall of an interim interdict will be conclusive of it having been wrongly obtained but only where it follows a judicial determination. The Lord Ordinary noted Lord Pentland's decision in *Aird Geomatics Ltd* v *Stevenson* 2015 SLT 329 where he rejected an argument that recall was conclusive on the matter only if there had been an examination of the facts. However, the view was taken that since the recall in the present case implemented a joint minute there had been no judicial determination either after a proof or a contested motion. It followed that the onus remained on Mr McGowan to prove that he had been wrongfully interdicted (paragraph 28).

The decision of this court regarding prescription

[7] In agreement with the Lord Ordinary we are satisfied that to obtain and then continue to insist in an interim interdict is a continuing act within the meaning of section 11(2) of the 1973 Act. The imposed restrictions subsist until the order is recalled or the action finally determined. It is obtained at the peril of the party seeking it (*periculo petentis*) and must be kept under review. Thus if at any time it becomes apparent that interdict is not warranted, the court should be asked to recall it; an application which the court will readily grant. As the Lord Ordinary observed, the holder of such an order cannot wash his hands of responsibility for its continuing consequences. And we agree that the circumstances in *Johnston* v *Scottish Ministers* can be distinguished for the reasons given by the Lord Ordinary at paragraphs 13-15 of her opinion.

[8] It is worth noticing the surprising outcome if Springfield's contention is correct. As noted in Scott Robinson, *Interdict*, page 152 and Walker, *Civil Remedies*, page 246, a claim for loss caused by a wrongful interdict requires to await its recall or reduction. However, if one proceeds on the hypothesis that the wrongful act is completed when the order is obtained,

the effect of section 11(1) of the Act when taken with section 6 is that the five year period began when loss and damage first occurred. In a case such as the present that would be when the interdict was granted. Thus, unless section 11(2) applies, since the order stood for more than five years, any obligation Springfield owed to Mr McGowan was extinguished before he could make a claim based on it. Clearly that would be a nonsense. Counsel for Springfield suggested that an action for damages need not await recall of the interdict, but that strikes us as wholly unrealistic. He also pointed out that a defender can seek recall, which is true, but any such attempt may prove unsuccessful.

Decision regarding the effect of the decree of absolvitor in the interdict action

[9] Mr McGowan was successful in his resistance to Springfield's action. He was granted decree of absolvitor. It makes no difference that this was because Springfield agreed to it. It is a final determination of the merits of the action and is *res judicata* as between the parties; in other words the matter cannot be re-litigated. With the exception of orders granted in old style possessory actions, such a decree is conclusive proof of the wrongful obtaining of the interim order unless a change of circumstances explained otherwise, for example that the wrong was no longer threatened. In *Aird Geomatics* at paragraph 18 Lord Pentland observed, in our view correctly, that long before *Mirza* was decided, the authorities were to this effect. Here there was no such change of circumstances. The undertaking did not involve any concession on Mr McGowan's part. He has always maintained the truth of his allegations. Springfield's conviction, if anything, suggests that he was right all along.

[10] Having successfully resisted Springfield's claim that it was entitled to interdict, there is no onus on Mr McGowan to prove that the interim order should not have been granted.

Springfield obtained it at its peril in the sense that if its action was unsuccessful it would be liable for any loss caused thereby, *Mirza* paragraphs 67-68 per Lady Dorrian. It also follows that *Aird Geomatics* was correctly decided. The pursuer abandoned the action and consented to decree of absolvitor. Lord Pentland granted summary decree on the merits of a damages counterclaim commenting that there is no support in the authorities for the proposition that a recall is conclusive of wrongfulness only if there has been an examination of the facts of the case (paragraph 19).

Disposal

[11] For these reasons the court refused the reclaiming motion, upheld the cross-appeal, and remitted the case to the Outer House for a proof limited to causation and quantum of damages.