OUTER HOUSE, COURT OF SESSION

[2020] CSOH 62

A106/20

OPINION OF LADY POOLE

In the cause

BRITISH GAS TRADING LIMITED AND CENTRICA PLC

Pursuers

against

DEREK MCPHERSON

Defender

Pursuers: Reid; Womble Bond Dickinson LLP
Defender: Party

29 May 2020

Note:

Introduction

[1] This is a further note in an action of defamation brought by the first and second pursuers, British Gas Trading Ltd and Centrica Plc, against the defender, Mr Derek McPherson. The action concerns a blog written and published by the defender on the internet. The blog is published in a number of different posts. After a hearing on 13 May 2020, I granted interim interdict against the defender. The case returned to the court on 29 May 2020 on the pursuers' motions: (i) to allow a minute of amendment to be received (ii) for further interim orders obliging the defender to remove certain blog posts (iii) for

expenses of the opposed motion for interim interdict, and in the event of success for the expenses occasioned by obtaining the further interim orders.

The minute of amendment

[2] The effect of the minute of amendment was to update the conclusions and condescendence of the summons to take account of events that had occurred since 13 May 2020. The summons had originally been concerned with a blog post of 2 May 2020 and further posts entitled "Preface to Episode 1" and "Episode 1" posted on 10 May 2020 (together, the "**initial blog posts**"). Three further blog posts were added to the summons by the minute of amendment: one entitled "Court Decision" posted on 14 May 2020, another entitled "Episode 2" posted on 17 May 2020, and a post entitled "Episode 3" posted on 24 May 2020 (together, the "**new blog posts**"). The pursuers' motion had been formally opposed, although in oral submissions the defender did not press the opposition. Since the effect of the amendment was primarily updating, I allowed the minute of amendment to be received and for the summons to be amended in terms thereof. The defender was still within the time period for lodging defences to the action. I did not consider it necessary to allow a period for the minute of amendment to be answered, as this could be done in the defences.

The further interim orders

[3] The pursuers sought an additional interim order for removal of the initial blog posts and the new blog posts. Section 47(2) of the Court of Session Act 1988 gives the court powers to make orders regarding the subject matter of the cause as the court may think fit. This includes the power to make an order *ad factum praestandum*, including an interim order

(Section 47(2A)). However, on the wording of Section 47(2) and (2A) of the Court of Session Act 1988, interim orders *ad factum praestandum* are available only in causes "in dependence before the Court". After the orders for interim interdict had been granted, the action had been served, and as a result the action was now in dependence before the court. The pursuers therefore sought further interim orders *ad factum praestandum*, of specific implement, to remove blog posts. I did not find the defender's criticism of the pursuers for seeking additional orders at this stage to be well founded. The orders now sought were of a different nature from the interim interdict already granted. Rather than restraining further publication in the ways set out in the interim interdict, the further order sought removal of existing blog posts. The timing of the motion was appropriate given the terms of Section 47 of the Court of Session Act 1988.

[4] The test for grant of interim orders of specific implement is in essence the same as I applied for interim interdict, set out in paragraphs [2] to [4] of the note accompanying the interlocutor of 13 May 2020 (*Scottish Power Generation* v *British Energy Generation (UK) Ltd* 2002 SC 517 at paragraph 23; *Massie* v *McCaig* 2013 SC 343). An interim order for specific implement should ordinarily only be granted if there is a *prima facie* case of a breach of a legal obligation, and the balance of convenience favours grant of the order. In this case the pursuers must meet a higher test than the requirement of a *prima facie* case (Section 12(3) of the Human Rights Act 1998 and *Massie* v *McCaig* 2013 SC 343). The pursuers must show they are likely to succeed in the conclusion for a final order for specific implement. That is because any order granted would have an effect on freedom of speech. Section 12(4) of the Human Rights Act 1998 requires the court to have particular regard to the importance of the Convention right to freedom of expression, including in this case the extent to which the material is available to the public and the public interest in publication. Other factors to be

weighed in the balance of convenience are the preservation of the status quo, the relative strength of the parties' cases, the harm to either side, the adequacy of damages as a remedy, and any other relevant matters. If granted, any order should be no wider than necessary to protect the pursuers' rights.

[5] It is convenient to apply these legal tests for grant of interim specific implement separately to the initial blog posts and the new blog posts. The posts differ in various respects. In general terms, the initial blog posts were made prior to the grant of interim interdict. They proceed in an unrestrained style. The new blog posts show some restraint, although they remain critical of the pursuers.

The initial blog posts

[6] I took into account the defender's submission that the initial blog posts were not defamatory, and he was protected by Article 10 of the European Convention on Human Rights and the defence of fair comment. However, I adopt the reasoning in paragraphs [5] - [8] of the note with my interlocutor of 13 May 2020 in relation to the initial blog posts. Article 10 is a qualified right. I consider the initial blog posts contain matters which are defamatory, and that any defence of *veritas* or fair comment is likely to fail. In my opinion the pursuers would be likely to succeed after proof in their conclusion for an order of specific implement for the initial blog posts to be removed.

[7] I also find, narrowly, that the balance of convenience favours grant of the interim orders to remove the initial blog posts. The balancing exercise differs in various ways from the balancing exercise I carried out in relation to interim interdict. The status quo, which is an important consideration in the balance, does not favour removal of the initial blog posts. The initial blog posts are already published and in the public domain. There is some public

interest in a blog about how the pursuers treat their customers, in particular in relation to tariffs. I must have particular regard to freedom of expression, which would be curtailed to some extent by removal of the initial blog posts. The pursuers already have the protection of an interim interdict. On the other hand, freedom of expression is a qualified right and the pursuers have rights to protect their reputation. Their case against the defender in relation to the initial blog posts appears strong, which is a weighty factor in the balance of convenience. There is prejudice to the reputation and business interests of the pursuers if the initial blog posts are not removed. Damages, while not impossible, would be difficult to quantify. The defender remains able to publish within the constraints set by the law of defamation and the interim interdict already granted. The blog is not a commercial operation, the defender complains of historic events, and if he is vindicated after proof will be able to re-post the initial blog posts then. Having weighed these factors, I find that the balance of convenience favours grant of the interim order for removal of the initial blog posts.

[8] As far as the width of the order sought in relation to the initial blog posts is concerned, the potentially defamatory references in the initial blog posts are frequent and numerous. It would not be a straightforward exercise to redact to remove these parts. There would be little left of substance, and the blog posts would be unlikely to make sense after significant redactions. In essence, the initial blog posts are so tainted that their whole character appears unjustifiably defamatory. It is appropriate to grant interim orders for removal of the initial blog posts in their entirety.

The new blog posts

[9] The new blog posts were made after the court had granted interim interdict. The issue of whether the new blog posts breach the interim interdict is not currently before me; and nor is any issue arising under the offer to make amends procedure under Sections 2-4 and 18(2) of the Defamation Act 1996. The defender is of course bound by the court order granting interim interdict. He should carefully read the terms of the interdict, and abide by those terms; if he does not, there may be adverse consequences. However, for present purposes, I am considering only whether interim orders to remove the new blog posts should be granted, by applying the tests set out in paragraph [4] above.

[10] The first issue is whether the pursuers would be likely to succeed after proof in their conclusion for permanent specific implement for removal of the new blog posts (*Massie* v *McCaig* 2013 SC 343 paragraph 34). Are the pursuers likely to establish at proof that publication should not be allowed? It is to be noted that the order which the pursuers currently seek in relation to the new blog posts is for removal in their entirety. I do not consider that the pursuers would be likely to obtain that order after proof.

[11] I acknowledge the existence of passages in the new blog posts which may be found after proof to bear a defamatory meaning. For example, the post of 14 May 2020 entitled the "Court Decision" suggests, among other things, that the interdict ordered by the court means the defender:

> "should not be allowed to publish a letter containing demonstrably dishonest information and then claim the author of that letter is a 'pathological liar' or that the letter was written for the specific purpose of misleading the recipient and was therefore 'criminally fraudulent'";

and goes on to refer to subsequent analysis "highlighting dishonesty contained therein". These reflect claims made in the initial blog posts. There are issues of innuendo which arise

in Episode 3, for example where the defender says "Given the above, you would not expect that a British Gas Executive Officer would attempt to mislead a customer…". There is also an assertion that a particular sentence is "proof positive that British Gas was, as the time of writing, in clear violation of its obligations as prescribed in "The Scheme, Schedule 5 of the 1995 Gas Act". The pursuers also criticised the blog heading references back to the initial posts, and a link to a petition presented to the Scottish Parliament.

[12] However, I have already noted the difference in character between the initial blog posts and new blog posts. There is extensive other text in the new blog posts which, in my opinion, and without prejudice to whatever may be decided by a judge after proof, is unlikely to be found to be unjustifiably defamatory. A significant proportion of the text is original correspondence, followed by comment on this correspondence. By seeking to remove the new blog posts in their entirety, the pursuers are seeking to remove all text, and not only potentially objectionable text. When I raised this matter, the pursuers' position was that the overall effect of the new blog posts was defamatory. It was also maintained that it was not for the pursuers to edit the defender's blogs to remove objectionable parts. That may be true, but under Section 12(4) of the Human Rights Act 1998 the court must have particular regard to the importance of the Convention right to freedom of expression. The summons accepts that in the past the pursuers gave incorrect tariff information to the defender, and that the pursuers' agent wrote to the Sheriff court on 2 November 2018. It would not be consistent with Section 12(4) of the 1998 Act to prohibit the defender from publishing anything at all about those matters. Removal of the new blog posts in their entirety as sought by the pursuers is, in my opinion, unlikely to be obtained after proof.

[13] The new blog posts also gave rise to additional factors which may arise for consideration at proof. First, given that I have ordered the initial blog posts to be removed

on an interim basis, that may have an effect on the strength of any remaining innuendo in the new blog posts. Second, there may be questions about which parts of the new blog posts are comment, and which are fact (*Campbell* v *Dugdale* [2020] CSIH 27 paragraph 35 to 39). Third, while I have identified above various passages in the new blog posts that may give cause for concern, there is a significant amount of other material in respect of which defences of *veritas* or fair comment may be available. Fourth, the passages I have quoted in paragraph [11] above, and quite possibly other aspects, are capable of being redacted while leaving the new blog posts substantially intact. These were all matters which adversely impacted on the strength of the pursuers' prospects of success after proof.

[14] For these various reasons, I was not satisfied that the pursuers had shown they were likely to succeed in Conclusion 1 for a final order for specific implement in relation to the new blog posts. Further, even if I was wrong on that matter, I was not satisfied that the balance of convenience favoured removal of the new blog posts at this stage. The relevant factors to be balanced are set out in paragraph [7] above. What tipped the balance the other way in respect of the new blog posts was that I did not find the pursuers' case to be as strong as for the initial blog posts, for reasons set out above. I also considered that references back to the initial blog posts in the new blog posts would have their potency reduced, because of the interim order for removal of initial blog posts. This lessened the potential prejudice to the pursuers. Accordingly I refused the order sought for interim removal of the new blog posts *in hoc statu*.

Expenses

[15] I granted the pursuers' motion for expenses in relation to the hearing of interim interdict. I considered that expenses should follow success, and the expense of litigation

should fall on the person who had caused it. Before bringing the action to court, the pursuers had written to the defender, seeking an undertaking not to publish his blog. The defender was expressly warned that the letter would be founded on in relation to expenses. The undertaking was not given and the initial blog posts were made, and this resulted in the pursuers having to bring an action. Even after the action had been brought, the motion for interim interdict was opposed and a hearing was necessary. The defender argues that the cause of the expense was the pursuers, because they committed acts he wishes to publish about. However, I find that the actions of the defender in relation to the motion for interdict were the proximate cause of that expense. The defender could have given the undertaking requested, or not opposed the motion, still leaving it open for him to argue that what he proposed to do was lawful at proof. The legal expenses of the motion for interim interdict to regulate the interim position were caused by him choosing to take the course of action he did. I also took into account the defender's submission that during the course of the hearing on interim interdict, the width of the interdict sought by the pursuers was narrowed. However, the pursuers were successful in obtaining most of what they had sought. Interdict was granted preventing further blog posts and restricting publication in various ways. That was substantial success. I had regard to the right of freedom of expression, but that is a qualified right, as explained in the note of 13 May 2020. I did not consider it a good reason to withhold expenses because the pursuers have more resources than the defender. The pursuers have reputations they are entitled to take steps to protect regardless of their means. In all the circumstances I found the defender liable to the pursuers in the expenses of the opposed motion for interim interdict.

[16] In relation to the expenses of the motion for further interim orders, I considered that there had been divided success. The pursuers had succeeded in obtaining interim orders for

removal of the initial blog posts, but not the new blog posts. They had not been successful in obtaining a substantial part of what they sought. In those circumstances I considered that the appropriate order was to make a finding of no expenses due to or by either party.