OUTER HOUSE, COURT OF SESSION

[2020] CSOH 61

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

13 May 2020

Note:

[1] This is 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 second pursuer is a corporate parent of the first pursuer. The defender has started a blog at www.britishgaslawlessness.blogspot.com headed "British Gas: a Lawless Private Company?". The first blog post on 2 May 2020 announced 12 weekly episodes to follow, giving a summary of each episode. The first episode has now appeared. The case came before me on 13 May 2020 on a motion for interim interdict. I heard argument from the parties, and took some time carefully to consider their submissions, including a written

submission from the defender. On 13 May 2020 I granted interim interdict in the terms set out in the interlocutor, and gave the following reasons for doing so.

Governing law

[2] The defender relied on his right to freedom of expression and quoted Article 19 of the International Covenant on Civil and Political Rights. This International Covenant has not been incorporated into domestic law. However, Article 10 of the European Convention on Human Rights is to similar effect and has been incorporated into Scots law by virtue of the Human Rights Act 1998. Article 10(1) provides so far as relevant:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontier."

[3] It is important to notice that freedom of expression under Article 10 is a qualified right. Article 10(2) goes on to say:

> "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, **for the protection of the reputation or rights of others**, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

This means that free expression may be curtailed in circumstances set out in Article 10(2). These include (as emphasised in bold print in the quotation above) protection of the reputation of rights or others. In Scotland, the law of defamation is one of the ways prescribed by law in which the reputation and rights of others are protected.

[4] Section 12 of the Human Rights Act 1998 makes further provision for situations, such as applications for interim interdict in defamation actions, in which the court is considering whether to grant any relief that might affect freedom of expression. Section 12(3) provides:

> "No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that a publication should not be allowed".

As set out in the case of *Massie* v *McCaig* 2013 SC 343, where interim interdict is sought in a defamation case, the normal test of the pursuer having to show a *prima facie* case is modified. A higher standard is required because of the terms of Section 12(3). The court must be satisfied that the applicant is likely to succeed in the conclusion for a permanent interdict. The pursuer must also satisfy the court that the balance of convenience favours grant of interdict. Any order granted must leave the defender in no doubt as to the measure of his liability, and must be no wider than necessary to protect the legitimate interests of the pursuers. Given that this case concerns material claimed to be journalistic or literary, the court also is required to have particular regard to the importance of the Convention right to freedom of expression, and the extent to which the material has or is about to become available to the public and whether it is in the public interest for the material to be published (Section 12(4)).

Are the pursuers likely to succeed in their conclusion for permanent interdict?

[5] Both the initial blog post of 2 May 2020 and the first episode are lengthy, and so the following quotations give only a flavour of the contents of the blog. The blog asserts British Gas agents covered up "unlawful business practices", and "provided blatantly false and dishonest information in clear violation of anti-fraud legislation throughout the UK". It talks of money "stolen" by the British Gas, British Gas hiring an outside counsel with "a propensity for dishonesty" or "corrupt outside counsel", and "manifest dishonesty". It goes on to say it will provide proof that British Gas' attempts to cover up its outside counsel's outrageous attempt to mislead the court reached to the very highest level of its organisation.

It talks of "massive fraud" and British Gas ignoring its obligations under Schedule 5 of the 1995 Gas Act, "British gas' unlawful business practices", "this utterly corrupt solicitor's behaviour on behalf of, and sanctioned by British Gas", and this being "an actual danger to the Rule of Law". In episode 1 the blog states that information given by the pursuers was "entirely and knowingly, false and dishonest, and clearly, in violation of the 2006 Fraud Act" and later "is dishonest and in flagrant violation of both the 2006 Fraud Act and Common Law Fraud (Scotland)". (I note that the relevant parts of the Fraud Act 2006 do not extend to Scotland).

[6] In my opinion, this language, with which the existing blog is peppered, bears a defamatory meaning when objectively read. I accept the submission of the pursuer that the blog posts bear the innuendo set out in Article 14 of condescendence. The blog posts contain clear innuendo that the first pursuer: has been committing fraud and theft, which are criminal offences; is involved in a criminal conspiracy; and operates unlawful business practices. Those are matters which would tend to lower the first pursuers in the estimation of right thinking members of society generally. I also accept that the second pursuer has a reasonable apprehension that it may also be similarly maligned in blog episodes to come. Although, so far, the references in the blog are to British Gas, there is express reference to attempts to mislead reaching the very highest level of the organisation (the second pursuer being the first pursuer's parent company), and reference to matters involving people employed by the second pursuer. There is a long history between the parties which includes the defender bringing various court actions, including a defamation action against the second pursuer, which did not succeed. There is other correspondence before the court in which the defender suggests he will bring the second pursuer before the court.

[7] The defence raised is that the allegations made are factual. In essence, defences of *veritas* and fair comment are raised. For the defence of *veritas* to succeed, the defender must prove that the statements made are true. For the defence of fair comment to succeed, the defender must show that each statement of fact is true, that the matter is one of public interest, and that the comment on the facts is fair (*Massie* v *McCaig* 2013 SC 343 paragraph 30).

[8] I am prepared to accept that the way that the pursuers treat their customers, in particular in offering them particular tariffs, is a matter of public interest. But I do not accept that the defender has shown that the statements set out above made by him are true. Nor do I accept that what is written in the blog could amount to fair comment. There is no evidence before me of convictions in any court for fraud, theft, conspiracy or any offence of dishonesty on the part of the pursuers, in respect of the matters raised by the defender. This is despite a court action in Stornoway sheriff court having been paused to allow the defender to raise matters with Police Scotland, the Lord Advocate, and the First Minister. No such proceedings have been brought. The correspondence the defender sought to rely on as showing the pursuers had accepted they had stolen from him does not bear the inference he sought to put on it. There is no court order or finding of any regulatory body before me finding the pursuers have unlawful business practices. There is no professional finding against the pursuers' solicitor, and indeed there is a decision at 6/6 of process from the Scottish Legal Complaints Commission rejecting a complaint about the pursuers' solicitor by the defender as totally without merit. It is one thing to say, as the pursuers accept: that one of their employees said that a particular tariff was not available in Stornoway, and that the answer was not correct; or that their solicitor wrote to the court to ask for a witness to be excused, describing her as a "junior customer services manager"

within the second pursuer, although her formal job title was "Senior Customer Manager"; or that the pursuers declined to respond to a request from the defender's MP about that witness's position saying "As your letter raises issues which are currently connected to live Court proceedings I am afraid that we are not in a position to respond". It is quite another to make serious allegations that the pursuers have committed theft or fraud, criminal conspiracy, were blatantly or purposefully dishonest, or that they have unlawful business practices, or that their solicitor is corrupt and a pathological liar, as the defender has done in submissions and correspondence before the court. In my opinion this goes beyond what can count as fair comment on the matters by which the defender is aggrieved.

[9] I therefore consider that the pursuers are likely to succeed in their conclusion for permanent interdict.

The balance of convenience

[10] On the side of the balance against granting interim interdict are the considerations set out in Section 12(4) of the Human Rights Act 1998. The initial post announcing 12 episodes, and the first episode, are already in the public domain. However, 11 more episodes are intended. From their descriptions in the initial post, if published they would be highly likely to contain further defamatory material which is not in the public domain. While I accept there is some public interest in publication of details about the manner in which the pursuers treat their customers, that public interest can be met by publishing without the additional defamatory material the pursuer adds by way of comment, described above. I have had particular regard to the importance of the Convention right to freedom of expression, but I consider that if I grant interdict the pursuer is not prohibited from publishing at all. He is entitled to publish matters which are true, and express fair comment

on them. What he is not entitled to do is publish in the unrestrained way he has favoured so far, and which defames the pursuers in the way set out in the interlocutor. I also note that the Convention right of freedom of expression to which I am having regard is qualified and allows respect for the rights and reputation of others.

[11] On the other side of the equation, I consider the case against the defender is strong. Given what the defender stated in his initial blog post about further publishing, in my opinion the pursuers reasonably apprehend there will be further publication on matters affecting both companies. Serious allegations are made by the defender of criminal and unlawful conduct. No court orders or findings of professional or regulatory bodies are produced which properly substantiate allegations of this seriousness. I also consider that the potential prejudice to the pursuers if no interim interdict is granted far outweighs the prejudice to the defender if interim interdict is granted. Further publication containing the type of defamatory material dealt with in the previous part of this opinion will cause prejudice to the pursuers. It is likely to be damaging to the pursuers' reputations and business interests in Stornoway or elsewhere. Damages to compensate the pursuers for this type of harm would be difficult to quantify and may not be an adequate remedy. The prejudice to the defender in contrast is small. He complains of historic events. The blog is not apparently being published for commercial reasons. If the defender is successful in this action after proof, he will be able to publish then. The delay will cause him no adverse financial consequences.

[12] Having balanced the various relevant considerations, I am of the opinion that the balance of convenience is firmly in favour of grant of interim interdict.

Scope of the interim interdict

[13] In considering the terms of the orders to make, I was mindful of the importance of the right of freedom of expression. It would not be appropriate to prevent the defender from saying anything at all about the events which have passed between him and the pursuers, because of this right. There is nothing to prevent him publishing full copies of correspondence previously sent to him by the pursuers. He is entitled to say things that are true, and make fair comment (as legally defined) on them. The problem is that he is currently going far further than that, and planning to continue doing so, given what he has said in the existing blog posts. Accordingly, while I was satisfied interim interdict should be granted so that the defender refrained from defaming the pursuers, I was concerned that the order not be any wider than necessary to protect the pursuers' legitimate interests. After raising these matters with counsel for the pursuers, he moved to amend the second conclusion at the bar, and modified his motion to seek interdict only in respect of an amended paragraph (i), and paragraph (iii), of the second conclusion of the summons. Those orders exclude court proceedings from the scope of the interdict, including current proceedings in Stornoway sheriff court involving the parties, so that the defender remains able to put his case in the way he chooses in those proceedings. In my opinion, the modified motion struck the appropriate balance between protecting the pursuers' interests and allowing the defender freedom of expression within legal limits.

[14] I also had regard to the need to ensure that the defender was in no doubt as to the measure of his liability. In a situation in which I considered the defender was entitled to make some comment about the pursuers, but not defamatory comment, a balance had to be struck in a way that was clear to the defender. In my opinion, the clear prohibition on him publishing episodes 2-12 in the form presently proposed in his blog post of 2 May 2020,

together with a specific list of what he was not allowed to do in any other publishing he chose to do, made matters sufficiently clear.

[15] In submissions, the defender offered to forward what he intended to publish 4 hours before publication to the pursuers. He could then remove matters appropriately objected to by them. He also offered not to publish if the pursuers got in touch with certain people to tell them what the correct position was. These are not matters in respect of which the court has a role, but it is open to parties to consider them further.

[16] For these reasons I granted interim interdict in the terms set out in the interlocutor.