FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 48
CA176/19

Lord President
Lord Menzies
Lord Malcolm

OPINION OF THE COURT

delivered by LORD MALCOLM

in the commercial action by

HIGHLANDS AND ISLANDS ENTERPRISE

Pursuer and Respondent

against

CS WIND UK LIMITED

Defender and Reclaimer

Pursuer and Respondent: D. M. Thomson, Q.C.; CMS Cameron McKenna Nabarro Olswang LLP
Defender and Reclaimer: R. Dunlop, Q.C.; MacRoberts LLP

18 August 2020

[1] The defender manufactures wind turbines at a site at Campbeltown airport. At the outset it received substantial financial assistance from the pursuer. In return, in a formal and detailed deed of undertaking, the defender agreed to various restrictions on its activities for the period to March 2021, which the pursuer required in order to protect its investment and ensure that it created employment and economic activity in its area of operation. The pursuer is concerned that the defender is not complying with its obligations, and has raised

a commercial action seeking, among other things, an interdict prohibiting the removal of plant and equipment used in the business; something which is said to be in breach of the undertaking. The summons states that the defender has expressed doubts as to the sustainability of its operations and has announced the redundancy of three-quarters of the workforce. The commercial judge granted an interim interdict against such removal, and subsequently refused the defender's motion for recall, albeit he altered its wording. With the leave of the judge, the defender now reclaims (appeals) against that interlocutor.

[2] The commercial judge subsequently explained his reasoning in a note to this court. The balance of convenience strongly favours the pursuer. Out of 80, only 13 employees remain on site. Items of plant and equipment, said to have been covered by the undertaking, have been removed. The defender is part of a South Korean operation with production facilities in other parts of the world. It would cause no material prejudice to the defender if the plant and equipment still on site stayed there pending resolution of the action. As to whether the pursuer had put forward a prima facie case in support of interim interdict, the judge described the issue as concerning the proper approach to clause FOURTH 1(8) of the undertaking. It stops the defender from moving "the Business or any of (the defender's) plant, equipment or other assets acquired in connection with the Purpose out of the Highlands and Islands area of operation of HIE." The defender contends that this clause does not cover plant and equipment used in its business. It is said to be restricted to plant and assets acquired for the construction of the premises from which it operates. The commercial judge took the view that, having regard to the pursuer's submissions, which included reference to the factual background and the purpose of the restrictions, there is a prima facie case in support of interdict ad interim in the terms granted.

[3] The defender has three grounds of appeal. First it is said that, by addressing balance of convenience at the outset, the commercial judge misdirected himself, in that his view on that issue will have coloured his approach to prima facie case in a manner favourable to the pursuer. In effect he "put the cart before the horse". The defender accepts that if it fails on the other grounds of appeal, which as will become apparent is indeed the case, this issue is academic. In any event, in the view of the court the decision on balance of convenience was clearly open to the judge, and there is no foundation for the assertion that the order of treatment caused or led to a misdirection on his part.

[4] The second ground of appeal focusses on prima facie case, and asserts that the defender's construction of the said clause is the only tenable outcome; therefore it follows that the interim order should have been refused. The defender has no intention of removing plant and other assets acquired in connection with the building works on the site. Attention is drawn to the definition of "Purpose" in the undertaking, and its connection with the construction works, allied to a textual analysis of the clause itself. The pursuer contends that if regard is had to the background of assistance from public funds to provide economic activity in its area; the fact that the parties knew that the defender would not be responsible for the construction works; the terms of the deed of undertaking as a whole; and its commercial purpose, the overall intention of the parties is tolerably clear. The commercial judge's decision on prima facie case was more than justified. In any event the court should not, in effect, treat the appeal as a fully-fledged debate on relevancy; something which the defender could have sought from the commercial judge, but instead chose to reclaim a determination on interim regulation. Affidavit evidence might be relevant to a proper consideration of the issue, and it was explained that the pursuer's case is not intended to be

predicated solely on clause FOURTH 1(8), there being a number of other relevant provisions in the deed of undertaking.

[5] The court is not prepared to embark on a consideration of the merits of this dispute. An interim order of this kind made at an early stage of proceedings is the result of the exercise of a discretionary power designed to regulate matters pending a substantive hearing. As it is put in Burn-Murdoch, *Interdict in the Law of Scotland*, (1933) at paragraph 143, "The question at this stage is not so much the absolute relevancy of the case as the seeming cogency of the need for interim interdict." In *Toynar Ltd* v *Whitbread & Co plc* 1988 SLT 433, their Lordships of the Second Division observed (434F): "Where matters of law are raised, it is neither necessary nor desirable for any concluded decision to be made upon them at the stage of considering the making of an interim order." That is as true for this court as it was for the commercial judge. Suffice to say that, having considered all the submissions, both oral and written, we have identified no good reason to criticise the view taken by the commercial judge on the question of prima facie case. Given that the whole matter will be remitted to the commercial roll for further procedure it would not be appropriate to express any more definitive opinion on the proper approach to clause FOURTH 1(8), or as to the other clauses mentioned in the course of the discussion.

[6] The final ground of appeal states that any prima facie case is so weak, an interim order should have been refused. While the court does not wish to address the merits of the matter, it can say that it does not accept that description of the pursuer's position.

[7] For the above reasons, the reclaiming motion is refused and the action will be remitted to the commercial roll for further procedure.

[8] By way of a postscript, the court adds that it is surprised that leave was granted for this reclaiming motion. It will only be in a clear case that this court will interfere with an

interim order of a commercial judge. And speaking more generally, given the potential for delay, when commercial procedure is designed for a speedy resolution of business disputes, the court expects leave to be granted in respect of an interlocutory matter only when such delay is outweighed by compensating benefits which further the just and effective disposal of the case at hand.