SHERIFF APPEAL COURT

[2024] SAC (Civ) 8
OBN-A20-21

Sheriff Principal Pyle
Sheriff Principal Ross
Appeal Sheriff McCartney

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL ROSS

in the appeal in the cause

MOWI SCOTLAND LIMITED

Pursuer and Respondent

against

DON STANIFORD

Defender and Appellant

Defender and Appellant: Campbell KC, Crabb, advocate; R & R Urquhart LLP
Pursuer and Respondent: Barne KC; Aberdein Considine and Company

14 March 2024

[1] The pursuer and respondent (the "pursuer") operates aquaculture farming sites in Scotland. This involves the breeding, rearing and harvesting of fish, principally salmon. The fish are reared in hatcheries and freshwater loch farms, and once sufficiently grown the fish are moved to one of the seawater, or marine, farms. These marine farms are normally situated in sea lochs, voes and inlets. A marine farm will typically consist of one or more groups of cages arranged in a grid pattern. These cages are structures of circular or square design which float on the surface of the sea, from which hangs a large enclosed net bag. These cages are normally 90 to 120 metres in circumference and the net bags hang to a depth

of 15 to 20 metres. A walkway normally surrounds the perimeter of each cage. The cages are anchored to the seabed, and the anchors are marked by grey buoys which float several metres from the cages. The pursuer operates 47 such marine farms around the coast of Scotland.

[2] The defender and appellant (the "defender") is an environmental campaigner. For many years he has been involved in campaigning to raise awareness of environmental and animal welfare issues arising from the salmon farming industry. His activities include publishing content on digital platforms and correspondence with third parties. Since 2018 he has attended at the farms of aquaculture businesses, including several sites operated by the pursuer, operating in Scottish sea lochs, voes and inlets. He avers that he has undertaken significant academic and practical study of the environmental impact of salmon farming in Scotland.

[3] The pursuer has raised the present action seeking interdict against the defender from carrying out various activities in relation to all 47 of their sites. The pursuer avers, and the defender admits, that he has attended at some of the pursuer's marine farm sites, namely at Loch Leven, Craobh Haven Marina, Bagh Dail nan Ceann, Poll na Gille, Loch Linnhe, Loch Arkaig, Ardintoul, Ardnish, Shuna and Port Na Cro. The pursuer makes specific averments in relation to each event, but in general terms the nature of the defender's conduct, so far as admitted, is that he attends the site, approaches the floating cages by dinghy or kayak, secures his vessel to the cages, and climbs onto the surrounding walkway. He will then carry out monitoring or recording activities, including submerging a video camera into the nets to record the activity of the fish within.

[4] The defender admits these activities, and explains that they were justified by events such as reports of containers of rotting salmon, detection of significant salmon mortalities,

alleged breaches of health and safety, welfare and environmental laws, the presence of dangerous chemicals, and the concerns of local residents. His view is that the pursuer has no right to stop his activities, and that he has a right to navigate on the waters around the sea farms. He claims this includes a right to tie up to, and enter, the marine farms themselves. The pursuer also avers that he overflies the farms with drones, but the defender denies possessing or operating any drone. Interim interdict was not sought, on the basis that the defender gave an undertaking to the court not to carry out his activities pending resolution of this court action.

The sheriff's judgment

[5] The pursuer sought debate and enrolled for decree on the basis that the admitted facts demonstrated that there was no defence in law. The sheriff found that the admissions were sufficient to support interdict in the terms craved. He considered and rejected arguments that the defender's actions fell within the freedom of navigation; that the Crown leases did not permit the terms of the interdict sought; that there was no appreciable harm caused by the defender's activities; and that the interdict was unnecessary and disproportionate. He rejected a further argument on title to sue.

[6] He granted permanent interdict in the terms sought, which prevented the defender from "boarding, entering onto, physically occupying, attaching himself to, attaching vessels to or approaching within 15 metres of all structures, docks, walkways, buildings, floats or pens" of 47 named sites belonging to the pursuer; also from "flying unmanned aircraft, also known as drones, above the pursuer's salmon acquaculture farms" and from "instructing, procuring, encouraging or facilitating others to so act". The interdict extended beyond the sheriffdom under the powers in section 84 of the Courts Reform (Scotland) Act 2014.

[7] The defender appeals on the grounds that the sheriff went beyond the admitted facts, that he failed to apply the correct test for interdict, and that he failed to recognise the full extent of the defender's freedom to navigate.

Submissions on appeal

[8] Senior counsel for the defender submitted that interdict was not justified where there was no harm. The pursuer's averments about the risk to safety were irrelevant. The pursuer did not aver that the defender had caused harm to the pursuer's property. *Winans* v *Macrae* (1885) 12 R 1051 was authority to the effect that minimal appreciable harm meant that interdict would be refused. This litigation was designed primarily as a strategic litigation to impose a groundless and unmerited restraint on the defender's lawful actions. It was relevant that the last of these events dated from 2021, so it was not clear that interdict was necessary more than 2 years later. The sheriff erred in that he did not consider the explanation for each of the defender's visits to the marine farm cages. Motivation was relevant.

[9] The defender had a right to navigate the coastal waters in which most of the sea farms were situated. The sheriff had not addressed this. The defender's position was not that the pursuer interfered with the right of navigation, but that the defender was exercising that right in reaching the farm cages. His position was that mooring a boat, or going on to the walkway, was all part of the exercise of a right of navigation. Necessity was not limited to necessity of navigation, but also necessity of the ancillary purposes for which the right of navigation was exercised, such as surveying and recording the farm activities.

[10] Senior counsel for the pursuer submitted that the appeal should be refused, but that it would be competent to grant interdict de novo if adjustment was required, or to remit the

matter for proof. The admissions were, however, sufficient for the interdict to stand. The pursuer was entitled to interdict to prevent interference with the structures. It did not rely on the terms of the Crown leases of the sea bed, as it was accepted that these could not interfere with a right of navigation. There was, however, no such interference. The pursuer was seeking to protect its equipment and staff, and also to ensure the safety of those around the cages, so an exclusion zone of 15 metres was sought. The defender's activities served to bypass protocols intended to achieve biosecurity for the fish. Confrontations had occurred between the defender and the pursuer's staff.

[11] It was misconceived to regard the case of *Winans* as requiring appreciable harm. It related to appreciable wrong, not harm, and illustrated only a *de minimis* principle. This was not such a case. Harm could only be relevant at the interim stage, as part of an assessment of balance of convenience. It was not relevant at the stage of final interdict. Interdict was always available to constrain illegality. This was not truly an emergency situation which might justify intervention.

[12] In relation to the 15 metre exclusion zone, senior counsel moved, unopposed, to delete the reference to approaching within 15 metres. He also moved to delete the reference to drones, as unsupported by admission, and the word "encouraging".

Decision

[13] The two primary submissions in the appeal relate to the requirements of the test for interdict and the alleged interference with a right of navigation.

The requirements for interdict

[14] In relation to the test for interdict, the defender's position was that the remedy of interdict requires proof of an appreciable wrong involving a threat to the rights of the opposing party. We do not accept that submission. That submission appears to conflate the requirements for interim interdict with the requirements for perpetual interdict. At the interim stage, the court will consider whether there is a stateable case, and where the balance of convenience lies. At that stage, the risk of threat or damage is relevant, as the court is engaged in assessing the "seeming cogency of the need for interim interdict" (Burn-Murdoch; *Interdict in the Law of Scotland* (1933) at para 143).

[15] An award of perpetual interdict does not require harm to be established. Interdict is available to prevent unlawful conduct. The pursuer has a right of ownership in the structure of the marine farms, extending to the whole of the structure. It is entitled, as of right, to prevent the defender entering upon or interfering with the structures. The pursuer has notified the defender that it does not consent to his entering the marine farms. It has required the defender to stop interfering with or entering upon their property. He refuses to do so and asserts that he intends to continue to carry out these acts. The pursuer is entitled to interdict to stop such interference with their property. The entitlement to interdict is based on straightforward principles of the law of property, and is not affected by the defender's motives, or any wider questions of law.

[16] The defender relied in response on the proposition that: "On the other hand, considerations of fairness or 'equity' may in exceptional circumstances modify strict legal rights" (Burn-Murdoch, above at page 3).

[17] The defender also relied on the case of *Winans* v *Macrae* (above), in which the court refused interdict. On those facts, the owner of 200,000 acres of land sought interdict against

a cottar, based on his grazing his pet lamb on the grass around his cottage. The court refused to grant interdict, noting that "No doubt, if the thing is to be taken very strictly, that was a trespass on the part of the lamb" but that interdict should not have been applied for. That case is not authority for the proposition that harm must be shown. It addresses appreciable wrong, not appreciable harm. It was, rather, an illustration of the doctrine referred to by senior counsel for the pursuer, namely *de minimis non curat lex* - the court will not grant remedies in matters of negligible importance. *Winans* involved exceptional circumstances which are not mirrored in the present case. The defender's pleadings are eloquent as to why he regards his activities as not being of negligible importance.

[18] The defender also referred to *Phestos Shipping Co Ltd* v *Kurmiawan* 1983 SC 165. There the court granted interdict to prevent the crew of a vessel remaining on board, despite being dismissed over a dispute. The Second Division considered questions of harm and the Lord Ordinary's observation that he should not pre-determine whether the crew were committing only a minor civil wrong. We have not found assistance in that authority. It was a hearing on interim interdict, not permanent interdict. As observed already, the grounds on which these motions can be granted are quite distinct.

[19] Reference was also made to Bell; *Principles of the Law of Scotland* (10th ed, 1899) which provides: "The exclusive right of a landowner yields wherever public interest or necessity requires that it should yield" (at para 956).

[20] This principle is said (at para 957) to allow extinguishing a fire, pursuing a criminal, or destroying dangerous or noxious animals. Counsel submitted that it was not a bad analogy to think of the death of tens of thousands of salmon as if it were equivalent to a fire. Reference was made to paragraph 961, which provides that interdict will not be granted "where no right is asserted and no appreciable injury is done".

[21] In our view these passages do not assist the defender. The exclusive right yields only to the class of events outlined in Bell at paragraph 957, which require instant response and there is no opportunity to observe the requirements of permission. The present is plainly not such a case. Paragraph 961 does not apply, because the defender does assert a right, namely that of tying up to and entering onto the marine farm structures, in furtherance of a right of navigation.

[22] Reference was also made to *Southern Bowling Club* v *Ross* (1902) 4 F 405, in which interdict against the police was refused on the grounds it would interfere with their statutory duty of investigation. A similar situation arose in *Shepherd* v *Menzies* (1900) 2 F 443. Again, these are not similar cases. The defender in the present case has no such countervailing authority, statutory or otherwise, which would authorise him to disregard the pursuer's rights of ownership.

[23] The defender's pleadings contain extensive averments as to his motivation and justification for entering onto the marine farm structures. We cannot take these matters into account in the present action, as they do not override the law of property. The motivation of a trespasser does not influence the nature of the underlying property rights, or the entitlement to interdict. For their part, the pursuer's pleadings refer to industry regulation, animal welfare, and the safety of persons in the vicinity of the marine farms. These are not relevant considerations either, and we have not taken them into account. Private regulations cannot encroach on public rights.

Interference with navigation

[24] In relation to the rights of navigation, it was submitted for the defender that the actions of going onto the marine farm structure, tying up a dinghy or kayak, and walking on

the structure were all part of the exercise of navigation. Senior counsel for the defender submitted that the Crown, and therefore the pursuer as lessee or operator, could not act in a manner which interfered with the right of the public in the foreshore, sea and sea bed. (*Crown Estate Commissioners* v *Fairlie Yacht Slip Ltd* 1979 SC 156 at p169 per Lord President (Emslie)). The public has the freedom to navigate the seas and sea lochs. The right to navigate is not determined by the purpose of the navigation, but by the capacity of the water for navigation. It extends to any act which could reasonably be described as navigation, by any vessel that could be reasonably described as a boat (*Wills Trustees* v *Cairngorm* 1976 SC (HL) 30, pp 166 to 169, per Lord Fraser of Tullybelton).

[25] Senior counsel for the pursuer did not dispute the general right to navigation, but submitted that the sheriff had correctly concluded that the grant of interdict did not interfere with the defender's navigation rights.

[26] We agree that the interdict is not incompatible with the defender's rights, or wider public rights, of navigation. That is because:

> "The right is primarily one of passage and is not a right to sail over every square metre of the sea, and no objection can be taken to a private use, for example for the purposes of fish farming, which does not substantially interfere with passage" (*Stair Memorial Encyclopaedia*, Vol 18, para 519, under reference to *Crown Estates Commissioners* (above)).

[27] The defender does not claim that any of the pursuer's marine farms interfere with his ability to sail or row on the waters on which they float. His contention is solely that he can "navigate" by climbing over the structure of the marine farms. We find no support in the authorities for that proposition. The defender enjoys all the public rights of navigation which he would otherwise have if the marine farms were not present. His right of passage is not compromised. His case is not predicated on interference with his ability to access the sea lochs, voes and inlets which are affected. Rather, he seeks to extend the right of

navigation to include the manufactured structures of the pursuer's marine farms. We do not accept that he has established that there is any basis in law for that position. Neither can his activities be described as ancillary to navigation, as there is no navigational requirement to access the marine farm structures. Ancillary rights can only exist to the extent they are necessary for navigation, not for any other purposes (*Stair Encyclopaedia*, vol 18, para 520). Were the defender's submissions correct, any member of the public could claim the right to board any vessel or structure in coastal waters, irrespective of ownership, at any time.

Pleading points

[28] The defender's submission included reference to the sheriff's treatment of relevancy and specification, and that he reached views on facts which were not admitted. These propositions were not controversial and we agree with them. We have considered anew the whole of the pleadings and the sheriff's treatment of the averments. It is sufficient to observe that the sheriff's opinion is not in conventional form, does not summarise the issues or carry out a comparative exercise, and that there is merit in some the defender's analysis of conclusions drawn. However, this appeal does not turn on the sheriff's treatment of the facts or of the pleadings. It turns on the underlying law, which is discussed above and which does not support either a defence or this appeal. The sheriff's conclusions on averments of fact do not influence that state of affairs and need not be considered further.

The extent of the interdict

[29] Following discussion of the scope of the interdict, it was recognised that in parts it went beyond admissions on record, for example in reference to drones, use of which is denied and has yet to be proved. It also raised questions of entitlement to a 15 metre

exclusion zone. Senior counsel for the pursuer moved to restrict the terms of the interdict granted by the sheriff. The amendment was to delete the words "or approaching within 15 metres of"; the reference to "flying unmanned aircraft, also known as drones, above the pursuer's salmon acquaculture farms"; and the word "encouraging". That motion was not opposed, and we will grant it. It does not materially affect the nature of the existing interdict.

Disposal

[30] We will recall the decree, allow the crave to be amended in terms of the pursuer's unopposed motion made at the bar, and of new pronounce interdict in the amended terms. We will reserve expenses of the appeal meantime. Parties should attempt to agree these, failing which the clerk will fix further procedure to deal with issues of expenses.