

[2006] CSIH 16

A730/04

OPINION OF THE LORD JUSTICE CLERK

in

Lord Justice Clerk RECLAIMING MOTION

by

Lord Macfadyen ROBERT BELL

Lord Johnston Pursuer and Reclaimer;

against

(First) INKERSALL INVESTMENTS LIMITED; (Second)
PROSPER PROPERTIES LIMITED; and (Third) MICHAEL
WOODCOCK

Defenders and Respondents:

For pursuer and reclaimer: Nicoll; Drummond Miller, WS

For defenders and respondents: Joughin; Digby Brown

15 March 2006

Introduction

[1] The defenders severally own tracts of agricultural land at Kirkconnell, Dumfriesshire that are known collectively as Rigg Estate and Nethercairn Farm. I shall refer to the aggregate of this land as "the estate."

[2] Over a number of years the pursuer acted as agent for the defenders in relation to various matters on the estate, including the letting of cottages and other properties. It is not disputed that in 2000-2003 the first and second defenders gave the pursuer a series of seasonal grazing lets over various parts of the estate and that in April 2002 the first defender gave the pursuer a short assured tenancy of Rigg Farmhouse.

[3] In 2004 the pursuer fell out with the third defender. He then claimed that he had an agricultural tenancy over the whole of the estate.

[4] The first defender served notice terminating the short assured tenancy as at 31 March 2005 and the first and second defenders each raised two summary cause actions against the pursuer in Dumfries Sheriff Court for removing and ejection respectively. In the actions for removing, the defenders alleged that the pursuer was in breach of the relevant grazing let. In the actions of ejection, they averred that he had occupied land not covered by the let. These defenders also raised similar actions against the pursuer in the ordinary court which

remain in dependence. In his defences to each of them the pursuer avers, *inter alia*, that the grazing let does not "reflect the whole extent of the parties' agreement in relation to the tenancy."

[5] In November 2004 the pursuer raised the present action in which he concludes for interdict in the following terms:

"For interdict against the Defenders or anyone on their behalf from disturbing or interfering with the Pursuer's peaceful possession of the lands known as and forming the Rigg Estate; and that in particular by breaking open locks and chains on the buildings or field enclosures there occupied by the Pursuer, by removing the Pursuer's stock, equipment or other belongings therefrom, or by placing locks or chains on said buildings or field enclosures against the Pursuer and for interdict *ad interim*."

The action is based on a claim that the pursuer has a tenancy created in the following way.

"The pursuer has been in occupation of the Rigg Estate by agreement of the defenders since February 2002 and has paid rent and had occupation from year to year. The stock have never been removed from the ground. Buildings have been occupied and repaired and renewed. Works of improvement on the estate have been carried out. All of the foregoing are apt to exclude the effective operation of said grazing lets as regulating or as truly representing the parties relationship" (cond 4).

The pursuer avers that despite the sheriff court proceedings, he "received intimation" that the defenders would give or had given instructions to "others on their behalf" to take the actions referred to in the conclusion and that he is reasonably apprehensive that the defenders intend to effect his removal *brevi manu* (cond 5).

The interim interdict and its aftermath

[6] On 5 November 2004, the date of signeting, the pursuer moved *ex parte* for *interim* interdict in terms of his conclusion. As is now clear, there was no particular urgency at that time. Those acting for the pursuer had no evidence, other than the pursuer's own say-so, that the defenders proposed to act in the manner alleged. The Lord Ordinary, Lord Emslie, was not informed that, while the pursuer now claimed that he had had a tenancy over the entire estate since February 2002, numerous parts of the estate were subject to leases to third parties that had been negotiated by the pursuer himself: nor was the Lord Ordinary informed that by letter dated 6 August 2003 the pursuer's solicitors had intimated to the first defender that the pursuer would be interested in obtaining tenancies of two specific parts of the estate. When counsel for the pursuer addressed the Lord Ordinary on the motion, he did not produce or refer to the grazing lets, of which he was aware. All of these documents were at odds with the pursuer's claim. On the basis of this selective presentation of the circumstances, counsel obtained *interim* interdict.

[7] The defenders thereupon lodged in process five grazing lets, each for a period of less than a year, two granted by the first defender dated 21 October 2002 and 3 October 2003 and three granted by the second defender dated 27 October 2000, 21 October 2002 and 3 October 2003. Each was signed by the pursuer. Each required the pursuer to remove his stock from the land at the expiry of the let (cl 4) and in each the pursuer acknowledged that nothing in the agreement implied security of tenure under the Agricultural Holdings (Scotland) Act 1991 or any other legislation (cl 13). The defenders lodged numerous agreements vouching the letting of various houses and cottages on the estate. Six of them were witnessed by the pursuer. The defenders also lodged the letter to the first defender dated 6 August 2003. In it the pursuer's solicitors, Pollock and McLean, Sanquhar, said that the pursuer would be interested in a limited duration tenancy of Rigg Villa Farm and a lease of a further area of 484.64 ha with certain former mine buildings at the entrance to Crockroy and three small paddocks to the north of Rigg farmhouse and steading.

[8] On 19 January 2005 Lady Paton, having heard parties, recalled the interdict. Her reasons are set out in an Opinion dated 12 April 2005. The pursuer now reclaims against Lady Paton's interlocutor.

The Lord Ordinary's reasons

[9] Lady Paton held that there was just sufficient on record to make out a *prima facie* case that the pursuer had a protected tenancy rather than a series of grazing lets (para [62]). She referred to *Morrison-Low v Paterson* (1985 SLT 255) on which counsel for the pursuer relied (*ibid*). However, she considered that two other issues had a bearing on the question of recall, namely balance of convenience and the form of the interdict sought (para [63]).

[10] On balance of convenience, the Lord Ordinary considered that since the defenders had made clear that they did not seek to eject the pursuer *brevi manu*, the *interim* interdict was unnecessary. On the other hand, the pursuer's perception of his rights in terms of the *interim* interdict was having disruptive effects on the tenants of houses and cottages on the estate and was impeding the administration of the estate in various ways (para [65]).

[11] The Lord Ordinary was also of the view that the conclusion for *interim* interdict lacked specification in its reference to the "lands known as and forming the Rigg Estate," not least in the absence of a plan to which the conclusion could be related and in the light of a dispute between the parties on the question whether Nethercairn Farm was part of Rigg Estate (para [66]). She also commented that the reference in the *interim* interdict to "peaceful possession" was unsatisfactory in view of the pursuer's perception of what peaceful possession entitled him to do. She referred to numerous examples of high-handed behaviour on the part of the pursuer after he obtained the *interim* interdict, such as grazing his sheep on other tenants' ground, putting locks on other tenants' outbuildings, driving a quad bike over some tenants' yards and occupying a field that was let to the tenant of one of the cottages. She also alluded to other allegations of obstructive conduct that I need not rehearse (paras [67], [69]).

[12] On the whole matter the Lord Ordinary concluded that the pursuer's presence on the estate and the terms of the *interim* interdict had resulted in his acting as if he were in charge of it with the power to put animals to graze on any area, to control or direct other tenants as to the way in which they could enjoy their tenancies, and to make estate management decisions possibly involving Government and other bodies (para [67]).

The grounds of appeal

[13] Counsel for the pursuer submitted that on the question of balance of convenience the Lord Ordinary erred in law in accepting the defenders' word that they did not propose to eject the pursuer *brevi manu*. She failed to have regard to the risk that if the interdict were to be recalled, the defenders would take matters into their own hands. She also erred in law in having regard to the pursuer's perception of the effect of the interdict rather than to the restrictions actually suffered by the defenders in consequence of it. The defenders' representations on this point were unfounded or exaggerated.

[14] On the question of specification, counsel submitted that there was no need to specify what "Rigg Estate" meant. It meant the total of all of the defenders' land. The defenders knew what they owned.

The legislation

[15] Under the now repealed section 2(2) of the Agricultural Holdings (Scotland) Act 1991, which applied during the relevant period in this case, a let of land entered into in contemplation of the use of it only for grazing or mowing during some specified period of the year did not attract security of tenure. It is not disputed that, on the face of them, the grazings lets lodged by the defenders complied with the requirements of section 2(2).

The parties' pleadings

[16] The pursuer's pleadings in this case are unsatisfactory. While the pursuer seeks interdict on the basis that he has a tenancy over "The Rigg Estate," he has no conclusion for declarator of the existence of any such

tenancy, or of the source of it, or of the extent of it, and he does not specify the basis of his alleged tenancy in his averments. He merely avers that four actions have been raised against him in Dumfries Sheriff Court by the defenders and that a defence has been intimated on the basis that he is tenant of Rigg Estate as an agricultural holding with security of tenure under the Agricultural Holdings (Scotland) Acts (cond 3). His whole claim rests on the unspecific averments in condescendence 4 that I have quoted.

[17] The defenders have pled a detailed defence. They aver that the pursuer was tenant of Rigg Farmhouse in terms of the now terminated short assured tenancy; and that since October 2000 the pursuer has entered into a number of agreements with the first and second defenders to take parts of the estate on "grazings licenses" for periods of less than a year. The defenders specify these now expired agreements by reference to dates, field numbers and a plan. They also refer to the letter dated 6 August 2003 from Pollock and McLean (ans 2). The pursuer has not replied to any of these averments.

[18] The defenders aver that after about 1999 the pursuer acted as agent for the first and second defenders and in that capacity arranged the letting of various houses on the estate to third parties. They specify eight such houses. They give details of the lets of five of them. They specify by field numbers all those parts of the estate over which, they aver, the pursuer has never had rights of any kind. They refer in detail to the practical difficulties created by the pursuer's behaviour on the subjects in relation to various arrangements between the defenders and third parties (ans 4). The pursuer has not replied to any of these averments.

Conclusions

The interim interdict

[19] *Interim* interdict ought not to be applied for *ex parte* unless there are circumstances of genuine urgency. If a party contends that such urgency exists, he must satisfy the court to that effect. Since the defenders were seeking to recover vacant possession by means of responsible litigation, and had taken no unlawful steps to evict the pursuer, it is difficult to see why the pursuer should have been "reasonably apprehensive" that the defenders proposed to take matters into their own hands in the manner that he alleged. Even a year after the *interim* interdict was recalled, counsel for the pursuer was unable to provide us with any objective justification for the pursuer's alleged apprehensions. In my opinion, the pursuer had no proper basis for applying for the *interim* interdict.

[20] I am also of the opinion that those acting for an applicant for interdict have a stringent professional obligation to draw to the attention of the court all relevant circumstances, whether favourable or unfavourable to the application. I am certain that if the Lord Emslie had had the circumstances fully disclosed to him, he would have refused *interim* interdict out of hand or would have continued the motion to enable the defenders to be heard. In my view, the application for *interim* interdict was presented to Lord Emslie on an uncandid basis. If that had been brought to Lady Paton's notice, she would have been justified in recalling the interdict on that account.

[21] This case demonstrates the far-reaching difficulties that may follow from the granting of an *interim* interdict *ex parte* in cases of this kind. Merely by involving the defenders in these attritional litigations the pursuer has retained occupation of much of the estate for well over a year. It now appears that by abusing the procedures of the court in this process, he may have obtained further unwarranted advantages. There was information before the Lady Paton, which she was disposed to accept, that the pursuer has opportunistically used the interdict to invade the rights of existing tenants and to extend his occupation of the estate even further. If that information is correct, and if it should be established that the pursuer's claim is groundless, his potential liability in damages for this interdict, which was granted *periculo petentis*, may be insufficient redress for those whose rights he has invaded.

Relevancy

[22] The Lord Ordinary was of the view that the pursuer had just sufficient on record to make out a *prima facie* case. I do not agree. In my opinion, the pursuer's pleadings are irrelevant for lack of specification on the critical questions to which I have referred and for their failure to reply to the detailed defences which, if made out, would be a complete answer to the action.

[23] But the action is irrelevant for a more fundamental reason. Before the Lord Ordinary, counsel for the pursuer relied on *Morrison Low v Paterson (supra)* in submitting that the pursuer's alleged tenancy was constituted by his continuous occupation of the land over a period of years and by his payment of rent therefor. In my opinion, that submission is based on a misunderstanding of the law. In *Morrison-Low v Paterson (supra)* there was no document constituting the lease claimed by the defenders; but there was evidence of continuous occupation by the defenders over several years with payment of annual rents. The House of Lords held, in the words of Lord Keith of Kinkel, that

"where a proprietor admits someone into the possession of an agricultural holding, or maintains him in such possession without any pre-existing right thereto, and regularly accepts rent from him, there is an inescapable inference that a tenancy has been brought into existence, and it is of no moment that no particular occasion can be pointed to upon which the parties agreed to the one granting and the other taking a tenancy" (*ibid*, at p 268).

[24] This is not such a case. In this case there is a series of grazings lets, each signed by the pursuer, which *prima facie* qualify under the former section 2(2) of the 1991 Act. The pursuer does not suggest that any of these lets was a sham transaction. He does not aver that he made any payments of rent other than those due under the lets. His allegedly continuous occupation of the land to which the lets relate is consistent with his having been in breach of clause 4 in each case. Likewise, his unspecific averments that he has occupied, repaired and renewed buildings and carried out works of improvement on the estate are consistent with his having illegally exceeded his rights under the lets. Since the pursuer does not attack the validity of the lets, it is not open to counsel for the pursuer to submit, in the face of them, that the pursuer occupies the land to which they relate under an entirely different form of contract. Moreover, in relation to the land to which the grazing lets did not relate, the pursuer, in my view, has no relevant averments that any of the defenders granted him a tenancy of any kind.

[25] I conclude therefore that the claim to a tenancy as presently pled is irrelevant. That would have been a sufficient reason for the recall of the *interim* interdict.

Balance of convenience

[26] I agree with the Lord Ordinary that since it is plain that the defenders have no intention of removing the pursuer *brevi manu*, there is no need for the court to grant the interdict sought. The submission that, in exercising her discretion on this question, the Lord Ordinary erred in law is absurd.

Specification

[27] I also agree with the Lord Ordinary that the crave for interdict is lacking in specification; but that point is merely an aspect of the fundamental irrelevancy of the action.

Disposal

[28] I propose that we should refuse the reclaiming motion.

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HOUSE, COURT OF SESSION

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Lord Macfadyen

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Lord Johnston

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[29] I agree that, for the reasons given by your Lordship in the chair, the reclaiming motion should be refused.

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OPINION OF LORD JOHNSTON

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[30] I agree.