



OUTER HOUSE, COURT OF SESSION

[2017] CSOH 141

P1137/16

OPINION OF LADY WOLFFE

In the petition of

(FIRST) SKY PLC; and (SECOND) SKY UK LIMITED

Petitioners

against

ROBERT STEWART

Respondent

**Petitioners: Tariq; Burness Paull LLP**

**Respondent: Party**

3 November 2017

**Introduction**

[1] These are proceedings for breach of interdict.

[2] The petitioners, together with Sky Subscribers Services Limited (“SSSL”) (the petitioners and SSSL are hereinafter collectively referred to as “Sky”), are well known providers of digital pay-television broadcasting services to domestic and commercial subscribers. Their broadcasts of football matches feature graphics, logos and match information, much of which are artistic works in respect of which the petitioners enjoy copyright (“the Works”). Not infrequently, the petitioners bring proceedings for breach of copyright of the Works by reason of their having been shown, in the course of broadcasts of

football matches containing some of the Works, but without the permission or consent of the petitioners.

[3] The petitioners have previously brought proceedings of this character for interdict against the respondent (“the Interdict Proceedings”). In particular, by interlocutor dated 7 June 2016, the court granted decree including *inter alia* for Perpetual Interdict against the respondent (“the Perpetual Interdict”) from infringing the petitioners’ Works by communicating them to the public and, in particular, in the absence of any agreement from the second petitioner permitting him to do so, from showing broadcasts of football matches made by the second petitioner (including the Works) on televisions in licensed premises known as “The Village Inn, 30 Inglis Green Road, Edinburgh (“the premises”). At the material time the respondent was the licensee or the premises manager of the premises. The date of the infringing broadcast that formed the basis of the Interdict Proceedings was 17 January 2016. A certified copy interlocutor of the Perpetual Interdict was duly served by messengers-at-arms on an individual within the premises on 23 June 2016.

[4] The petitioners bring the present petition and complaint for breach of the Perpetual Interdict, alleging that the respondent showed (or permitted to be shown) a further football match in the premises on 25 September 2016 (between Aberdeen Football Club and Rangers Football Club), which had been broadcast on the Sky Sports 5 channel (“the AFC Match”). This was said to constitute a breach because the respondent did not have a commercial subscription agreement that permitted him to play the AFC Match, which, of course, included communication of the Works.

### **Scope of Matters in Dispute**

[5] The matter called before me for Proof. As I record below, much of the evidence was

agreed or not disputed. The principle issue is whether the respondent showed the AFC Match in the premises, in breach of the Perpetual Interdict. The respondent's position is a little difficult to discern. In his answers, he "*vehemently*" denies broadcast of the football match between Aberdeen and Rangers; however, in his witness statement, he states that he was not present in the premises on the day in question and he relies on a contract with Scotsport Sat Limited ("Scotsport") for provision of the football matches shown.

[6] Having regard to the respondent's answers and the two witness statements submitted (for himself and his sister, Sharon Stewart), the respondent also wished to raise questions about the circumstances surrounding the Interdict Proceedings and the grant of the Perpetual Interdict. The respondent disputed that a Sky football match was shown on 17 January 2016. He denied having received service of the Summons in the Interdict Proceedings or service of the interlocutor granting Perpetual Interdict. In his witness statement he referred to a letter he sent on 26 April 2016 to the petitioners' agents, in which he informed them that all broadcasts were via "European Broadcasters". In Sharon Stewart's witness statement, there is also reference to her having been at her own work on the day that service of the Summons for the Interdict Proceedings was effected in the premises on 13 April 2016. It was explained to the respondent at the outset of the Proof, that it was not competent in these proceedings to challenge the grant of the Perpetual Interdict in the Interdict Proceedings. Matters raised for the purpose of challenging the Perpetual Interdict were, strictly, irrelevant to what is the subject-matter of the issue in these proceedings. However, as there was some reference to this in the evidence and in submissions as bearing on credibility, and perhaps also going to the knowledge of the respondent, I record this evidence so far as it is necessary to do so.

### **Documentation Available in these Proceedings**

[7] The respondent appeared personally. At a series of By Orders preceding the Proof, what was required at each stage was explained to the respondent, as was the procedure to be followed at Proof. Notwithstanding the respondent's failure appropriately or timeously to respond to the petitioners' notice to admit (No 10 of process), the court identified only those matters that were conceded in the respondent's answers and recorded these in an interlocutor. In addition, a number of steps were required or undertaken in order to facilitate the respondent's understanding of, and participation at, the Proof. These steps included the provision well in advance of the Proof of:

- (1) witness statements for the petitioners' witnesses,
- (2) a joint bundle of productions,
- (3) copies of the petitioners' authorities (with passages to be relied on identified by paragraph number),
- (4) a Joint Minute (No 25 of process) ("the Joint Minute");
- (5) a List of Agreed Facts and Disputed Facts ("the List of Agreed and Disputed Facts").

[8] In addition, Mr Tariq, appearing on behalf of the petitioners, provided a copy of his submissions. The list of agreed and disputed facts usefully covered all matters in the parties' pleadings, Joint Minute and in the previous notice to admit procedure, and afforded the respondent a single document which clearly identified the scope of what was disputed. This was also discussed at the outset of the Proof.

### **Agreed Evidence**

[9] It is not necessary to set out all of the evidence agreed in the Joint Minute, in the

deemed admitted facts under the notice to admit procedure, or in the List of Agreed and Disagreed Facts. The following suffices (I have inserted headings for convenience):

*Sky's Subscription Services*

- (1) The broadcasts made by Sky contain a copyright notice. Broadcasts of football matches made by Sky features graphics, logos and match information. Some of this material is within the scope of the Works, in respect of which Sky has intellectual property rights. SSSL provides ancillary services supporting the satellite television broadcasting operations of the second petitioner. SSSL supplies both domestic and commercial subscribers with viewing cards enabling them to decode satellite broadcasts received by decoders.
- (2) Sky enters into domestic and commercial contracts to enable subscribers to access Sky television services. Commercial premises, including licensed premises such as the premises, require to enter into commercial contracts with Sky. Typically, a commercial contract will cost substantially more than domestic contracts and is calculated according to the rateable value of the premises, reflecting the fact that the broadcasts are being displayed to a wide audience and in order to generate a financial benefit for the commercial premises.
- (3) In order legitimately receive Sky's broadcasts and broadcast them to the public, it is necessary to have a decoder and a viewing or decoder card, as well as a satellite dish. These are provided by Sky. The viewing card is inserted into the decoder and is needed to decrypt the signal.

- (4) All Sky domestic and commercial viewing cards are owned by SSSL. Viewing cards are supplied to subscribers at the inception of their contract and, possibly, from time to time thereafter. Under the terms of the domestic and commercial contracts, SSSL continues to own the viewing card after it is sent to both domestic and commercial subscribers. A notice to that effect appears on the card.
- (5) SSSL does not, and did not at any time, sell or license their proprietary rights in the viewing cards to any other party.
- (6) Viewing cards for both domestic and commercial contracts are non-transferable. A subscriber, whether domestic or commercial, is only permitted to use the equipment supplied and to access Sky broadcasts at the specific or single address identified in the subscriber's contract. These rights are not transferable. A subscription under a domestic contract does not entitle the subscriber to access Sky broadcasts in commercial premises.
- (7) Sky embed certain images in their broadcasts. For domestic subscribers receiving a broadcast via a residential viewing card provided under a Sky residential subscription contract taken in the UK, there will either be a white dot visible in the top right corner of the television screen on certain channels or, if in interactive services are available a red dot. For commercial subscribers, there is embedded a pint glass graphic (the "Sky Bug") is visible (instead of the white or red Sky residential dots). Broadcasts made by the second petitioner contain a copyright notice.

- (8) Investigation agents, as instructed by Sky, attend various premises to check if those premises are showing Sky programming and in particular Sky Sports broadcasts of football matches.
- (9) Upon receiving the investigation agent's report, Sky check their customer database to see whether or not that premises has a commercial subscription agreement which would have allowed the operator(s) of the premises to show the Sky Sports broadcast, which was viewed by the investigation agents.
- (10) The images constituting the Works are agreed, as annexed to the summons in the Interdict Proceedings.

*The Respondent's Responsibilities vis a vis the Premises*

- (11) The respondent was the designated premises manager of the premises in terms of the Licensing (Scotland) Act 2005 ("the Act") between 16 January 2016 and 16 January 2017.
- (12) As designated premises manager, the respondent was responsible for the day to day running of the premises. The respondent was the tenant of the premises between 16 January 2016 and 30 September 2016.

*The Interdict Proceedings*

- (13) Following service of the Summons on 13 April 2016, the petitioners' solicitors, Burness Paull LLP, received a letter from the respondent dated 25 April 2016 denying that the relevant match on 17 January 2016 shown at the premises was shown on Sky Sports.

*The lack of a Commercial Subscription for the Premises at the Material Time*

- (14) No commercial subscription agreement existed in respect of the premises that licensed communication of the Works to the public between 16 January 2016 and 16 January 2017.
- (15) The respondent had entered into a commercial subscription agreement with Sky for the premises on 21 May 2014. However, that agreement was cancelled on 29 June 2014 as the respondent did not keep up his monthly subscription payments.
- (16) A commercial subscription agreement with Sky was subsequently entered into with Sky on 19 March 2017 for a 12 month period. Under this agreement, the monthly payment for the premises is £612.33 plus VAT.

**Disputed Matters**

[10] So far as relevant to the issue of whether or not there has been a breach by the respondent of the Perpetual Interdict, the respondent disputes the following contentions by the petitioners:

- (1) That on 25 September 2016, the respondent showed the AFC Match on the televisions in the premises, or that this constituted a communication of the Works on that date.
- (2) That if the respondent wished to show football matches broadcast by the second petitioner at the premises, he was able to enter into a commercial subscription agreement with the petitioners. This is the only legitimate way for a licensed premises, such as the premises, to show Sky Sports broadcasts.



- (3) That a person viewing the broadcast of football matches with the inclusion within it of the Works would or ought to have known that the broadcast was that of the petitioners;
- (4) That the system used by the respondent to broadcast football matches in the premises provided access to football matches that included the petitioners' Works;
- (5) That the petitioners have not entered into any agreement with Scotsport Sat Limited ("Scotsport") or otherwise granted them permission to provide access to football matches made by the second petitioner and which include the petitioners' Works; and
- (6) Any agreement between the respondent and Scotsport Sat Ltd did not entitle the respondent to show football matches made by the second petitioners and in particular, to communicate the petitioners' Works on the televisions in the premises.

### **Evidence Led on Behalf of the Petitioners**

#### *David Mackie*

[11] David Mackie worked for an inquiry agency used by Sky. He had done so for about 2 years and had had training in what to look for in order to ascertain whether a broadcast was one by Sky. Prior to that, he had been with Strathclyde Police for 30 years, latterly in the capacity of detective inspector.

[12] He and another inquiry agent, David Crookston, attended at the premises on 25 June, arriving about 1.20pm and staying for about 35 minutes. Around ten other persons were present in the premises on their arrival. Only one of three televisions with the premises was

on, the one above the bar, and it was showing the AFC Match. He described where he and David Crookston sat; they were no more than 3 metres away and had a clear view- a “perfect view”, in his words.

[13] During the 20 or 35 minutes he was in the premises watching the TV, he identified the following Works of Sky: the Sky Sport 5 logo (at the top right of the screen), the score clock (at the top left), and the Sky Sports colour logo. He also saw the “trophy wipe”, used by Sky to transition to replays, a “mini match” and a Sky Sports advert for an upcoming game. In addition, he recognised the commentators in the Sky studio (Neil McCann and Alex McLeish) and he identified other well-known commentators by the voices (Ian Crocker and Andy Walker). He explained that, as he had Sky Sports at his own home, he was very familiar with all of these commentators. He was positive he had identified them correctly.

[14] In relation to the suggestion that this was a broadcast via a foreign channel, he explained that, having heard the discussion and commentary in English, he was in “no doubt” that this was a Sky Sports broadcast, and not via a foreign channel. He also spoke to the names and sequences of 13 advertisements shown during the broadcast while he was present. These would not have been broadcast via a foreign channel. After 35 minutes he and David Crocker left and completed their inquiry report, the terms of which he spoke to.

[15] Cross was brief. He had no knowledge of European brands of broadcasting. He was 100% absolutely sure it was a Sky broadcast.

*David Crookston*

[16] David Crookston was a retired police officer, having been with Lothian and Borders Police for 30 years, the last half of his career in Criminal Investigations Department. He had worked as an investigator for about 6 years. He knew the premises well, as he had visited

them on about ten occasions in the past, in a non-inquiry capacity. He had a clear unobstructed view and had watched the broadcast on the TV for most of his visit.

[17] He identified the same features as those spoken to by David Mackie (the logos, the trophy wipe, mini match and commentators), and which confirmed beyond doubt in his mind that this was a Sky sports broadcast. The particular trophy wipe was unique to Sky. He also spoke to the same order and identity of advertisers. He rejected the contention that this was a foreign broadcast.

[18] Again, cross-examination was brief. While he had seen European broadcasts of UK - based matches, he was sure that this was a Sky Sports 5 broadcast by virtue of the logos and other details he had spoken to. He had no knowledge of Scotsport.

*Scott Fenwick*

[19] Scott Fenwick was a sheriff officer and messenger-at-arms. He spoke to the service of the extract decree comprising the Perpetual Interdict at the premises on 26 June 2016, together with his colleague Grant Ferguson. These were left with a female who had been behind the bar, and who had identified herself as "Tracy Wallace". She had confirmed that she was an employee and that she would accept service on behalf of the respondent.

[20] It was put to him in cross-examination that he should obtain a signature. He explained that this was not a requirement for valid service.

*Grant Ferguson*

[21] This witness evidence was to the same effect as Scott Fenwick, as was the cross-examination.

*Karen Anderson*

[22] Karen Anderson is the Commercial Policing Operations Executive for the second petitioner. She spoke to the operational and technical matters, I have set out above (at paragraph [9 (1) to 10]). She augmented her witness statement, explaining the possibility for “card sharing” enabling non-subscribers to decrypt the encrypted television signal the way a legitimately paying or subscribing customer could. This still constituted unauthorised access to Sky content by any non-subscriber or in respect of any premises not identified in a relevant commercial or domestic subscription agreement.

[23] She also spoke to the fact that that there was no commercial agreement or subscription in place in respect of the premises at the material time. She spoke to the conduct of the Interdict Proceedings, the grant of the Perpetual Interdict in those proceedings (the extract decree was document 22 in the joint bundle), and the instruction of service of the certified copy interlocutor of the Perpetual Interdict by messengers-at-arms on 23 June 2016.

[24] In respect of Scotsport, she explained that, whatever the terms of any agreement between the respondent and Scotsport, that would not permit broadcast of Sky matches or the Sky match. She confirmed that Sky does not licence the right to broadcast Sky content to Scotsport. The only legitimate way to show Sky Sports broadcasts was through a commercial subscription agreement.

[25] She also identified the advert log for the timeframe spoken to by the two agents who had attended the premises on 26 September. The advertisers she identified were identical, as was the order in which these appeared. Finally, she spoke to the respondent’s prior, brief, contract as a subscriber of Sky in 2014, and to the fact that there is now a new contract in place in respect of the premises. The monthly payment under the current agreement is

about £617. From this Karen Anderson inferred that the respondent was, or ought to have been, aware what was required to be paid legitimately to show Sky Sports. What he said he was paying through Scotsport was half of that figure. It would have been obvious to the respondent that any access to Sky via Scotsport was not legitimate.

[26] She confirmed in her oral evidence that there was no relationship between Sky and Scotsport. The latter company had no right to show Sky content and had no authority to communicate the Works. The terms of a 12 month contract between Scotsport and the respondent dated 1 April 2015 was put to her (no 16 in the joint bundle), to the effect that the signatory (ie the respondent) “understand and accept the coverage of sport I receive and appreciate that Scotsport Sat are not responsible for broadcasting decisions”. To her, this meant that whatever is broadcast is the decision and responsibility of the contract holder ie the respondent. Even if Scotsport managed to facilitate the viewing of the AFC Match, this would not have been legitimate. They were not a broadcaster in their own right and they had no agreement with Sky that would permit this. She also spoke to the Works identified by the two investigators. The advert log she had checked coincided exactly with what they described.

[27] She also explained that Sky had exclusive rights to broadcast certain matches, including the AFC Match, within the UK. If it were a Sky broadcast, it would have the Sky Works. No other broadcasters could have the right to communicate or broadcast those Works.

[28] In cross, it was put to her that Scotsport was a legitimate company, so that it was “okay” to use their broadcasts. She replied that it would nonetheless be a breach of Sky’s intellectual property rights and that they were not allowed to sell or show Sky’s content. It was put to her that Sky should pursue Scotsport. She explained that they had been reported

but it was not her department that would deal with them. She could not speak to any increase in price of the respondent's brief subscription in 2014.

### **Evidence on behalf of the Respondent**

*Sharon Stewart*

[29] Sharon Stewart was the sister of the respondent. She was helping the respondent in the premises in mid-September 2016 because she was due to take over the tenancy on 2 October 2016. She was in the premises on 25 September 2016; her brother the respondent was not. Her witness statement has some internal inconsistencies or confusion about whether a match was shown or whether they had the means to do so: she stated that she was working in the premises on the day in question and that the premises had a commercial contract with Scotsport, which "had been in place to show alternative games"; however, she also denied showing football games on 25 September. She suggested that if there were only ten people in the premises, she would not have risked showing "illegal broadcasts to that amount of customers".

[30] In cross, she accepted that the respondent was at the material time, and remained, the designated premises manager for the premises. As such, he was responsible under the Licensing (Scotland) Act 2005 ("the Act"). While she was being trained, he was the responsible person on 25 September 2016 in respect of the premises.

[31] She accepted that she was aware that Sky had accused her brother of showing a Sky match earlier that year. She also understood that the respondent had a contract in place with Scotsport at that time and had a device from them to play matches in the premises. She denied that when the device was used that there was any Sky Sport logo or any commentary.

[32] Her observation in her witness statement that, as she was aware of the earlier allegation, she was "being extra vigilant" to ensure that there was no such broadcast in the premises. However, she could not state what kind of logo, if any, there was for a Scotsport broadcast. She was not able to state what game was shown. She was not being "extra vigilant" in that sense. She then suggested that it was a foreign broadcast logo. She could not say which one. She was not really paying attention. She thought it was maybe a foreign language broadcast. She was not sure what language. She was very sure, however, that it was Scotsport that was used in order to play the game in the premises. She was adamant that this was not Sky Sports.

[33] It was put to her that Scotsport was not a legitimate way to broadcast Sky. Her position was that she broadcast whatever Scotsport gave her. She paid them; they gave her a box; she assumed it was ok. She accepted that the only way to air Sky Sports content was via a subscription with Sky, but her position was that perhaps Scotsport had a contract with Sky permitting this. She did not know. She was pressed several times. Her eventual position was that with Scotsport, she put the TV on, the football on, but she did not know whether Scotsport could legally show Sky content. She backtracked on her suggestion that the commentary of the football match played in the premises on 25 September 2016 was foreign. She was not sure. Most of the time, she played it with the sound down.

[34] It was put to her that her evidence kept changing. Her initial position had been that the broadcast was definitely not Sky and that there was a foreign commentary. Then she had said she was not sure about the language of the commentary. She stated that her position was that most times the commentary was foreign. Customers complained so she turned the sound down. It was put to her that she said she was being "extra vigilant" to ensure that there was no Sky Sport logo on 25 September. She retracted that

characterisation, stating that she was not being extra vigilant before she took over the premises (ie in early October 2016). Her position was that it could not be a Sky match because they did not have a Sky viewing card. She was pressed as to whether nonetheless there was a Sky Sports logo. She did not know; the TV was positioned above the bar; she was not sure as she was not paying much attention. The evidence of the two enquiry agents was put to her about the logo and the commentary: she said “they weren’t lying but they weren’t correct”. In respect of the commentary they had described hearing, she said that it might have been in English. The volume was down. The evidence about the 13 advertisers spoken to by the two enquiry agents and by Karen Anderson was put to her. She remained adamant that in the time she was in the premises that day Sky was not being broadcast. It was put to her that the two enquiry agents had had 30 minutes within which to observe what they had described in evidence. She then suggested that maybe she was away doing a stock check or on a lunch break. This would have been in the kitchen. It was put to her that she was lying: she denied this. She did not have a Sky viewing card and so could not have broadcast the AFC Match.

*Robert Stewart*

[35] Mr Stewart explained that his sister, Sharon Stewart, was due to take over running the premises from the third week of September 2016. He had been training her in various matters, including dealing with contracts with Scotsport and the electricity supplier. While she was not taking over the premises until 2 October, she took them over in practical sense by the beginning of the third week of September. He was not present in the premises on 25 September.



[36] Mr Stewart stated that there was only one box or device in the premises for broadcasting games, and this was a Scotsport box. The broadcasts were in a foreign language, with English subtitles, or one could push a button and the commentary would switch to English, at least most of the time.

[37] Mr Tariq began his cross-examination of Mr Stewart with the issue of whether or not he had received service of the Perpetual Interdict at the premises on 23 June 2016.

Mr Stewart accepted that as he was not in the premises on that date, he could not contradict evidence of the messengers-at-arms, Mr Fenwick or Mr Ferguson. He complained that they should have got a signature. He also accepted that he was not present on 25 September, so could not contradict the two inquiry agents, Mr Mackie or Mr Crookston. Mr Stewart's position was that they did not appear to know much about European football.

[38] The substance of their evidence - seeing the Sky logo, hearing the commentators and so on - was put to Mr Stewart. His first reply was that they would not know if what was broadcast was via Scotsport. When asked if, as he described, the commentary of a match was switched to English, would that be a Sky Sports broadcast, Mr Stewart was adamant that it would be a Scotsport broadcast. His position, repeated at several points in his cross-examination, was that the only device in the premises was incapable of showing Sky broadcasts or anything with a Sky logo. The evidence of the two inquiry agents was again put to him, but his position was that he did not know as he was not there on the day in question. He was adamant that it was impossible to show a Sky broadcast via the device in the premises. At other points in his evidence, his position was to suggest that if anything else was put on via the device, he was not in the premises on 25 September.

[39] It was put to him that the use of this device had prompted Sky to pursue him. He accepted that, but he explained that he had called Scotsport. They told him they would

contact Sky. He said they phoned him back 2 days later to say it was all sorted. It was put to him that he was not suggesting that the Scotsports device permitted him to watch Sky. Mr Stewart's position, which appeared to shift from his earlier adamant denial, was that he could watch football games, even if from Sky. However, under further questioning, his position reverted to the contention that it was impossible via the Scotsport box to play a Sky broadcast.

[40] He was questioned about the contract with Scotsport he had produced and the disclaimer. His position was that he broadcast what they provided, so they should be responsible. In his view, they were a registered company and so legitimate. He could play what they provided.

[41] Mr Stewart accepted the he knew it was wrong to broadcast Sky Sports or anything with a Sky logo. If the device in fact were capable of showing Sky Sports, he nonetheless accepted that it would be wrong to show such broadcasts without a Sky subscription. He was aware of the interdict, and so would not do that. He accepted that he had been aware from the early part of 2016 that it was wrong to broadcast Sky content without an agreement with them.

[42] When questioned about the service of the Summons initiating the Interdict Proceedings, his position was that he was not there; someone had impersonated his sister, whom he maintained had not been in the premises; that no member of staff had given him the papers and he had found them amongst the junk mail. When he had found the papers, he had contacted Scotsport to ask why Sky was taking him to court. They had said they would get in touch with Sky. He accepted that Scotsport had not told him he could watch Sky content via the Scotsport device; he knew that that was not allowed.

[43] The exchanges of April 2016 between him and the petitioners' agents, Burness Paull, were put to him. Among the agreed productions was his letter of 25 April 2016 to Burness Paull. This letter referred to correspondence dated 13 April 2016 from them, and it contained the assertion that all live sports shown in the premises were via European broadcasters. This included the match in January 2016 that formed the basis of the Interdict Proceedings. He initially denied or could not remember receiving a reply from Burness Paull dated 29 April 2016 ("the Burness Paull letter"). It was pointed out that that letter had been sent to his personal email, as well as to the premises. Again, Mr Stewart initially cavilled as to whether that was his email, but eventually accepted that it was at that time. Passages in the Burness Paull letter were put, including the reference to the Sky match said to have been broadcast in January, which was supported by an inquiry agent's report, and the contention that "it was beyond question there is a device within [the] premises that allows access to Sky Sports". Mr Stewart said that that was when he contacted Scotsport and that they were going back and forward with Sky. While he accepted that he was aware of the Interdict Proceedings by April, his position was that Scotsport had phoned Sky and everything had been "sorted".

[44] It was put to him that, notwithstanding what he had said about Scotsport, he knew from April 2016 that Sky were still pursuing him; that whatever device he was using, it was providing access to Sky games and yet he did nothing. He accepted this. He did not defend the Interdict Proceedings. This was either because the staff had not given him the paperwork or he could not recall. It was put to him that from his call to Scotsport he was aware there was a Sky action against him, but he did not check to see if matters were sorted. Mr Stewart could not recall. He did not know what happened. When he had received the Perpetual Interdict he had called Burness Paull in June 2016. In relation to service of the

Perpetual Interdict, and whether Mr Stewart was aware then that there was a judgment against him, Mr Stewart said he really did not know. He could not recall. He knew he “got some stuff” but he could not remember. He eventually accepted that he was aware that a judgment had been obtained against him, relating to the football game broadcast in the premises in January 2016.

[45] He accepted that by July or August 2016 he knew that the issue with Sky had not been resolved but that he did nothing about removing the Scotsport device. He did not remove it, he said, because it was legitimate. He accepted he did nothing, notwithstanding that he knew by then that the difficulty had arisen because of live sports played via the Scotsport device. It was put to him that this was a deliberate decision. Mr Stewart’s reply was that yes, it was. He did not know what he had done wrong or why Scotsport had not been taken to court. He had done nothing wrong and he was not going to remove the Scotsport device from the premises.

### **Submissions on behalf of the Petitioners**

#### *Introduction*

[46] Mr Tariq began by explaining that breach of interdict is a contempt of court, for which the court may inflict a penalty within its discretion. In *Gribben v Gribben* 1976 SLT 266 at 269, the court held that “a complaint of breach of interdict is a complaint of disobedience of a competent order of the court. Such disobedience constitutes contempt of court.” The proceedings are widely described as being as “quasi-criminal” in *Londono, Aldridge, Eady & Smith on Contempt* (5<sup>th</sup> ed.), paragraph 16-234. As Lord President (Inglis) explained in *Samuel Christie Miller v Bain* (1879) 6 R 1215 at 1216:

“in one sense a petition for breach of interdict is criminal proceeding. But one cannot help seeing that in many ways it is a civil proceeding. Civil interests are often largely concerned, and therefore it is often called a quasi-criminal proceeding.”

The standard of Proof is beyond reasonable doubt: *Gribbens v Gribbens* 1976 SLT 266 at 269.

[47] He identified the principal questions of fact for the court as follows:

1. Did messengers-at-arms execute valid service of the interlocutor dated 7 June 2016 granting, *inter alia*, Perpetual Interdict on the respondent on 23 June 2016?
2. Did the respondent show the AFC Match, made by the second petitioner and broadcast on the Sky Sports 5 channel, on television in the premises on 25 September 2016?

[48] He submitted that if the answers to those questions were in the affirmative, the court was invited to hold that the respondent had communicated the Works, referred to in the Summons, to the public on 25 September 2016 and in doing so, had breached the Perpetual Interdict pronounced by this court on 7 June 2016. If so, the respondent was in contempt of court.

#### *Challenging the Validity of the Perpetual Interdict Pronounced on 7 June 2016*

[49] Mr Tariq submitted that there was no basis in law (or the facts) to challenge the validity of the Perpetual Interdict pronounced on 7 June 2016. There has been no recall of the interdict or reduction of the court’s interlocutor of 7 June 2016. Service had been duly affected in accordance with the rules. Furthermore, the respondent handwritten to the petitioner’s agents on 25 April 2016 referring to “the correspondence dated 13<sup>th</sup> April 2016”. Accordingly, he was aware of the Summons and the certified copy interlocutor granting interim interdict in the Interdict Proceedings. This was sufficient to fix the respondent with knowledge of the Perpetual Interdict.

[50] Mr Tariq then turned to consider the mental element to establish a contempt of court.

The mental element in cases of breach of interdict turns on whether the existence of the interdict was known to the alleged contemnor. In addressing this question, the court has sometimes been ready to find constructive knowledge both of the existence of an interdict and its terms. He referred to *Londono, Aldridge, Eady & Smith on Contempt* (5<sup>th</sup> ed.), paragraph 16-226; and *Burn-Murdoch, Interdict in the Law of Scotland* (1986), at paragraph 447.

[51] There must be a “wilful” breach before proceedings may be taken. Under reference to paragraph 16-227 of *Londono, Aldridge, Eady & Smith on Contempt* (5<sup>th</sup> ed), Mr Tariq argued first, that it is of the essence of the offence that the relevant act should be deliberate, but only in the sense that it is not accidental, and secondly, that it was not necessary to demonstrate an additional element of either intention or foresight as to the consequences of any such breach for the administration of justice. He next referred to two cases. The case of *Muirhead v Douglas* 1979 SLT (Notes) 17 concerned a solicitor who had not been present in court when the case called. In the course of his Opinion, with which the Lord Justice General (Emslie) and Lord Johnston concurred, Lord Cameron stated (page 18):

“It would be undesirable in this case to endeavour to define the limits of conduct which may be held to constitute contempt of court. The variety and quality of the acts or omissions which in particular cases may fall within that description are not capable of precise delimitation or formulation. On the other hand it may be said that where there has been in fact a failure to obey or obtemper an order or requirement of a court such a failure demands satisfactory explanation and excuse, and in the absence of such may be held to constitute a contempt of court of varying degree of gravity. I can see no reason in principle and there is certainly none in authority, for an assertion that failure due to carelessness alone may in no circumstances constitute contempt of court. The question in my opinion is essentially one of fact and circumstances, in which the position and duties of the party alleged to be in contempt are necessarily material considerations.”

This passage was considered by the Inner House in *Beggs v Scottish Minister* 2005 1 SC 342 (at paragraph 30) where the court explained:

“It is clear that, in order to constitute contempt of court, conduct requires to be wilful and to show lack of respect or disregard for the court. It would not qualify as contempt if the conduct complained of was unintentional or accidental. What should be held to establish contempt plainly depends upon the nature of the case ... Where ... a person has been ordered, or has undertaken, that he will not do something, the very fact that he does so implies, on the face of it, a lack of respect for the order or undertaking, and hence for the authority of the court, as in *Muirhead v Douglas*.”

[52] In the present case, he argued there was no evidence that the showing of the AFC Match on television at the premises was accidental. The broadcast was denied. If the court finds that the respondent showed the AFC Match, the court was entitled to hold that there has been a breach of interdict and contempt of court. The existence of the court’s order was known to the respondent. There is no evidence of the steps that he took to comply with the court’s order. In the words of (*Muirhead v Douglas*) the respondent’s conduct demanded a “*satisfactory explanation and excuse*” but there was none in the circumstances of the case.

#### *The Responsibilities of the Designated Premises Manager*

[53] It was a matter of admission that (1) “the respondent was the designated premises manager of the premises in terms of the Act between 16 January 2016 and 16 January 2017” and (2) that “as the designated premises manager, the respondent was responsible for the day to day running of the premises”. He was also the tenant of the premises between 16 January 2016 and 26 September 2016”. In these circumstances, the respondent accepts on the facts that he was responsible for the day to day running of the premises. Under reference to the paragraph 164 of the Guidance issued by the Scottish Government for licensing boards, under section 142 of the Act, Mr Tariq urged that the designated premises manager bears the burden of responsibility for the day to day running of the premises. These responsibilities include instructing the staff in their duties. This formulation of the

designated premises manager's role has been accepted by the court in *British Sky Broadcasting Group Plc v Avalonbar Ltd* [2014] CSOH 39 at paragraph 11.

[54] Mr Tariq submitted that the respondent's witness statement and answers contained a remarkable series of circumstances for which the respondent accepted no responsibility.

Leaving aside issues of the credibility of his account, Mr Tariq commented on features of the respondent's own evidence, as follows:

(1) *Service of the Summons and certified copy interlocutor granting interim interdict on*

*13 April 2016*: the respondent stated in his witness statement:

"At the time the person who received the information did not give their real name for whatever reasons known to them as they had stated that their name was Sharon Stewart and gave Ms Stewart's mobile number"; and "I am still not aware of which member of staff received this information from the messengers-at-arms."

It was alleged that an unknown member of staff impersonated his sister to messengers-at-arms. The respondent further stated in his witness statement:

"This was brought to my attention a couple of weeks after a summons had been served on the premises on 13 April 2016 as the member of staff who had received the documentation had not brought it to my attention at the time ... Once I discovered the warrant documentation in the kitchen but not in the correspondence file approximately two weeks later, I immediately wrote to Burness Paull".

It was alleged that the unknown member of staff placed the documents in the kitchen but did not bring to the respondent's attention that there had been a visit from messengers-at-arms to the premises serving documents on the respondent. There is no explanation why the respondent did not discover the documentation in the kitchen for a number of weeks.

(2) *The respondent's letter of reply dated 25 April 2016*: the respondent stated in his

witness statement: "I then ended the correspondence with 'I trust for the reasons



detailed above that this matter is now at a close’.” The respondent’s response to the service of interim interdict on him was to assume that matters were not going to be progressed by the petitioners. He did not explain what steps, if any, he took to comply with the interim interdict. He did not, of course, enter appearance and defend the action.

- (3) *The petitioners’ agents’ letter of reply dated 29 April 2016:* the respondent alleged that he did not receive this letter. The respondent stated in his witness statement:

“I don’t think that it is unreasonable to assume that any such correspondence could have been misplaced or discarded by any member of staff working at that time as they were obviously not either contentious, reliable or honest”.

The letter of reply was posted to the premises. The respondent blamed members of staff for not bringing this letter to his attention. The respondent appeared to have overlooked that the same letter was sent by email to him. The respondent further stated in his witness statement: “As I received no further correspondence I assumed that the matter had been resolved”. The respondent’s approach was, Mr Tariq suggested, indicative of someone who was not troubled by a Summons being served on him. Once again, he did not explain what steps, if any, he took to comply with the interim interdict. He did defend the action. There was no suggestion that he wrote again to the petitioners’ agents to enquire about the status of the court proceedings against him.

- (4) *Service of the certified copy interlocutor granting perpetual interdict on 23 June 2016:* In his answers, the respondent averred:

“I did not employ anyone named Tracy Wallace at the time noted and there is no official paperwork in relation to employee records or tax return information to the contrary and therefore did not receive any interlocutor by anyone calling themselves by that name”.

In his notice of non-admission, the respondent stated:

“I did not employ anyone named Tracy Wallace at the time that the messengers-at-arms on 23 June 2016 when it was stated that a certified copy interlocutor was served. Tracy Wallace had previously worked as a part time bar maid on a casual basis employed by a previous leaseholder and not employed during my duration as a leaseholder. This name may have been given by someone else on the premises at the time to possibly protect their identity in case they were receiving any benefits at that time. I do not have any current contact address details for any of the casual staff who worked at the Village Inn previously”.

It was again alleged that an unknown member of staff impersonated a former member of staff to messengers-at-arms at the time of service of the certified copy interlocutor granting Perpetual Interdict.

(5) *The broadcast of a football match on 25 September 2016 at the Premises:* The respondent stated in his witness statement:

“Ms Stewart had assured me that no such game was shown and she had also taken on a contract with Scotsport Sat Ltd to continue to offer the customers the same viewing that had been shown throughout the previous year ... Ms Stewart was aware of the accusations that had been made by Sky plc in January 2016 and would have been extra vigilant to make sure that no-one would have been in a position of using any other type of technology to show any such game”.

Leaving aside the evidence of David Mackie and David Crookston of ID Inquiries about what was being shown on television screens at the premises on 25 September 2016, Mr Tariq suggested that it appeared to be that the sum of the respondent’s evidence was that he was in no position to say what was shown that day. He relied on the assurance received from his sister. However, Mr Tariq argued that the respondent was aware or ought to have been aware that the system used by him to broadcast football matches at the premises provided access to football matches that include the petitioners’ Works. It was for that

reason that the first proceedings were commenced against him. Mr Tariq submitted that, in the knowledge of interdict being obtained against him, the respondent continued to broadcast football matches at the premises via an alleged agreement with Scotsport. As the designated premises manager, he authorised his sister to continue to broadcast football matches at the premises via an alleged agreement with Scotsport. The evidence of David Mackie and David Crookston of ID Inquiries was clear. Regardless of what system was being used at the premises on 25 September 2016, the match being showed was the AFC Match in English commentary bearing the Sky Sports logos and other channel indicators.

(6) *The Designated Premises Manager's reliance on a lack of staff training and general*

*disorganisation:* The respondent stated in his witness statement:

“The casual part time staff were not trained nor organised in the office administration functions of the bar and merely placed incoming mail in piles in the back kitchen for me to collect”; and “I don’t think that it is unreasonable to assume that any such correspondence could have been misplaced or discarded by any member of staff working at that time as they were obviously not either contentious, reliable or honest”.

Mr Tariq argued that this attitude disregarded his responsibilities as the designated premises manager which included, *inter alia*, responsibility “for the day to day running of the premises”; responsibility for “the training and supervising of the staff”; and required the designated premises manager to be a “responsible person” who is “experienced in the supervision and training of staff and suitably qualified”. This was all in terms of 164 of The Scottish Government Guidance dated 4 April 2007, paragraph 164.

[55] In all these circumstances, Mr Tariq submitted that the respondent cannot rely on his own failures as the designated premises manager to avoid culpability for a breach of interdict and contempt of court.

*The Need for Reasonable Steps to Comply with the Court's Order*

[56] Mr Tariq turned to consider the conduct incumbent upon a person against whom a decree for interdict had passed. A party against whom interdict was served must, he said, take reasonable steps to ensure compliance with the court's order. This obligation arose as a breach of interdict can be committed not only directly but through others (he cited *Londono, Aldridge, Eady & Smith on Contempt* (5<sup>th</sup> ed.), paragraph 16-219, an authority for this proposition). Thus, in the context of companies, the court in *Beggs v Scottish Ministers* explained that:

"We consider that it is no reason why a similar approach should not be valid in Scotland where a servant or agent of a company unknowingly does the act which is prohibited by a court order which has been served on the company or by an undertaking which has been given by the company to the court. The company would have a duty to take all reasonable steps to ensure that the relevant servants or agents were made aware of the requirement to comply with the order or undertaking and did not forget, misunderstand or overlook the requirement. Where the order or undertaking has been breached as a result of a failure in that duty, the company should be held to have committed a contempt of court. This is only reasonable if the court order or undertaking is to be effective in maintaining the rule of law. We should add that the failure to comply with the order or undertaking should be treated prima facie as indicative of contempt. It is only right that it should be for the company to satisfy the court that it took all reasonable steps to ensure that the order or undertaking was complied with."

The same principles had been applied to designated premises managers on whom an interdict has been served. Thus, in *British Sky Broadcasting Group Plc v Avalonbar Ltd*, the court held:

"... it is clear that her role as the Designated Premises Manager of the Avalon Bar was to give instructions as to what could or could not be done by members of staff.

If they breached those instructions, that did not make her vicariously liable for their acts. The other hand, if she authorised the match to be shown live on television, and she did so knowing full well that that could only be achieved by showing it on a Sky channel, then she is responsible for the actions of the staff in acting with her authority, not by reason of the doctrine of vicarious liability but under ordinary principles of agency, because their actions, carried out with her authority, become her acts. As is made clear in section 16(2) of the 1988 Act, the act of infringement is carried out not only by showing the work without permission but also by authorising others to show the work. The terms on the interdict specifically prohibit the defenders 'by themselves or by their servants or agents ... or anyone acting on their behalf' showing the broadcasts ... When she was served with the interdict, she ought to have given instructions to her staff that the match was not to be shown. She failed to do so. She permitted the staff to continue to act under the previous authorisation to show the match and must take responsibility for that."

[57] Accordingly, the observations in *Begg v Scottish Ministers* that the failure to comply with an order of the court should be treated *prima facie* as indicative of contempt applied equally to the present case. It should be for the respondent to satisfy the court that he, as the designated premises manager and the individual against whom the interdict was directed, had taken all reasonable steps to ensure that the order would be complied with. This included, as the court noted in *British Sky Broadcasting Group Plc v Avalonbar Ltd*, giving instructions to the members of staff of what could and could not be done to comply with the terms of the interdict.

[58] However, Mr Tariq noted, there was no evidence that any instructions (or indeed any action) was taken to ensure compliance with the terms of the interdict after it had been served. In fact, the respondent's own evidence appeared to be that football matches continued to be broadcast at the premises after interdict had been served on the basis of the alleged agreement with Scotsport. By this time, the respondent was aware or ought to have been aware that the system used by him to broadcast football matches at the premises provided access to football matches that include the petitioners' Works. In these circumstances, no reasonable steps were taken to comply with the court's order.

*The Witnesses*

[59] Mr Tariq then turned to his submissions on the outcome of the witness led on Proof.

*David Mackie*

[60] David Mackie had undertaken *ad hoc* investigation work for ID Inquiries for around 20 months. He was formerly a Detective Inspector in the Strathclyde Police for 30 years. He was experienced in investigation work of this nature. He has been trained to do this type of work. He attended the premises with one purpose – to look for the Sky Sports logo on the television screen and to record his findings in a call report. Mr Tariq submitted that his evidence should be accepted as reliable and credible. The respondent failed to identify any motivation, reason or basis to explain why David Mackie is untruthful or mistaken about his evidence.

[61] In terms of David Mackie's evidence this was clear, detailed and specific. He attended the premises between 1.20pm and 1.54pm on 25 September 2016. He explained that the AFC Match was being shown on one screen at the premises. He sat no more than 3 metres from that screen. He had a "clear view" of that screen from where he was sitting. This witness described seeing or hearing the following: (1) He saw the Sky Sports 5 logo; (2) He saw the Sky Sports colour logo; (3) He saw the trophy wipe (which was a logo used by Sky when showing replays); (4) He saw the mini match (which is a Sky Sports advert for an upcoming match); (5) He heard English commentary; (6) He identified the commentators as Ian Crocker and Andy Walker who he recognised from Sky Sports broadcasts; and (7) He saw the half-time studio guests Neil McCann and Alex McLeish who he recognised. From this, the witness had concluded that Sky Sports was being shown at the premises.

[62] In respect of the suggestions made by the respondent's witnesses that the match was shown on a foreign broadcast, Mr Mackie's evidence was that this was "incorrect". He confirmed that

"due to the logos and studio guests I saw and the commentators I heard ... I have no doubt whatsoever that the Match was being shown on a Sky Sports broadcast and not a foreign channel".

He further identified the advertisements shown during the half-time interval, including advertisements for Sky Sports, that would not be shown on a foreign channel.

[63] In these circumstances, the court ought to conclude that there has been a breach of interdict based on David Mackie's evidence noted above. He has "no doubts" that the petitioners' Works were communicated to the public at the premises. There was no uncertainty or ambiguity in his evidence. His evidence was also corroborated by David Crookston.

*David Crookston*

[64] David Crookston had also undertaken *ad hoc* investigation work for ID Inquiries. He was formerly a police officer in Lothian and Borders Police for 30 years. He was experienced in investigation work and had been trained to do this type of work. He attended the premises with one purpose – to look for the Sky Sports logo on the television screen and to record his findings in a call report. Like David Mackie, this witness should be accepted as reliable and credible. Again, the respondent had failed to identify any motivation, reason or basis to explain why David Crookston was untruthful or mistaken about his evidence.

[65] Mr Tariq submitted that David Crookston's evidence was clear, detailed and specific. He knew the premises as he had visited the premises on around ten occasions. He saw the

AFC Match being shown on one screen at the premises. He had a “clear, unobstructed view” of that screen from where he was sitting. He was “100 per cent sure” that Sky Sports was being shown at the premises. He described the same features on those spoken to by David Mackie.

[66] He refuted the suggestion that the match was shown on a foreign broadcast. In his words:

“I am 100 per cent sure that the television screen was showing the Match on Sky Sports 5. This is because of the logos that I saw on the television ... The commentators that I heard during the broadcast of the Match and the guests in the studio at half-time in the Match, also confirm this”.

He also identified the advertisements shown during the half-time interval, including advertisements for Sky Sports, that would not be shown on a foreign channel.

[67] In these circumstances, the court ought to conclude that there has been a breach of interdict based on David Crookston’s evidence noted above. He was “100 per cent sure” that the petitioners’ Works were communicated to the public at the premises. There was no uncertainty or ambiguity in his evidence. His evidence was also corroborated by David Mackie.

*Scott Fenwick*

[68] Scott Fenwick is a messengers-at-arms. He has held this position at Stirling Park LLP for 13 years. He is experienced in serving court documents. He attended the premises with one purpose - to validly execute service of the documents. He had attended the premises with his colleague, Grant Ferguson, to serve the extract decree containing the Perpetual Interdict on 23 June 2016. When he entered the premises, there was a female behind the bar. She gave her name as Tracy Wallace. She explained that she was an employee at the



premises. He asked her if he could speak to the respondent. She explained that the respondent was not present. She agreed to accept service of the documents on behalf of the respondent. He therefore served the interdict on the respondent by leaving the documents with the employee calling herself Tracy Wallace at the premises at 3.55pm on 23 June 2016. His evidence should be accepted as reliable and credible. The respondent had failed to identify any motivation, reason or basis to explain why Scott Fenwick was untruthful or mistaken about his evidence. He had completed his job sheet in the car immediately after leaving the premises. He returned to the office and completed the certificate of execution and report on service. His evidence was also corroborated by Grant Ferguson.

[69] In these circumstances, the court should conclude that messengers-at-arms executed valid service of the interlocutor dated 7 June 2016 granting, *inter alia*, Perpetual Interdict on the respondent on 23 June 2016.

*Grant Ferguson*

[70] Grant Ferguson was a Sheriff Officer's Assistant. He had accompanied Scott Fenwick on 23 June 2016 to serve the extract decree containing the Perpetual Interdict on 23 June 2016. His evidence of what had taken place in the premises coincided with Scott Fenwick's evidence. When they entered the premises, there was a female behind the bar. She gave her name as Tracy Wallace when Scott Fenwick asked her if he could speak to the respondent, she had explained that the respondent was not present. She agreed to accept service of the documents on behalf of the respondent. Grant Ferguson witnessed Scott Fenwick serving the interdict on the respondent by leaving the documents with the person calling herself Tracy Wallace at the premises at 3.55pm on 23 June 2016. He signed the certificate of execution as a witness.

[71] In these circumstances, the court should conclude that messengers-at-arms executed valid service of the interlocutor dated 7 June 2016 granting, *inter alia*, Perpetual Interdict on the respondent on 23 June 2016.

*Karen Anderson*

[72] Karen Anderson was employed by the second petitioner as a Commercial Policing Operations Executive. Her evidence should be accepted as reliable and credible. Her evidence about Sky 's group structure, the technical services offered by Sky, the viewing cards; the distinction between domestic and commercial viewing cards, the presence of Sky "Bug", and the creation and ownership of the copyright in the Works was all agreed in terms of the Joint Minute of admissions and response to the notice to admit. Her witness statement recorded the case history of the Interdict Proceedings including, the breach of copyright on 17 January 2016, the obtaining of interim interdict on 13 April 2016; the service of interim interdict on 13 April 2016, the exchange of correspondence between the petitioners' agents and the respondent on 25 and 29 April 2016, the obtaining of decree on 7 June 2016, and service of the extract decree on 23 June 2016. These were background facts that the respondent had refused to agree. However, Mr Tariq submitted that a disagreement with these facts (with the exception of service of the decree on 23 June 2016), which went to the knowledge, cannot form the basis of a defence to the proceedings for breach of interdict and contempt of court. In her witness statement Karen Anderson also confirmed that the advertisements noted by David Mackie and David Crookston during the half-time interval of the broadcast were shown during the broadcast of the Aberdeen FC v Rangers FC match on the Sky Sports 5 channel on 25 September 2016 and in the same order as they described.

[73] In relation to the respondent's apparent reliance on a contract with Scotsport, Karen Anderson refuted the suggestion that broadcasts of football matches communicating the petitioners' Works could be shown via a subscription with Scotsport. This was because the only legitimate way for a licensed premises such as the premises to show Sky Sports broadcasts was through a commercial subscription agreement. There is no business relationship between Sky and Scotsport. Scotsport did not have rights to show Sky Sports broadcasts. She also noted the substantial difference in subscription fees for an agreement with Sky and one with Scotsport. The respondent stated that he paid £300 per month to Scotsport. However, he had previously signed up to a commercial subscription agreement with Sky. It was agreed that he had entered into an agreement with Sky for the premises on 21 May 2014 which was cancelled on 29 June 2014 for non-payment of fees. Sharon Stewart entered into an agreement with Sky for the premises on 19 March 2017. Under this agreement, the monthly payment for the premises is £612.33 plus VAT. The sum the respondent allegedly was paying to Scotsport was roughly half the sum that he would have paid to Sky for a commercial subscription agreement.

[74] In relation to the suggestion that the AFC Match was shown on a foreign broadcast, she explained that Sky had exclusive rights to broadcast the match in the UK. Sky's broadcast would include its logos. She explained that the Premier League might sell the rights to the same match to foreign broadcasters, although this would not include the petitioners' Works. She confirmed that Sky had no relationship with Trans World International or any Norwegian broadcasters.

[75] Mr Tariq submitted that her evidence should be accepted as credible and reliable. She was able to assist the court on the relationship between Sky and other broadcasters. The respondent, on the other hand, has provided no credible basis to refute that evidence. In

these circumstances, the court should reject any suggestion that the broadcast of the AFC Match at the premises on 25 March 2016 was legitimate (in the sense that it did not infringe the petitioners' copyright) and/or did not breach the terms of the interdict. The broadcast featured, *inter alia*, the Sky Sports logos and other channel identifiers such as the trophy wipe. It included the advertisements that were shown on Sky Sports 5; it had English commentary; and it featured commentators and studio guests who were known to feature on Sky Sports broadcasts.

[76] Mr Tariq then turned to consider the respondent's witnesses.

*Robert Stewart*

[77] Mr Tariq began noting that although the respondent advanced several defences to the proceedings for breach of interdict and contempt of court, he did not in fact refute what has been said by the petitioners' witnesses. He was not present when the interdict was served on 23 June 2016 (thus he was in no position to dispute the accounts of Scott Fenwick and Grant Ferguson); he was not present when the breach of interdict occurred on 25 September 2016 (thus he was in no position to dispute the accounts of David Mackie and David Crookston); and he was in no position to assist the court on the relationship between Sky and Scotsport and other broadcasters (thus he was no position to dispute the evidence of Karen Anderson). Where there is any disagreement between the respondent and the petitioners' witnesses, their evidence should be preferred over his.

[78] Mr Tariq submitted that the respondent had attempted to distance himself from the matters of this complaint. This drew attention to the following aspects of the respondent's account:

- (1) the respondent said he was not aware that interim interdict was served on him on 13 April 2016 for a couple of weeks;
- (2) a member of staff impersonated his sister;
- (3) the court documents addressed to him were left in the kitchen and not brought to his attention;
- (4) he did not receive the letter from the petitioners' agents dated 29 April 2016 that was posted to the premises;
- (5) he assumed that a member of staff discarded or misplaced the letter dated 29 April 2016;
- (6) he overlooked that the same letter had been emailed to him;
- (7) he assumed that because no reply was received to his letter dated 25 April 2016, the matter of court proceedings (and the interim interdict taken against him) had been resolved;
- (8) he was not aware that Perpetual Interdict was served on him on 23 June 2016;
- (9) another member of his staff impersonated Tracy Wallace; and
- (10) no member of staff brought the court documents addressed to him to his attention.

Mr Tariq suggested that individual aspects of this account were doubtful. If read together, the whole account was entirely fanciful and wholly incredible. In these circumstances, the petitioners invite the court to find the respondent to be an unreliable and incredible witness. Even if the court was to believe this account, it still provides no answer to the fact that he cannot rely on his own failures as the designated premises manager to avoid culpability for a breach of interdict and contempt of court.

*Sharon Stewart*

[79] Sharon Stewart was the sister of the respondent. She was involved in the running of the premises. She previously worked there part-time and was now the tenant and operator of the premises. She is not a party to these proceedings but she has played an active role in assisting the respondent in these proceedings. There was a suggestion that, while the respondent remained the designated premises manager as at 25 September 2016, Sharon Stewart was working most of the week in which the breach was committed in preparation for taking over the lease. She explained (in her witness statement) that:

“I was on the premises from 19 September 2016 until the beginning of my leasehold in order that I received the necessary training required under the Licensing (Scotland) Act 2005 and additional training to cover the complete operations and management of running the premises including the stock order, cellar control and contract management”.

However, Mr Tariq submitted that this did not absolve the respondent of his responsibilities as the designated premises manager. Further, it appeared that it would have been the respondent who was providing the training and, as such, he was also present at the premises during that week.

[80] Mr Tariq submitted that Sharon Stewart was not a credible and reliable witness. In her witness statement, she explained that she was working at the premises on 25 September 2016. In reference to the AFC Match on 25 September 2016, she said “this football game was not broadcast on the premises and a commercial contract with Scotsport Sat Ltd had been in place to show alternative games”. She denied “showing any such football games”, and she was being “extra vigilant to ensure no such broadcasting was shown by any other method by anyone on the premises”. If the court were to believe the evidence of Sharon Stewart, who was the sister of the respondent, it would have to disbelieve the evidence of David Mackie and David Crookston. Both had 30 years’ experience as police officers,

latterly serving as respectively, Detective Inspector and Detective Constable. Both were experienced in investigatory work of this nature. Both had no reason to be untruthful. She had an obvious personal interest in the matter. The respondent is her brother. This is a serious allegation made against him. As a consequence where there was any disagreement between Sharon Stewart and the petitioners' witnesses, their evidence should be preferred over hers.

### *Conclusion*

[81] The petitioners invite the court to find that the respondent has communicated the Works, referred to in the Summons, to the public on 25 September 2016 and in doing so, has breached the interdict pronounced by this court on 7 June 2016 and is in contempt of court.

### *Submission Relevant to Disposal*

[82] In that event, the case should then be continued to a hearing on the question of what punishment the court should impose on the respondent. The respondent should be ordained to appear at that hearing. If the court wishes to deal with sentencing at the end of the Proof, the petitioners invite the court to consider the following matters:

- (i) The conduct of the respondent throughout these proceedings. A review of the court's interlocutors in the process will show a series of failures to comply with court orders. The most recent example before this court was the failure to lodge witness statements in accordance with the court's interlocutor and ignoring the numerous correspondence sent by the petitioners' agents requesting witness statements and productions.

(ii) The breach was not admitted at an early stage. Most breaches of interdict and contempt of court proceedings raised by the petitioners result in the breach being admitted and an imposition of a court fine, on the basis of the clear evidence of the breach supported by the call reports of ID Inquiries investigators. If the petitioners are successful at Proof, there is a likelihood that the respondent and/or his witness has been untruthful in evidence under oath and put the petitioners to substantial time and expense in policing their intellectual property rights and the court's order.

(iii) The disposals granted in other breach of interdict and contempt of court proceedings include:

- (a) *British Sky Broadcasting Group Plc v Avalonbar Ltd (A496/13)* - the court pronounced a fine of £5,000 against the first defender and £2,000 against the second defender following Proof on the breach of interdict and contempt of court;
- (b) *British Sky Broadcasting Group Plc v SMJS (Muirhead) Ltd (A526/14)* - the court pronounced a fine of £1,500 against the first defender and £700 against the second defender after the breach was admitted without the need for Proof;
- (c) *British Sky Broadcasting Group Plc v Revels Sports Bar (A637/14)* - the court pronounced a fine of £1,750 against the first defender and £1,000 against the second defender after the breach was admitted without the need for Proof; and



(d) *Sky Plc v D.E.M. Diam Ltd* (A761/15) - the court pronounced a fine of £2,000 against the first defender and £750 against the second defender after the breach was admitted without the need for Proof.

(iv) The respondent's offence is not to show one football match but a disobedience of the court's order and authority.

(v) The need for any disposal to be an adequate deterrence to others. There is a high number of interdicts obtained by the petitioners from this court that end up in further proceedings for breach of interdict and contempt of court. Statistics shows that almost 30% of these interdicts end up with further proceedings before this court.

(vi) The respondent is in the process of being sequestered for outstanding sums due to the petitioners from the first proceedings but he is opposing his sequestration. The petitioners are likely to be left substantially out-of-pocket as a result of the previous unsatisfied decree and the expenses of policing its rights and the court's order in these proceedings.

## **Discussion**

### *The Credibility and Reliability of Witnesses and Determination of Principal Issue of Fact*

[83] Reduced to its essentials, the stark difference between the parties is whether the football game admittedly broadcast via the device in the premises on 25 September 2016 was a Sky match, as Sky contend, or it was not, as the respondent maintains. Both parties cannot be right and so it is appropriate that I determine that issue having regard to issues of credibility and reliability.

[84] Mr Tariq invited the court to find Sharon Stewart and Robert Stewart lacking in credibility and reliability for the reasons he identified. I accept that submission.

Sharon Stewart was, in my view, completely lacking in credibility. In her oral evidence she changed her position several times in relation to what was shown and whether the match being broadcast was in English or in a foreign language. The problem with the latter explanation is that she had also stated that foreign-language broadcasts had prompted complaints from customers, so the sound would be turned down. In these circumstances, there would be nothing for the inquiry agents to hear. She then retreated to the position of not knowing or recalling what was broadcast. When pressed in cross about the import of what the enquiry agents had seen and (importantly, in this context) heard, namely the English - speaking Sky commentators, her position changed again to suggest that she might have been doing a stock check or taking a lunch break in the premises' kitchen. Furthermore, these passages in her oral evidence were at variance with the adamant position she had adopted in her witness statement and that she was being "extra vigilant" - a characterisation she expressly retracted in cross, either because she wasn't being "extra vigilant" about the subject-matter of the question, or that she was not being "extra vigilant" until she took over in early October 2016.

[85] I also note that in her witness statement, after noting that there were only ten members of the public in the premises on 25 September, she stated: "I think it is reasonable that I would not have shown **illegal broadcasting** to that amount of customers ...". While this was offered as an exculpatory statement, the words I have highlighted in bold indicate that she well knew that broadcasting Sky content was illegal. It is also highly suggestive that she was aware of the capacity to do so via the device in the premises. It was just that, as she suggested, it was not worth running the risk for only ten people. The critical point, in

this context, is that it was implicit in this passage that by using the device available in the premise she was capable of running that risk.

[86] She was wholly incredible and I place no reliance on her evidence.

[87] In relation to the reliability or credibility of Robert Stewart's evidence, there is also a basis for grave concern. In his answers he denied receiving service of either the Summons initiating the Interdict Proceedings or the certified copy interlocutor granting Perpetual Interdict. However, in his oral evidence he was driven to accepting that he had received service on both occasions. Leaving aside the improbability of a person impersonating his sister on the first occasion of service or of a person impersonating a named employee on the second occasion (explanations that emerged in his written witness statement), his denial of receipt of notice of the Summons is contradicted by the terms of the April exchanges. Again, while his position was initially to deny receipt of the Burness Paull letter, this became untenable when it was pointed out that he had replied to their letter of 13 April by his own letter of 25 April and, further, that Burness Paull's reply had been sent to his personal email as well as by post.

[88] Mr Stewart's evidence was also troublingly inconsistent when it came to whether or not the Scotsport device was capable of broadcasting Sky content, especially Sky Sport football games. The position advanced in his answers was that whatever was broadcast was via European broadcasters. He repeated this contention in his letter to Burness Paull of 25 April 2016. In his oral evidence, though, he appeared to start with this as an explanation. However, he could not plausibly explain how a foreign broadcast could be switched at the press of a button to an English language broadcast, without this becoming a Sky Sport broadcast (if it were a match for which Sky had exclusive rights in the UK). This explanation then gave way to the chapter of evidence about his contract with Scotsport.

[89] His position about Scotsport was also problematic. On the one hand, he maintained that it was impossible to broadcast Sky content via the device supplied by Scotsport. On the other hand, he gave evidence about a call made to Scotsport and a call they made back to him a few days later, to the effect that it was “all sorted”. The critical difficulty for Mr Stewart with this chapter of his evidence is that, if the first contention were correct (that it was not possible to broadcast Sky content via the Scotsport device), then he would not need to rely on them to sort anything. There would not be anything for Scotsport “to sort”. Conversely, he would only need to invoke Scotsport’s assistance if the device was capable of showing Sky content. This would mean that the first contention was incorrect. When this difficulty was put to him in the course of his submissions for him to offer an explanation, he was unable to do so. As I understood him, he ultimately plumed for the first proposition that it was not possible to show Sky content, albeit his answer was to ask rhetorically why he would show it when he had only 5 days left before his sister took over the running of the premises. That answer, however, echoes Sharon Stewart’s purportedly exculpatory statement, discussed above. Implicit in his response was the prospect that Sky content could be accessed, it is just that it was not worth running that risk just a few days before Sharon Stewart took over. The fact that both Sharon Stewart and Robert Stewart both referred to the possibility of running this risk is striking, even if they offered different reasons for choosing not to run the risk on that occasion. The risk could not arise, if Robert Stewart were correct in his first contention that the device was incapable of broadcasting any Sky content.

[90] Having regard to the foregoing, I find the evidence of Sharon Stewart and Robert Stewart to be wholly lacking in credibility. I place no reliance on their evidence, to

the extent that it is inconsistent with or contradicted by other evidence or material placed before me.

[91] Turning to the petitioner's witnesses, I accept the submission that they were credible and reliable. I accept their evidence without qualification. The evidence of the two enquiry agents was particularly compelling. Their evidence was clear and cogent, and corroborated each other. Further, there was the striking overlap between their identification of the names of the advertisers, whom they had identified, and the order in which the Sky advertisements had appeared, and Karen Anderson's evidence derived from the advertisement log. I also accept her evidence on the technical matters, the exclusivity of the rights Sky enjoys for broadcasts within the UK and that Sky do not enter into any licence or contact arrangements that would have enabled a third party lawfully to broadcast Sky's sport content in the UK. Having regard to all of this evidence, I find it proved beyond reasonable doubt that the football game broadcast in the premises on 25 September 2016 was a Sky match and one containing those elements of the Works spoken to by Mr Mackie and Mr Crookston. There is, accordingly, breach of the Perpetual Interdict. It does not necessarily follow, however, that this constitutes a contempt of court. The next question that arises is whether that breach constitutes a contempt of court.

*Whether the Breach Constitutes Contempt of Court*

[92] I accept Mr Tariq's submissions as a careful and full exposition of the law. Mr Stewart did not take issue with any feature of them. It was not suggested that the broadcast of the AFC Match was accidental or inadvertent. Accordingly, in respect of the test to be applied, I proceed on the basis (1) that there must be a wilful breach of the Perpetual Interdict on the part of the respondent, in the sense of a breach that was not

accidental, and (2) that where a breach of a court order is shown, that failure demands a satisfactory explanation and excuse, which failing the court may find there to be a contempt of court.

[93] On the evidence, it is clear that the respondent was aware of Sky's intentions to pursue him for an alleged breach of its copyright in the Works by April 2016. He also knew at that stage that the Interdict Proceedings were based on the alleged broadcast made via a device in the premises. This could only be the Scotsport device the respondent received from them, as this was the only device in the premises. In his exchanges with Sky, he had asserted that broadcast had been via a European broadcaster. It was around this time, too, that he said he had invoked the assistance of Scotsport Limited. However, by the time that the Perpetual Interdict was granted and he became aware of it (which he accepted was by no later than late June or July 2016), the respondent knew or ought to have known that those explanations had not been accepted in respect of his use of the ScotSport device to play live broadcasts of football games. He knew or ought to have known that Sky asserted its rights to the Works and that Sky had obtained a court judgement, namely the Perpetual Interdict to protect those rights. Further, he knew or ought to have known that Sky's rights in the Works had been infringed by his use of the Scotsport device in the premises.

[94] Notwithstanding this state of knowledge, the respondent made no changes to his commercial arrangements. There is no suggestion that he had taken any steps to instruct staff working in the premises as to the more limited use to be made of the device, to ensure that there was no breach of the Perpetual Interdict. There is no suggestion that he put in place any other system, apart from training, to ensure that any use of the device would be in a manner compliant with the Perpetual Interdict. Indeed, this failure is in my view all the more culpable given that he had said he had been training his sister in management of the

premises during the first 2 weeks of September; that she had also made reference to this training; and to the fact that this had extended to dealing with the Scotsport contract, but that nonetheless he did not give her any instructions to ensure that any use of the device was in accordance with the Perpetual Interdict. At times, the respondent sought to deflect responsibility: he had not received service of the Summons or the Perpetual Interdict; he was not in the premises on 25 September 2016; if the decision was taken to broadcast a match on 25 September, he was not there and this was not his responsibility. However, in his evidence the respondent did accept that as the designated premises manager at the material time he was responsible for what took place in the premises, even if he was not present. He is responsible in law for the broadcast of the AFC Match in the premises that took place in his absence.

[95] In my view, the respondent was fully aware of the fact that any further use of the Scotsport device to show live broadcasts of football matches in the UK entailed taking a risk of further breaching Sky's rights in the Works, in disregard of the Perpetual Interdict. He took no steps to avert that risk or to ensure that if the device were used for the broadcast of live football matches that it would be done in such a manner as to obtemper the Perpetual Interdict. I find it established beyond reasonable doubt that this was a wilful breach of the court's earlier order and constitutes a contempt of court.

### **Disposal**

[96] In the light of my finding, I shall put the case out By Order on Thursday 16 November 2017 at 10am to consider the appropriate disposal, to consider what further information should be provided to the court in relation to any proposed disposal, and to afford the respondent an opportunity to address the court on these matters.