OUTER HOUSE, COURT OF SESSION

[2025] CSOH 81

A270/21

OPINION OF LADY HALDANE

In the cause

MARTIN MCGOWAN

Pursuer

against

SPRINGFIELD PROPERTIES PLC

Defender

Pursuer: Dunlop KC Dean of Faculty, Welsh; Horwich Farrelly Solicitors
Defender: Webster KC, Crabb; Davidson Chalmers Stewart LLP

26 August 2025

Introduction

[1] The pursuer in this action is Martin McGowan. The defender is a house building company. The present proceedings are an action for damages for wrongful interdict. The proof was restricted to the question of causation and quantum of damages only, in terms of a decision of the Inner house (the appeal court) dated 20 August 2024. The proof took place over 4 days, with five witnesses being led for the pursuer, and four for the defender. Submissions were presented over the course of half a day, the week following the conclusion of the evidence.

Background

[2] In order to set the context for the present proceedings, it is necessary to understand the circumstances giving rise to the dispute. The pursuer has for most of his working life been involved in providing teams of men to carry out groundworks for various companies, such as Scottish Power, McAlpine and the defender. He operated his business through a number of limited company vehicles. The defender engaged the pursuer's services, contracting through one or other of his companies, over a period of years, at various sites it operated in Scotland.

[3] Relations between the parties soured when the pursuer began raising health and safety concerns with the defender, notably around the presence of asbestos on certain of their sites. He did this by way of direct communication, letter, email and text over a period of some months. He asserted, put very shortly, that the defender had known about the presence of asbestos, had done nothing about it, and had allowed men, including the pursuer's teams, to work on sites contaminated with asbestos. No suitable PPE for working in the presence of asbestos was provided to those working on the sites. Matters came to a head when the pursuer emailed the defender on 1 February 2016 repeating these concerns. Concerns were raised separately by certain of the pursuer's employees with the health and Safety Executive, who began an investigation. The defender raised proceedings for interdict and interim interdict founding on the allegations made by the pursuer, which they asserted were untrue and defamatory. Interim interdict was pronounced on an ex parte basis on 5 February 2016.

[4] In around October 2020, the defender was prosecuted and pled guilty to certain Health and Safety offences relating to the presence of asbestos on certain of their sites. They received a fine in respect of those offences. Shortly thereafter the pursuer lodged with the

court in the action for Interdict a number of documents he asserted demonstrated that the sting of the allegations that he had made were true. In May 2021, some 5 years after the interim interdict had been pronounced, it was recalled of consent and a joint minute entered into in terms of which the pursuer was granted decree of absolvitor in his favour.

[5] Thereafter the pursuer raised the present proceedings later in 2021 seeking damages for the consequences of the wrongful interdict. The action came before the court for a Procedure Roll Debate (a hearing on legal arguments only) when the defender argued that the action was time barred. The Lord Ordinary rejected that argument but also held that the uncontested decree of absolvitor did not relieve the pursuer of the obligation of proving that the interim interdict was wrongful.

[6] Both parties appealed that decision, and on 20 August 2024 the Inner House held, firstly, that the action was not time barred, and further that the granting of a decree of absolvitor in the pursuer's favour was conclusive of the fact that the interim interdict had been wrongful. The court's determination on that second aspect of matters, to be precise, was as follows:

> "[9] Mr McGowan was successful in his resistance to Springfield's action. He was granted decree of absolvitor. It makes no difference that this was because Springfield agreed to it. It is a final determination of the merits of the action and is res judicata as between the parties; in other words the matter cannot be re-litigated."

On that basis the court allowed Mr McGowan a proof, restricted to the questions of causation and quantum of damages only.

[7] The pursuer seeks damages under four heads; (i) distress, anxiety and inconvenience, (ii) damage to reputation, (iii) loss of earnings and (iv) loss of employability. The defender's primary position is that the pursuer has suffered no loss as a result of the wrongful interdict. They also argued that if any loss had been suffered by the pursuer that

had been caused by the pursuer's own actions and, that the pursuer had in any event failed to mitigate any losses suffered by failing to seek early recall of the interim interdict. Finally, and in any event, the defender argued that the sum sued for is excessive.

[8] The pursuer led evidence from his wife, Ruth McGowan, his son, Mark McGowan, Charles Ruddy, who worked at the relevant time with McNicholas Construction, and David Bell, a forensic accountant, as well as giving evidence himself. The defender led evidence from David Beaty and Gary Dunleavy, both employees of McNicholas Construction at the time the interim interdict was pronounced, Andrew Todd, the in house solicitor for the defender in 2016 and Adrian Petticrew, another former employee of McNicholas Construction in around 2016. Although for the most part, the general credibility of the witnesses was not seriously challenged, that was not the case with the pursuer and Mr Ruddy, both of whom were suggested to be incredible and unreliable by the defender. The pursuer, for his part, was critical of the evidence given by Mr Todd, and, to an extent, Mr Petticrew, although the criticism of Mr Petticrew's evidence lay more in its inconsistency with other evidence, and the failure to put his position to others who might have been well placed to comment upon it, rather than a direct suggestion that he was fundamentally incredible. I deal with these issues in more detail below.

The evidence for the pursuer

Martin McGowan (63)

[9] The pursuer was the first witness. Mr McGowan explained that having started working on the roads at the age of 15 he had gone on to start his own company supplying labour to larger companies for groundworks, excavations for cabling and the like. He worked with, among other companies, RJ McLeod and Scottish Power. He was then

approached by the contracts manager for the defender at the time who brought the pursuer on to a site at Braehead that was being developed. The pursuer was then given more and more work by the defender until he had about 70 men working on their sites, including one at Milton of Campsie, which featured specifically at points in the course of this proof. He was proud of the fact that during the time he and his men were working for the defender they were awarded "Housebuilder of the Year."

[10] As he was becoming more successful the pursuer began involving family members in his various company vehicles. In particular he brought his daughter and two of his sons into the business as he told them he could offer them a lot of work as he was being brought into more and more contracts because of the reputation he was building. Although the pursuer accepted that he had set up a number of limited company vehicles to run various contracts, he was vague on matters such as who the directors of each company were, and which of his family members held shares in each. It was clear that, whatever the strict legal position, the pursuer simply viewed these all as "his companies". When he came across paperwork indicating the presence of asbestos in certain of the defender's sites he was clear that all he wanted to achieve was to "get something done about it". Instead, the next he knew he had been served with an interim interdict prohibiting him from speaking about such matters. The pursuer described himself as feeling "let down" by the defender. He considered that he had been integral to them developing successfully over a period of 2 years and that it would have taken "five minutes" to speak to him about the paperwork he had discovered. He tried to make contact with various people at the defender and did in fact speak to their in house lawyer, Mr Todd. His motivation throughout, he insisted, was trying to get the defender to take responsibility for what they did. His workers included his own son who he was concerned might have been taking home asbestos to his house where

he had a new-born child. The inability to speak about why his relationship with Springfield had come to an end, or what were the issues underlying the interim interdict resulted in the breakdown of what had been a close family unit, with his older three children all refusing to speak to him or allow him to see his grandchildren. Only recently had relations begun to improve.

[11] The pursuer described the financial effect the interdict being in place had on him and his family. He and his wife had cashed in their respective pensions and he had been forced to rely on friends as well to help him fund the litigation process. He tended not to go out socially now. He was concerned about the reception he might face if he came across any of the men he used to work with and so preferred just to focus on work. He no longer ran his own businesses but rather worked as an employee for a construction company. The pursuer considered that his reputation had been damaged in the industry and cited (un-named) examples of companies indicating that they were not prepared to give work to him but that they might consider contracting with a company in the name of either his wife or his son. The pursuer was clearly aggrieved that his reputation and all he had worked for since leaving school had been damaged when he was "just telling the truth."

[12] Mr McGowan described a particular project he said he would have worked on had it not been for the interdict being in place. This was a project in York ("the York project"), the overall aim of which was to deliver widescale fibre optic cable installation to homes in the city. The main contractor was McNicholas Construction and the pursuer had a contact at that company, Charles Ruddy. Mr Ruddy knew of the pursuer and his work from contracts carried out by the pursuer for Scottish Power. Mr Ruddy was looking for sub-contractors to carry out groundwork for cable installation at the York site. He sent a letter to the pursuer dated 28 February 2016 bearing to be an offer to the pursuer, or more accurately, to his

company Rumarc Utilities Ltd, to quote a price for sub contract work on the project. The value of the project was said, in the letter, to be £8.2 million. The letter bore the signatures of Gary Dunleavy, David Beaty and Charles Ruddy, all of McNicholas Construction Services Limited. Amongst other matters, the letter contained a requirement that Rumarc Utilities Limited confirm that neither the company nor its directors had ever been convicted of any offences listed, committed any act of misconduct, or been guilty of serious misrepresentation in providing any information required "under this regulation."

[13] The pursuer confirmed receipt of that letter and also confirmed he had responded to that offer by letter dated 2 March 2016 advising his willingness to be involved and to complete the required contract documentation. However on 11 March 2016 the pursuer wrote again to Mr Ruddy, referring to the terms and conditions in the original offer letter and advising him that he had been "served an interdict by court order", that he believed it to have been wrongfully obtained, and that he was challenging the accusations. He hoped that this would not affect the working partnership. Mr Ruddy responded on 18 March recognising the pursuer's "transparency" but withdrawing the offer until such time as the interdict was lifted.

[14] The pursuer's position was that had it not been for the interdict, he would have had his prices for the sub contract work accepted, and the loss of the "York contract" as will be discussed below, was the substantial part of the pursuer's claim for loss of earnings said to be caused by the existence of the wrongful interdict. He was confident he would have been awarded the contract based on his reputation and his relationship with Mr Ruddy. He was used to contracts being awarded to him "on a handshake." In any event he would have had other opportunities for work based on his reputation and relationships with companies for whom he had worked previously. In addition, once word of the interdict got around, other

companies who had previously worked with him no longer wished to do so. The pursuer's explanation for that was that they were worried that if he had spoken out about the defender, then he might do the same to him.

[15] The pursuer was challenged in cross-examination on all aspects of his claim. He was referred to HMRC income schedules which had been produced and which indicated that the pursuer had in fact earned more by way of earned income in the year after the interdict had been obtained than in the tax year before that. The pursuer's position in relation to all financial matters was that his wife dealt with everything, and he simply took a wage from the contracts which he had won and which were performed through various corporate vehicles. He was unable to say from memory if he had been a shareholder and if so in what companies. He was willing to accept that if the documents had come from HMRC they would be accurate. The pursuer was asked why he had no employers recorded in 2020/2021, which he explained by saying that by that stage the whole fact of the interdict and its effect had got to him, and he was sitting in the house for long periods of time. He could not go to work in case he came across people he had previously worked with. He was not willing to accept that the real reason behind the lack of recorded income was more to do with the Covid pandemic at the time.

[16] The pursuer was asked about the York contract. Mr Webster began this chapter of cross-examination by suggesting it would be unusual to be offered a big contract of this size without a tendering process. The pursuer disagreed. He did not generally submit tenders for this sort of work; a price per metre for the sort of duct and tract work together with reinstatement and the like that would be required on this sort of project would be proposed instead and said he had often done deals of this size "on a handshake."

[17] Moving on from that matter, it was put to the pursuer that if he had sought to have the interdict recalled he could have contacted Mr Ruddy and re-established his involvement in the York contract. The pursuer did not deal with this suggestion head on but reiterated that because of the interdict he had had to go through all that he had described, and that there were many more jobs he could have gone for had it not been for the interdict being in place. He had chosen to work with Mr Ruddy because he knew him and knew that he would get paid every week on that contract, unlike some other projects in which he had worked. The pursuer explained he had a good relationship with Mr Ruddy, they had a shared interest in football and had worked together in the past. He was confident he would have been awarded the York contract and the value of the contract was not unusual to him. At that time for example he had been billing other employers £8000 per week on contracts for them.

[18] More generally, the pursuer was challenged to the effect that he could have done more to mitigate his loss by seeking recall of the interim interdict at an earlier stage. The information that he had shared with the Health and Safety Executive and which he had put in writing to the defender was all in his hands at that time the interdict had been sought. It was put to the pursuer that he could at any time have used that to found a motion for recall.

[19] The pursuer resisted that proposition. At all times all he had wanted was to tell the truth about what was happening. He had been told in the court order he was not allowed to talk about these things so he had done what he was told. The pursuer was asked about a conversation with Andrew Todd, the in house solicitor at the defender, who had secretly recorded a telephone call with the pursuer. Other than expressing surprise that the call was recorded, the pursuer did not demur from the contents of the transcript prepared by

Mr Todd, which related to a discussion about who might have been sending letters about the subject matter of the interdict both to the pursuer and to the defender. The pursuer was also asked about a face-to-face meeting with Mr Todd but he denied ever attending such a meeting. He said that Mr Todd's note of the meeting, including describing a conversation about an issue with a fuel tank at a site in Uddingston, suggested it was not true and the only issue with a fuel tank that he knew of related to a site in Edinburgh. It was suggested that the tone of written correspondence with Mr Todd was "menacing" and implied he wanted to be paid money for supplying information. The pursuer denied both these allegations. It was also put to the pursuer that his reputation had not in truth suffered any great harm, and that he had in fact been able to work and had worked in the period since the interim interdict was pronounced. The pursuer maintained the level of work was nothing like had had enjoyed before and that people were reluctant to contract directly with him after the interdict was pronounced.

[20] In re-examination the pursuer confirmed that at no time had the defender suggested that matters might be resolved between the parties at any time before they had been prosecuted and convicted under Health and Safety legislation in relation to the matters the pursuer had complained about. In fact he did not know the outcome of the prosecution until 6 months after the event. He had phoned the office of the procurator fiscal and been told that the case was closed. When he asked why, he was told he would receive a call back. Shortly after, the pursuer did receive a call and he was advised that the defender had pled guilty to "something like three charges" and received a £10,000 fine. The pursuer queried why 6 months had passed before he was told about the defenders' guilty plea and the fine imposed upon them. The pursuer asked his solicitor to raise the matter with the defender

and shortly thereafter the defender conceded decree of absolvitor in the pursuer's favour in the interdict action.

Charles Ruddy

[21] Mr Ruddy had over 35 years' experience working in the field of telecommunication contracts, although he had experience also working in gas and other projects as well. He had first come across the pursuer in the early 2000's when the pursuer was working on contracts for Scottish Power. At that time Mr Ruddy was working for another employer but by 2016 he was working for McNicholas Construction. At the time of these events he was Head of Operations. He explained that the York project was a joint venture between a number of different telecoms companies, operating under the name "Bolt Pro Tem" and McNicholas, was a main contractor. This was a major project to lay fibre optic cables city wide and the first of its kind in the UK. Mr Ruddy was the lead for the mobilisation team for what was entitled "tranche 2" (the first tranche being a more limited "proof of concept" project). There were clear divisions of responsibility within McNicholas and Mr Ruddy had responsibility for onboarding sub-contractors. He knew from previous experience of the pursuer that he could deliver for this sort of project. His "particular strength" was in the provision of labour and he thought the pursuer would find this project well within his capabilities to manage. His understanding was that the corporate vehicle Rumarc Utilities Limited was a company run by the pursuer and his family and he understood them to have been a big contractor for Scottish Power "back in the day."

[22] Mr Ruddy confirmed that the letter dated 28 February 2016 had been sent by him. He explained that there was no tendering process involved, rather he would engage with a "tier one" contractor such as the pursuer and in the end of the day if they met certain

criteria, such as price point, quality and the like then they would be given a schedule of documents to complete. The letter produced was simply to confirm that the pursuer, through Rumarc, had meet the initial criteria. He confirmed that it was not in itself the contract, that came later. The signatures on the letter were all electronic signatures that he had added. Normally this would be followed up with schedules for completion but that would be taken care of by the commercial team.

[23] Mr Ruddy was asked to look at a specimen document produced as 6/21 of process which had been completed by another sub-contractor and confirmed that this was the sort of schedule that would be completed. These documents were created by McNicholas as models for suppliers and they would then insert rates for each aspect of the job. He identified the company named in the schedule as "FNS" as being Future Network Solutions who worked on the York project, but since he was at that time on the point of leaving McNicholas to move to a new job he could not remember who in fact had been awarded the contract that had been first discussed with the pursuer.

[24] In cross-examination the theme of Mr Ruddy's dates of employment was picked up on by Mr Webster. Mr Ruddy confirmed that he had worked with McNicholas from some point in 2015 to early 2016. He thought he had finished formally in around January 2016 and had worked for a couple of months with McNicholas as a consultant before moving to his new job at Amec Foster. He was asked if he remembered an Adrian Petticrew and he confirmed that he did recall him working at McNicholas. It was put to Mr Ruddy that he was replaced by one Chris Atkinson, at the insistence of Mr Petticrew. Mr Ruddy's position was that he had resigned and therefore he needed to be replaced so "it depended on what you mean by insisted." He agreed he needed to be replaced. It was suggested he had given a different leaving date when in discussion with the expert accountant instructed by the

pursuer, Mr Bell, but Mr Ruddy maintained he was clear when he left and any different date mentioned by Mr Bell must just have arisen as a result of a misunderstanding in the conversation. He confirmed that after January 2016 he had stayed on as a consultant until taking up his new employment a few months later.

[25] Mr Ruddy was questioned about the letters issued by him to Rumarc Utilities and how it came to be that the signatures of others were on those letters. Mr Ruddy reiterated that he had access to electronic signatures and although he could not exactly remember why he had placed three signatures on the documents, he thought it was likely because he wanted to give confidence to the pursuer about the project which he thought would come from seeing that three people from McNicholas had signed the letters. He thought the reference to £8 million was a reference to the value of the particular phase of the contract and explained that at the stage these documents were sent out matters were still at the proposal stage; that the value of the works was not an exact science until parties entered into more formal contractual documentation. At the stage these letters were sent it was still a proposal, and remained a proposal until the contractual documentation was signed, and that involved personnel from operations, the supply chain and the commercial department. At that point Mr Ruddy described himself as being in the "departure lounge" and he had no knowledge of what actually happened post March 2016. He was clear that there was no formal tendering procedure so far as sub-contractors was concerned; rather there was a chain of suppliers McNicholas could call upon based on previous experience. In practical terms Mr Ruddy would choose the supply chain and perform a risk ratio on each potential sub-contractor. The issue of the value of the contract to Mr McGowan was explored in more detail and Mr Ruddy's position came to be that the figure of £8.2 million mentioned in the

original letter would not have been the sum proposed to the pursuer, rather that this sum was the overall figure for the contract phase.

[26] So far as the question of the interdict was concerned, Mr Ruddy candidly stated that he had no idea what an interdict was, but that if it had been "cleared" he would have renewed the proposal to the pursuer to be involved in principle with the project, although he thought it likely McNicholas would have wanted to review the pursuer's involvement on the basis that even if the interdict had been removed it would still sit as a "red flag" as it would raise the question as to why it had been there in the first place. When challenged as to whether he would ever have had authority to negotiate with the pursuer in the manner described, and even less so during the period he was a consultant, Mr Ruddy rejected that contention. He said that sort of correspondence was within his powers and remained so even during the period of his consultancy.

Ruth McGowan (57)

[27] Ruth McGowan is the wife of the pursuer. They had been married for 24 years. Mrs McGowan worked with children with special needs. The couple had one son together and Mrs McGowan was stepmother to the pursuer's older children. She was asked to describe her life with the pursuer in two stages; before and after the interdict was pronounced. Mrs McGowan described the period before as "fantastic", in relation to her marriage, and the family's lifestyle involving, amongst other things, lovely holidays. The family were very close and the pursuer was described as having a fantastic relationship with all his children. Mrs McGowan helped out with the business, she had prior experience as an accounts clerk and so she was able to help with emails, process wages, and the like. She agreed that her husband was, as he had admitted himself, not good with emails.

Mrs McGowan said that her husband had a good relationship with his workmen, that he knew them all personally and that he socialised with them all. He was a very fair employer and Mrs McGowan was not aware of any issues between her husband and his employees.

[28] After the interdict was pronounced, Mrs McGowan described the change in her husband as "horrific". Their relationship was affected; the pursuer was a "completely changed man" because he was not permitted to speak about the interdict. It broke his heart that he could not tell his family what was going on and it caused a major rift in the family. Mrs McGowan felt she had had to bear the brunt of what was going on. The pursuer changed from a loving husband to someone who did not want to go out and socialise. The interdict had affected them financially as well. They no longer had the 'lovely life' they had before. Previously they had gone on holidays with all the family two or three times a year and would be together at Christmas and New Year. That had all stopped. The pursuer's mental health had suffered. Mrs McGowan said it was a hard thing to watch a grown man cry. When asked what the pursuer was crying about Mrs McGowan explained that the family rift brought about by the interdict meant that they had not seen their grandchildren for years and that she had on occasion found the pursuer downstairs during the night with his head in his hands crying. She was of the view that all of this had been brought about by the interdict. The situation had got worse over a period of 6 or so months after the interdict was granted and although there had been some improvement to this day the pursuer was not "100%". Relationships with the grandchildren were improving recently and they now had contact with four of them.

[29] So far as the pursuer's relationship with his workmen was concerned, because the pursuer was interdicted from telling them anything, his relationship with them had suffered too. He no longer socialised with them, and they had in any event found work elsewhere.

Some had been taken on by the defenders. When asked about her husband's attitude to work, Mrs McGowan said her husband had always been a worker, and would put work before socialising. As an example, Mrs McGowan said that at one time her husband had been found to be a match for someone requiring a stem cell transplant. Rather than take time off work to go to hospital for required injections, he had the medical staff come and give him those injections at work. After the interdict, work slowed right down and other people were not willing to take him on as a sub-contractor. Now he worked for a company rather than run his own business, which was a big change for him.

[30] Mrs McGowan confirmed in cross-examination that her husband did have solicitors instructed and that she had been aware of the issues her husband had been concerned about that had led to the interdict being sought. She did not recall any discussions about recall of the interdict, her recollection was that neither she nor her husband even knew recall was an option. She did not accept that a cause of the tension in the family was that her stepson, who worked with his father on some of the defender's sites, might have been exposed to asbestos, although she readily accepted that there was concern about the possibility of exposure both for her stepson and her husband. So far as the tension in the family was concerned however Mrs McGowan was clear that the tensions arose because they were not able to tell the family the "ins and outs" of what had happened, due to the interdict being in place.

David Alan Bell (45)

[31] Mr Bell is an accountant employed by Quantuma Advisory Limited. He had been instructed to prepare a report, lodged as 6/16 of process. His curriculum vitae, produced as an appendix to his report, disclosed that Mr Bell is a Managing Director in Quantuma's

Disputes, Investigations and Valuations team. Prior to joining Quantuma in 2021 he spent 6 years at EY (formerly Ernst and Young) in the Forensic and Integrity Services team as a director. Prior to EY Mr Bell was a director with HW Forensic Accountants and headed up their forensic accounting practice in Scotland. He had prepared forensic accountancy reports and given evidence in court on a number of occasions. He adopted his report as his evidence in chief.

[32] Mr Bell's report confirmed that he had been instructed by the pursuer's solicitors to prepare a report giving an independent opinion on the loss of earnings suffered by the pursuer, if any, as a result of the wrongful interdict. In order to carry out that task, Mr Bell had been provided with background information by the pursuer's solicitors, and had in addition carried out his own investigations into the various corporate vehicles through which the pursuer conducted his business, and the shareholders and directors of each. So far as the York contract was concerned, in addition to the information provided to him Mr Bell had spoken directly with Mr Ruddy, to understand better the background to the correspondence inviting the pursuer (through the Rumarc corporate vehicle) to propose prices for the sub-contract work involved.

[33] Mr Bell then provided his views on the earnings lost by the pursuer attributable to the interdict being in place by considering firstly draft accounts and trading statements available for the various corporate entities with which the pursuer was involved. From that Mr Bell was able to calculate the gross and net profit margins of each company over the time frames available. He then turned to the question of the York contract. Mr Bell was provided with information showing that three companies proposed prices for the York contract. The company that ultimately was awarded the contract to carry out the ground works originally discussed with the pursuer, proposed labour costs of £3,913,064, material costs of £522,419

and thus a total contract cost of £4,435,483. He therefore considered that was a reasonable figure to use as the presumed loss to the pursuer of the value of that contract. Mr Bell thereafter used that contract value of £4.44 million as the lost turnover value across the 2½ years that the contract was scheduled to run, when calculating the loss of profits and loss of earnings suffered by the pursuer.

[34] Thereafter Mr Bell analysed the pursuer's actual earned income over the period April 2017 to April 2020 based on information from HMRC before calculating the loss of earnings suffered by the pursuer, based on the estimated loss of net profit within Rumarc Utilities from the York contract being withdrawn, with the pursuer extracting these profits as dividends. Factoring in the information available about the gross and net profit margins of the pursuer's entities, Mr Bell proposed three scenarios in order to estimate the profits available for distribution to Mr McGowan that could have been achieved from the York contract. The first and third calculations were based on the actual lowest and highest profit margins from across the range of companies operated by the pursuer or which he effectively controlled. The second scenario was the average of the lowest and highest figures. The resulting scenarios were as follows:

Scenario A – Rumarc Utilities generates a net profit margin of 8.6% per annum on the annual revenues from the York contract

Scenario B – Rumarc Utilities generates a net profit margin of 17.2% per annum on the annual revenues from the York contract

Scenario C – Rumarc Utilities generates a net profit margin of 23.6% per annum on the annual revenues from the York contract.

[35] Applying that approach and taking account of the pursuer's actual earnings, Mr Bell produced the following calculations:

Scenario A

Pursuer's loss of net earnings based under Scenario A	2017 £	2018 £	2019 £	Total £
Loss of profits availabe for Pursuer	123,767	123,767	61,884	309,418
Less: salary taken (personal allowance)	(11,000)	(11,500)	(11,850)	
Less: Dividend Allowance	(5,000)	(5,000)	(2,000)	
Taxable dividends	**107,767**	**107,267**	**48,034**	**263,068**
Dividend rate (basic rate)	*7.5%*	*7.5%*	*7.5%*	
Basic rate dividend band	*(£5,000 - £32,000)*	*(£5,000 - £33,500)*	*(£2,000 - £34,500)*	
Less: Dividend tax (basic rate)	**(2,025)**	**(2,138)**	**(2,438)**	**(6,600)**
Higher rate dividend band	*(£32,001 - £150,000)*	*(£33,501 - £150,000)*	*(£34,501 - £150,000)*	
Dividend rate (higher rate)	*32.5%*	*32.5%*	*32.5%*	
Less: Dividend tax (high rate)	**(24,624)**	**(23,974)**	**(4,398)**	**(52,996)**
Estimated net earnings	**97,118**	**97,656**	**55,048**	**249,822**
Less: actual net earnings	(19,187)	(26,695)	(33,395)	(79,277)
Loss of net earnings	**77,931**	**70,961**	**21,653**	**170,545**

Scenario B

Pursuer's loss of net earnings based under Scenario B	2017 £	2018 £	2019 £	Total £
Loss of profits availabe for Pursuer	247,738	247,738	123,869	619,346
Less: salary taken (personal allowance)	(11,000)	(11,500)	(11,850)	
Less: Dividend Allowance	(5,000)	(5,000)	(2,000)	
Taxable dividends	**231,738**	**231,238**	**110,019**	**572,996**
Dividend rate (basic rate)	*7.5%*	*7.5%*	*7.5%*	
Basic rate dividend band	*(£5,000 - £32,000)*	*(£5,000 - £33,500)*	*(£2,000 - £34,500)*	
Less: Dividend tax (basic rate)	**(2,025)**	**(2,138)**	**(2,438)**	**(6,600)**
Higher rate dividend band	*(£32,001 - £150,000)*	*(£33,501 - £150,000)*	*(£34,501 - £150,000)*	
Dividend rate (higher rate)	*32.5%*	*32.5%*	*32.5%*	
Less: Dividend tax (high rate)	**(38,350)**	**(37,862)**	**(24,543)**	**(100,755)**
Additional higher rate dividend band	*(over £150,001)*	*(over £150,001)*	*(over £150,001)*	
Dividend rate (additional higher rate)	*38.1%*	*38.1%*	*38.1%*	
Less: Dividend tax (additional higher rate)	**(31,142)**	**(30,951)**	**-**	**(62,093)**
Estimated net earnings	**176,222**	**176,787**	**96,888**	**449,897**
Less: actual net earnings	(19,187)	(26,695)	(33,395)	(79,277)
Loss of net earnings	**157,035**	**150,092**	**63,493**	**370,620**

Scenario C

Pursuer's loss of net earnings based under Scenario C	2017 £	2018 £	2019 £	Total £
Loss of profits availabe for Pursuer	339,761	339,761	169,880	849,401
Less: salary taken (personal allowance)	(11,000)	(11,500)	(11,850)	
Less: Dividend Allowance	(5,000)	(5,000)	(2,000)	
Taxable dividends	**323,761**	**323,261**	**156,030**	**803,051**
Dividend rate (basic rate)	*7.5%*	*7.5%*	*7.5%*	
Basic rate dividend band	*(£5,000 - £32,000)*	*(£5,000 - £33,500)*	*(£5,000 - £34,500)*	
Less: Dividend tax (basic rate)	**(2,025)**	**(2,138)**	**(2,438)**	**(6,600)**
Higher rate dividend band	*(£32,001 - £150,000)*	*(£33,501 - £150,000)*	*(£34,501 - £150,000)*	
Dividend rate (higher rate)	*32.5%*	*32.5%*	*32.5%*	
Less: Dividend tax (high rate)	**(38,350)**	**(37,862)**	**(37,537)**	**(113,749)**
Additional higher rate dividend band	*(over £150,001)*	*(over £150,001)*	*(over £150,001)*	
Dividend rate (additional higher rate)	*38.1%*	*38.1%*	*38.1%*	
Less: Dividend tax (additional high rate)	**(66,202)**	**(66,012)**	**(2,297)**	**(134,511)**
Estimated net earnings	**233,183**	**233,749**	**127,608**	**594,541**
Less: actual net earnings	(19,187)	(26,695)	(33,395)	(79,277)
Loss of net earnings	**213,996**	**207,054**	**94,213**	**515,264**

[36] Read short, the pursuer's losses were summarised by Mr Bell under each of the three scenarios as:

Scenario A: £171,000

Scenario B: £371,000

Scenario C: £515,000

[37] Mr Bell was cross-examined in detail as to the sources of the information upon which his report was based. In relation to the York contract and the discussions with Mr Ruddy about that background to that, Mr Bell confirmed that the figure of £4.4 million had not emerged in conversation with Mr Ruddy, rather that documentation showing the actual prices proposed by the company which eventually did the sub contract work were obtained, so it could be seen what sum was as a matter of fact paid. Mr Ruddy had not suggested that the exchange between him and the pursuer amounted to a binding contract, but he did

confirm that he thought from previous experience of the pursuer he would be able to do the work and he did not anticipate that the required due diligence would be an issue.

[38] So far as assessing loss of earnings was concerned, Mr Bell confirmed that often the approach was to simply look at trends, and if the earnings in question were from salary it would be possible to look at pre and post incident income. Sometimes, Mr Bell explained it was not always as straightforward as saying that the pursuer continued to have earnings that on the face of it increased year on year because the real question was whether the earnings would have increased by more had it not been for the incident in question. So earnings could increase but the pursuer might still have suffered a loss.

[39] It was suggested to Mr Bell that something might be taken from the description of the financial documents relating to the pursuer's companies as variously financial statements and unaudited financial statements elsewhere. Mr Bell confirmed this had no significance, they were all the same thing, namely sets of financial statements. He did not accept the proposition that any documents which had been taken from the Companies House website carried more weight than draft accounts provided by the pursuer's accountant. Mr Bell explained that the fact that financial statements are lodged with Companies House did not mean there was any more accuracy or rigour in the figures, as they are not checked by Companies House. Documents accepted by Companies House are simply put online and all that can be taken from that is that they have been finalised and submitted.

[40] Mr Bell was invited to accept that a better approach to testing loss of earnings was to use the HMRC figures showing what the pursuer earned before and after the interdict. In this case that exercise showed that in fact he earned more after the interdict than before. Mr Bell reiterated that this was too simplistic an approach. The calculation of the loss of

profits from the York contract is key to understanding the loss of earnings. Whilst sometimes earnings go up after an incident it is necessary to understand that even if they did go up, the real question is what might they have increased by but for the incident. In the present case the impact of the interdict was the loss of the York contract. The pursuer was worse off had the interdict not been in place and he had been able to carry out that contract. He was pressed repeatedly on the proposition that in fact the correct approach would be to start with the earnings as vouched by HMRC and ascertain if these disclosed any loss but Mr Bell adhered to the view that the start point from an accounting perspective should be the York contract.

[41] Mr Bell was further pressed on his assumption that the major part of the pursuer's income would be taken as dividend earnings, over and above what was shown in the HMRC documentation as employment earnings. Mr Bell explained that not only would that be the usual and most tax efficient way that earnings would be taken for someone in the pursuer's positon, there was evidence that he had in fact done so, as Mr Bell found evidence that he had in the past taken dividends from Rumarc. The pattern of dividend earnings could also be of assistance in calculating loss of earnings overall.

[42] A further challenge was made to the fact that Mr Bell had not, in his calculations of gross and net profit figures, included one set of figures from 2012 relating to the company MMCG limited which suggested a net turnover figure of 0.97%. Mr Bell explained that was because he had figures from 2014, 2015 and 2016. Typically the accounting approach was to look at figures over 3 years to get a feel for what the business is doing. The figures from 2012 were, in Mr Bell's opinion, too historic to be of value. The fact that they had been submitted to Companies House did not enhance their rigour or usefulness for this exercise.

[43] Mr Webster put calculations to Mr Bell based on the proposition that including the lower net profit figure from 2012 into the scenarios posited by Mr Bell would reduce the overall loss figures to about a tenth of the figures calculated by Mr Bell. Mr Bell made it clear he was not comfortable being asked to perform such calculations in the witness box but also reiterated that he did not depart from the premise upon which he had approached the calculations of loss. There was no re-examination.

Mark McGowan (26)

[44] Mr McGowan is the youngest son of the pursuer. In similar vein to his mother, he gave evidence about the effect of the interdict on his father, comparing and contrasting his demeanour before and after that occurred. Mr McGowan spoke of the close family relationship with his parents and his three older half siblings and their families prior to the interdict being pronounced. He described his father as "great", carefree and always having a laugh and a joke. The pursuer had been heavily involved in Mr McGowan's childhood, football was a particular passion. Mr McGowan said he realised now how fortunate he was in his childhood, as the family were able to take holidays together. He hoped to be able to offer the same upbringing to his own son, who was just 7 months old. Although Mr McGowan had not worked directly with his father his siblings Michael and Martin had done so. However he was familiar with his father's workmen and described them being very friendly and well disposed towards his father.

[45] Mr McGowan confirmed that his father had loved his work prior to the date of the interdict. After the interdict had been pronounced Mr McGowan said that his father felt strongly that it had been wrongly taken out and it became an "obsession" to try and prove his "innocence." Mr McGowan said that his father was a proud man and since he had been

called a liar he had to prove that he was not. When asked to explain what he meant by the term "obsession" Mr McGowan said that his father would come in from work he would immediately start trying to find ways he could prove he was telling the truth. He felt the action was unjust and that he was not the character he had been made out to be in court. This had a negative impact on home life. The pursuer was less interested in enjoying football with his son, everything was secondary to the interdict and trying to "sort that out." The relationship between father and son was affected. Mr McGowan started spending more time in his room but because he was "computer savvy" compared to his father, the pursuer would come and ask him to search for information on the internet to try and aid his quest to prove he was telling the truth. Mr McGowan, only a teenager at the time, somewhat resented this. He did not want to get dragged into this problem and for it to become the sole focus of his life as well.

[46] The biggest impact was on the wider family relationship. Although Mr McGowan managed to keep a relationship with his siblings the relationship between the pursuer and his other children fell away until there was little or no contact. This had gone on for 4 or 5 years, although there had been some improvement in relations recently. Otherwise, the pursuer went out and about a lot less than he had prior to the interdict being in place. Mr McGowan thought that was in great part due to the fact that he was worried about running into the former employees.

[47] In cross-examination Mr McGowan was asked whether there had been discussion in the home about his father's ability to prove that his allegations were not false. Mr McGowan explained that the discussions were more centred on his father believing the interdict had been incorrectly obtained and asking for Mr McGowan's help in uploading documents into various files on the computer. Mr McGowan could not recall specific discussion about

trying to bring the interdict to an end but he had been in High School at the time. He recalled his father was speaking to lawyers to try and fight the interdict but he knew no more detail than that. Mr McGowan was asked if he could assist with how the businesses were operated but he could not, other than by analogy to his own business which he currently operated providing electrical services, which involved him charging a specific rate and then providing himself and his employees with a wage. He remembered his father's business going from multiple squads and teams to a lot fewer men.

The evidence for the defender

David Beaty (69)

[48] The first witness for the defender was David Beaty. Mr Beaty was retired. Prior to his retirement in 2019 he had worked for the McNicholas Group. He had been involved in business strategy for the group, which was divided into different business units responsible for delivering projects in various sectors. Mr Beaty's role was to open up new business and services, in particular by attempting to secure large contracts with "tier 1" clients such as power networks, data and network providers of services. The communications division was headed by Gary Dunleavy who in terms of the business structure was a peer to Mr Beaty. Both sat on the management team. Mr Beaty had no direct involvement with sub-contractors; that was dealt with by the business unit who would determine the supply chain. Providing a sub-contractor met minimum requirements they would be taken on. Mr Beaty remembered Mr Ruddy, who was in the commercial division reporting to Mr Dunleavy.

[49] Mr Beaty was asked about the York contract. He said that he vaguely remembered that McNicholas had bid to secure the framework contract for the installation of fibre optic

cable and that York was one of the locations they bid for. He had nothing to do with the hiring of sub-contractors for that project. To his knowledge he had not come across the company Rumarc and had no knowledge of the pursuer personally. The framework contracts Mr Beaty was describing could range from the "higher tens" to approaching £100 million in value. These would be discharged over a number of years and might be site specific such as the York contract. Generally, McNicholas would look to secure a target turnover for the project and that would be reflected in pricing that would be accepted from sub-contractors.

[50] Mr Beaty was asked to look at the letter of 28 February 2016 sent to Rumarc. He had no recollection of the letter and said that while the second signature was his signature, it was not his "usual" signature. He was told that Mr Ruddy gave evidence that sometimes electronic signatures were used and Mr Beaty confirmed that on occasion that would be something he would be asked to provide because of the separation between the various offices. He recognised the name "Bolt Pro Tem" at the top of the letter as being a Joint venture related to the delivery of communications. He said that in terms of the work McNicholas was undertaking this would be a significant contract but he did not think that the value would be stated in a letter like this probably because they would not know the exact value themselves. He agreed that consultants would frequently be involved but that they did not have the authority to contract on behalf of McNicholas.

Gary Dunleavy (59)

[51] Mr Dunleavy was no longer with McNicholas Group. However he had joined them in 1993 and worked for almost 26 years for them. In 2009 he became director of the communications group within McNicholas. In that role he did not manage sub-contractors

on a day to day basis although he was ultimately responsible for them. He would not find the sub-contractors; rather that was done by the procurement team. He knew Charles Ruddy as someone who worked on the delivery of their contract in York. He also knew an Adrian Petticrew who was based in the Belfast office at that time. Towards the latter end of the York contract Mr Petticrew had commercial responsibility for that contract. He also knew Mr Beaty as a peer of his.

[52] In terms of awarding sub contract work Mr Dunleavy explained that McNicholas was a family company so once a sub-contractor was vetted or approved, contracts over certain values would require two signatures. He could not recall exactly the delegation values but they did exist. The more senior your positon the higher the value of contract that you could sign. Ultimately the decision was one for the CEO. Mr Dunleavy confirmed he had authority to contract up to £4.4 million. He was asked if he would accept that his signing authority might have been different, and Mr Dunleavy accepted that was possible but that the matters being discussed were all a long time ago and he was going on his best recollection. He did not recall Charles Ruddy being engaged as a consultant but confirmed that a consultant would not have authority to contract up to £4.4 million. Mr Dunleavy confirmed in cross-examination that in terms of a contract being awarded that would arise when everything was "signed and sealed".

Andrew Ross Todd (47)

[53] Mr Todd was a solicitor employed by the defenders. He had been with the company for 11 years, originally as a property lawyer then he had held various roles such as general counsel and company secretary. Before joining the defender Mr Todd had trained at McGrigors solicitors (as it was then known) and remained with that firm, latterly as a

professional support lawyer before moving to the then Dundas and Wilson where he held a role as business development manager. He was asked if he held any other qualifications, and said that he thought he was still on the role of solicitors of England and Wales. In addition Mr Todd had co-authored a book on commercial awareness and produced articles for various journals and bulletins.

[54] Mr Todd was asked about the circumstances in which the interim interdict was obtained. Mr Todd recalled that the defender had received an email from the pursuer advising he was going to disseminate a letter containing allegations about unsafe practices at the defender's sites. External legal advice had been sought from the then company solicitors who had advised seeking an interim interdict against the pursuer. That advice had been accepted. At that time Mr Todd's recollection was that the pursuer was no longer engaged as a sub-contractor on the defender's sites. This had come about because the pursuer had made a complaint about a site manager stealing from him which was not upheld, as well as there being another "issue" in relation to a site in Edinburgh, and following that a decision had been taken not to retain the pursuer's services.

[55] After the interim interdict had been obtained it came to Mr Todd and the defender's attention that letters were being handed out to residents at the defender's development in Livingston, as well as one other development, which stated that there was asbestos in the ground. Mr Todd phoned the telephone number printed on the letters and spoke to someone who called himself "Mick", who confirmed that he had handed out the letters. Mr Todd met with this man, and one other calling himself Billy, and had made a detailed note of that meeting. By that time it was Mr Todd's position that the defender had in any event reported itself to the HSE over the allegations, principally around the issue of asbestos on the sites.

[56] In around December 2016 a meeting took place between Mr Todd and the pursuer at a hotel in Clydebank. Once again Mr Todd made a note of this meeting in the form of an email sent to himself dated 19 December 2016. The email recorded that the pursuer wanted to discuss compensation for him and his men. He made reference to an amount outstanding in respect of his legal fees in relation to the interdict proceedings. Mr Todd recorded that he had told Mr McGowan that any proposal should be put in writing by his lawyers. His email note ended with the sentence "I am clear that the meeting was not about compensation but rather the purchase of information." Mr Todd explained this to mean that he took it that the pursuer was offering to sell information in return for silence, or, as he also described it, blackmail.

[57] Mr Todd described further letters being sent to customers in 2018 in similar vein to the earlier letters, that is to say suggesting there was asbestos on the sites on which the defender' had built houses. Mr Todd did not suggest that the pursuer was responsible or connected with these letters. There was further direct contact from the pursuer, by email and at one point a phone call in January 2018, which Mr Todd had recorded without the pursuer's knowledge. When asked why he had done so, Mr Todd explained that he thought the pursuer would say something that he would want a record of.

[58] Mr Todd was cross-examined in relation to his knowledge of the presence of asbestos on certain of the defender's sites. He confirmed he did now know of its presence, as a result of surveys undertaken. He confirmed he was aware of the regulations around working with asbestos, that only some contractors were licensed to work with asbestos, and that only licensed contractors were permitted in terms of the regulations to work with asbestos, although he qualified his acceptance of that proposition to say "certain types" of asbestos. Mr Todd accepted that removal of asbestos by an unlicensed contractor, in circumstances

where a license was needed, was unsafe; and that to do otherwise could be dangerous to health.

[59] Mr Todd was taken to the Health and Safety Executive report into the allegations of asbestos at the defender's sites and he accepted that one report of the problem was recorded as being made in 2013. Mr Todd was then asked to look at a specialist refurbishment and demolition report prepared in April 2012 which reported 16 out of 25 samples as testing positive for asbestos. Mr Todd was asked to confirm that the clear recommendation in the report was for removal of the asbestos by a licensed contractor, but he replied that he was not quite sure that that was exactly what was being said. When it was put to Mr Todd that as a matter of fact the defender did not obtain a license to carry out this work, he replied that this had occurred before he joined the defender. He was pressed as to whether he knew that licensed contractors were not used at the site in question at Milton of Campsie, to which he responded that he believed that to be so.

[60] Mr Todd was then taken to a "Stop" notice issued by East Dunbartonshire Council dated 20 November 2014, lodged as 6/9 of process in relation to the Milton of Campsie site. Again Mr Todd's initial position was that this had been issued before he had started with the defender, but did not demur from the suggestion that he had seen the documentation, although he said that he had not seen it in a long time. The Dean of Faculty asked Mr Todd to accept that under the listed conditions for issuing the notice in Schedule 2 to the document, at paragraph 8, a scheme to deal with contamination on the site was required. Mr Todd's position was that he did not know whether that condition referred to asbestos. When was asked what other contamination there might be, Mr Todd suggested that he was aware there was Japanese knotweed on the site. He was then asked to look at condition 3, which referred specifically to Japanese knotweed, and then he was asked to confirm that he

was not suggesting that the contamination referred to in paragraph 8 was the same thing, which he accepted. However, almost immediately Mr Todd "rowed back" on that response, suggesting that any reference to contamination normally included invasive species, but when he was reminded that he had just accepted that the reference in this document to contamination did not refer to knotweed, he responded that he was "just saying." After some further to and fro, Mr Todd's final position came to be that the reference to contamination was most likely a reference to asbestos.

[61] Moving on to the matter of the prosecution of the defender in relation to health and safety matters, Mr Todd accepted that the defender had been convicted after a guilty plea related to the used of unlicensed contractors, specifically the pursuer's workmen employed through MMCG Ltd, although he was at pains to stress that this had only been in respect of four charges. He also acceded to propositions put to him that the defender knew in 2013 that it was working with asbestos; that it knew there was no license to work with asbestos in place; and that it knew that it was not using licensed contractors.

[62] Mr Todd accepted that he was involved in instructing the application for interim interdict. He was asked if he was aware of the professional ethics attached to the obtaining of ex parte interdicts and he professed not to know what that meant. In response to the propositions that he was aware of the ethical positon and that there was a heavy responsibility in relation to such matters to ensure that the pleadings were accurate, Mr Todd responded that he had simply relied on their solicitors at the time, BTO. Whilst he accepted that pleadings should be candid, Mr Todd reiterated that at all times reliance had been placed upon BTO. It was put to Mr Todd that BTO were reliant upon him to tell them the relevant facts, which Mr Todd accepted. He also accepted that for an allegation to be defamatory it had to be false. The Dean of Faculty then took Mr Todd through each of the

four allegations emanating from an email sent by the pursuer on 1 February 2016 which the defender had asserted in its pleadings at article 7 of condescendence were untrue and defamatory. It was put to him that what had been said in the email, as set out in those pleadings was in fact substantially true. Mr Todd attempted to draw distinctions between what was said in the pleadings and the fact that, for example, MMCG were not engaged as asbestos removal contractors but ultimately accepted that there was asbestos in the site and that the defender should have had a licence, and licensed contractors engaged to remove the asbestos and that the failure to do so had resulted in the Stop notice being issued.

[63] Mr Todd maintained that in 2016 the defender did not accept that they had done anything wrong but by 2020 they took advice to "accept the charges." When asked what had changed between 2016 and 2020, Mr Todd suggested that the construction direction at the time was "very strong" in rejecting the view that a licensed contractor was required for the work in question. The defender did not agree that it was in breach of the relevant regulations. Mr Todd was asked on what basis lawyers had been instructed to go to court and assert that the allegations made by the pursuer were a lie. Mr Todd disagreed that what was being asserted was that it was a lie, but in any event the pleadings were prepared on instructions from those with technical knowledge. It was suggested that when the motion for interim interdict had been made there was no mention of the asbestos survey; no mention of the lack of a licence; no mention of the Stop notice, to all of which Mr Todd assented. When put to him that all of that information had been withheld from the court in order to obtain the interim interdict Mr Todd reiterated that it had all been done on the advice of BTO. He had not personally told them about the findings in 2013 or the lack of licence or the use of unlicensed contractors. He was not personally aware of the Stop notice at the time and nor was he aware of the asbestos survey that had been carried out.

[64] Mr Todd maintained that the defender's commercial director was of the view that the type of asbestos concerned did not require a licence. In October 2020 when the decision had been taken to plead guilty to certain of the Health and Safety charges, that was a commercial decision because the defender had been advised that it was at risk of a fine of a million pounds if it had not done so. Mr Todd accepted that after the plea was agreed and tendered the defender did not take any steps to restrict or withdraw the interdict, and that nothing had in fact been done until the pursuer found out himself about the plea and raised it with Mr Todd. He said that he had no background in criminal law or the law of interdict and that neither solicitors nor counsel had advised him about the possibility of wrongful interdict. It was suggested to him that when, following conviction, when it was clear that the interdict was not warranted, basic fairness required the defender to tell the pursuer that a plea had been tendered and to apologise. Mr Todd's position was that with hindsight, for his part, he was sorry but at the relevant time the country had been in lockdown and they had just started back at work at that time. He was not aware that the defender should have taken immediate steps to recall the interdict and that if he had been aware he would have asked for that.

[65] It was put to Mr Todd that the defender's actions had been motivated by trying to protect the reputation of the company, which Mr Todd disputed, asserting that it was their customers rather than the company reputation that they wanted to protect. He was asked if an apology had ever been offered to the pursuer from the defender, or from Mr Todd personally. He accepted this had not been done but that he would wish to do so now.

Adrian Petticrew (58)

[66] The final witness for the defender was Adrian Petticrew. Mr Petticrew was now employed elsewhere, but previously he had worked for the McNicholas Group from 1998 until 2017 when it was taken over. Mr Petticrew had worked in network services, in utilities, water projects and telecoms and had also worked in Scotland on civil engineering projects. In 2015/16 his title was Head of Commercial for Northern Ireland and Scotland. He reported to the managing director in relation to contracts in Northern Ireland, portfolio projects in Scotland for energy networks and other clients. On a day to day basis he oversaw applications for payment, negotiated terms and conditions with clients, ensured that sub-contractors were on board successfully as well as processing their payments.

[67] Mr Petticrew explained that for the most part they would use direct labour and sub-contractors. As to whether he would find sub-contractors personally or whether that would be another person's responsibility, Mr Petticrew said it would vary from contract to contract; in Northern Ireland they ran a "lean" leadership team and he was very hands on, he had for example found the sub-contractors for a project in Edinburgh. He would regularly be involved in setting the sub-contractors rates and payment terms, checking their insurance and all paperwork in order to comply with the relevant regulations. So far as limits on signing off on the value of a contract was concerned, Mr Petticrew said there was no limit on the value of a contract but so far as on boards sub-contractors was concerned he had a limit of £500,000 and if anything went above that he would go to the Division Commercial Director and ask them to countersign any contract. He could go up to the next level and so on. Good governance required that significant orders would not be placed without counter signing.

[68] Mr Petticrew was asked to look at an email dated 31 March 2025 from the senior legal counsel at Kier Group (now encompassing McNicholas Group) to the solicitors for the defender. This email was a response to a query about the relative signing powers depending on the position held within the group. A table was produced setting out the relative signing powers depending on the position held. Inferentially, specific personnel and their signing powers had been asked about as, for example, it was stated that Gary Dunleavy would, in 2016, have had signing power up to £1 million. Mr Petticrew confirmed that reflected his understanding of the position. He said the onboarding of sub-contractors was a very specific and detailed process. He said they were all very mindful of their obligations and complied with them.

[69] Mr Petticrew explained that Mr Dunleavy was directly above him and then the Commercial Director and the Finance Director. He was asked if he remembered a project in York and he confirmed that he did. In October 2015 he had been asked to meet the then Finance Director Steven Mitchell in Leeds. Mr Mitchell wanted him to lead on the contract in York and to undertake a "surveillance" type of visit to see how the contract was operating and to report back on his impressions. He had a one day visit in October and then took on commercial responsibilities for the project from about 11 or 12 November 2015. He managed the project from then until 2019 when the final sub-contractor payments were made and the contract was closed out. He said the ground works for the infrastructure was well advanced and was due to be completed by 29 February 2016. By February McNicholas had spent about £6.6 million of the clients' money out of an eventual figure of £8.25 million, in other words they were about 70% through the contract at that stage.

[70] Mr Petticrew remembered Charles Ruddy, who was the operations manager when Mr Petticrew arrived. He was about the level of project or contracts manager and so would

have signing authority up to about £75,000. Mr Petticrew said that Mr Ruddy had left the day after he had started. He (Mr Petticrew) had been brought in to get things stabilised. The project was struggling commercially and had gone through a lot of staff, so he was asked to bring expertise in the company procedures on board. He had had to start from scratch again, and had brought new surveyors on board and got them up to speed in the procedures for sub-contractor onboarding. It was known in December 2015 that Mr Ruddy was due to leave. He was being replaced by a more senior person to bring a bit more strategy and structure, to work with the client and keep the programme online. Mr Ruddy was a "prolific emailer", sometimes Mr Petticrew received 10 or 12 emails a day from him but those stopped from 20 January 2016. Mr Petticrew could not say for sure whether Mr Ruddy had performed a consultancy role thereafter but he had no ongoing contact with him. In light of the governance structure if he had been a consultant for a period he would not have had authority to sign off on a contract. He had not heard of Rumarc Utilities or the pursuer. Neither Mr Petticrew nor Mr Ruddy would have had authority to award a contract with a value of £8.2 million or £4.4 million.

[71] Mr Ruddy was asked to look at the letter sent to Rumarc Utilities dated 28 February 2016. He had not seen a document like that being sent. He did recognise the format of documents lodged as 7/13/1 which is what he would have expected to have been used with sub-contractors. He recognised the name Future Network Solutions (FNS) as a contractor that was on site when he arrived. He could not recall them tendering for work after he arrived. By February 2016 he thought FNS had stopped working, there was slippage on the contract and problems getting people paid, although FNS did come back on site to finish work off. Mr Petticrew could not conceive of sub contracts of £4.5 million being awarded at that time. If a sub-contractor had been suggested as someone who could get the job done

they would want to make sure that any such sub-contractor was up to the corporate standards of McNicholas, particularly on Health and Safety.

[72] In cross-examination Mr Petticrew accepted that as a generality the engagement of sub-contractors was more within Mr Ruddy's remit than his. It was put to him that documentation from 2016 which had not been challenged showed that a contract was available and that he was not in a position to challenge that. Mr Petticrew responded that he would find it very unusual. He was not able to comment on a press release dated 25 October 2016 suggesting that the rollout of the Bolt Pro Tem project would begin in Spring 2017 and last 18 months. It was suggested to him that this was in fact what happened, after an initial trial in 2016 the full rollout had started in 2017. Again Mr Petticrew was not able to comment. He said that the contract was a difficult one for McNicholas and that they were pleased to get it effectively concluded in 2016 although the full commercial sign off was not until 2019.

Submissions for the pursuer

[73] On behalf of the pursuer, the Dean of Faculty adopted his written submissions which might be summarised as follows: He invited the court to sustain his third plea-in-law, and to award the sum sued for (£750,000 plus interest). The second plea-in-law had already been sustained, in terms of the interlocutor of the Inner House dated 20 August 2024. Accordingly, any submission that the defender is entitled to absolvitor was not open: the second plea-in-law has been sustained such that there is a finding of (i) wrongful interdict; (ii) causing loss; with (iii) a consequent entitlement to reparation.

[74] The submissions in relation to the credibility and reliability of the various witnesses began with the pursuer. It was submitted that he could be accepted as credible on the core

aspects of his evidence, namely: a) the wrongous interdict caused him distress and inconvenience; b) it also damaged his reputation; c) he had the prospect of the award of a substantial contract, which was lost as a result of the interdict; and d) there will have been other opportunities otherwise available to the pursuer, unknown and incalculable, lost to him as a result of the foregoing.

[75] It was submitted that the evidence of the pursuer's wife and son was also credible and reliable and that the evidence of Mr Bell was clear and cogent and could be accepted as an acute assessment of loss on the hypotheses he was asked to consider. Mr Ruddy should also be accepted as credible and reliable. He had made appropriate concessions and his evidence was supported by documentary productions. He was clear that the contract would not be finally awarded to the pursuer until formalised and approved "up the line." He was able to speak of past successful business dealings with the pursuer.

[76] The pursuer took no issue with the defender's witnesses Messrs Beaty and Dunleavy, who it was submitted had nothing markedly different to say from Mr Ruddy. However detailed criticism was made of the evidence of Mr Todd. His complaints of attempted bribery on the part of the pursuer did not ring true; it might be expected that he would involve the police if that is what he believed was happening. His attempts to blame BTO solicitors in relation to the interdict having being obtained carried no weight since, as Mr Todd accepted, they could only proceed on the basis of information made available to them. Material facts relating to the Milton of Campsie site were withheld from BTO, and thus from the court when the interdict was obtained. The pursuer cited LJC (Gill) in *Bell* v *Inkersall* 2006 SC 507 at [20]:

> "…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".

That had not happened here.

[77] So far as Mr Petticrew was concerned, the pursuer was again critical, not so much of the witness himself, but the content of his answers. This criticism was broken down into nine aspects. Firstly, Mr Petticrew had referred either to documents not produced or to matters not put to relevant prior witnesses such as Messrs Ruddy, Beaty and Dunleavy. Second, that as a result the evidence adduced from him runs counter to the best evidence rule, in terms of which parole evidence of the content of documents is inadmissible (*Scottish & Universal Newspapers Ltd* v *Gherson's Trustees* 1987 SC 27). Third, and similarly, evidence which ought to have been put to earlier witnesses yet was not is of little or no weight: it is not possible to determine how to reconcile the evidence of Mr Petticrew with that of Mr Ruddy when the former's was not put to the latter.

[78] The concerns with the evidence of Mr Petticrew went further; the failure to put such evidence to other witnesses and then seek to rely on the evidence of Mr Petticrew was simply unfair. In similar vein it was clear that the evidence from Mr Petticrew was being adduced at least in part to try and challenge the integrity of the documents produced relating to the exchange between the pursuer and Mr Ruddy although no formal challenge had been made to those and nor could there be standing the ruling in relation to that matter made early on in the proof. Further, it was not clear whether Mr Ruddy and Mr Petticrew were even talking about the same contract. If on the other hand, both were talking about the same contract and it was, as Mr Petticrew maintained, two thirds or more complete by February 2016 then it might be expected that Mr Ruddy and/or Mr Dunleavy would have known about that, and yet neither had said anything of that sort. Similarly, Mr Petticrew's evidence could not be reconciled with the contemporaneous documentation and nor could

his evidence that the first tranche of the York project was not undertaken by the McNicholas Group when other witnesses said that it was.

[79] The failure to put these matters to other relevant witnesses was significant. Not only should that have been done as a matter of fairness (*McKenzie* v *McKenzie* 1943 SC 108) but the resulting prejudice to the pursuer was palpable (*Grier* v *Lord Advocate* 2023 SC 116, at [131] per the Lord President (Carloway). All of Messrs Ruddy, Beaty and Dunleavy would have been able to comment on the points made by Mr Petticrew. His evidence was not put to them and their evidence runs contrary to his. There was resulting prejudice to both the pursuer and Mr Ruddy. There was no good reason why this line was not raised until the final witness in the case.

[80] Moreover, none of what Mr Petticrew had to say was vouched by contemporaneous documentation, which must have been available. On the contrary, such documentation as has been produced directly contradicts his evidence. The pursuer referred to the opinion of Lord Braid in *Oil States Industries (UK) Ltd* v *"S" Ltd* 2023 SC 209 at [76] "it has long been recognised that evidence of contemporaneous documentation is a better means of getting at the truth than oral testimony".

[81] Finally on this aspect of matters, the pursuer addressed the evidence of Mr Petticrew that he would find it "odd" to see correspondence such as that entered into between Mr Ruddy and the pursuer, particularly where the pursuer's company, Rumarc Utilities had only been incorporated shortly beforehand. The pursuer met that criticism by submitting that given the manner in which the pursuer conducted his business, that is to say incorporating different companies to conduct different contracts, this was not surprising at all, looked at objectively. What would be difficult to understand however is that such incorporation had happened, as the defender sought to imply, purely to found the basis for

a fictional claim when at the point in time when the company was incorporated and the correspondence entered into, the pursuer (nor Mr Ruddy for that matter) could have anticipated that (i) there would in 5 years' time be an action for wrongful interdict or (ii) that the interdict in question would be declared to be wrongous by the Inner House. Far from undermining the evidence of the pursuer or Mr Ruddy, the proximity of incorporation to the date of the correspondence supported the credibility of Mr Ruddy in particular.

[82] The Dean of Faculty then addressed the two pled defences for the defender; firstly an alleged failure to mitigate loss, and secondly an averment that any harm to the pursuer's reputation was not attributable to the interdict. So far as the second proposition was concerned there was little evidence to support that contention. Therefore the core aspect of the defence related to an alleged failure to mitigate loss, derived from the pursuer's failure to seek recall of the wrongful interdict at an earlier stage. This argument was misguided in a number of respects; firstly the approach of the defender conflated two notions, contributory negligence and failure to mitigate loss. The defender's plea in relation to contributory negligence had been repelled following the Procedure Roll debate. For the avoidance of doubt however, it was submitted that contributory negligence only arose where there was concurrent fault in the wrong, whereas fault on the part of a pursuer once a wrong is complete is met with a plea of failure to mitigate.

[83] The Dean of Faculty submitted that this temporal distinction was so obvious it was not the subject of discussion to any extent in domestic authority. However the proposition was clear, whilst a wrong is ongoing, the wrongdoer cannot assert that the victim should have stopped the wrong. Whilst the wrong is ongoing, that ongoing wrong is the cause of the loss. Unless a pursuer has a duty to stop a wrongdoer from continuing his wrong,

(a proposition described as "outlandish") then the rules about mitigation have no part to play.

[84] In support of that submission, the Dean of Faculty relied upon the analysis of Toulson J (as he then was) in *Standard Chartered Bank* v *Pakistan National Shipping* [1999] 1 All ER (Comm) 417 where he said:

> "The orthodox view is that the rule as to avoidable loss is merely an aspect of the fundamental principle of causation that a plaintiff can recover only in respect of damage caused by the defendant's wrong. The rule is not that the plaintiff owes any obligation to the wrongdoer to mitigate his loss (despite the much repeated use of the phrase 'duty to mitigate'), but that he cannot recover for a loss avoidable by reasonable action on his own part because, if he could reasonably have avoided it, it will not be regarded as caused by the wrongdoer."

[85] A similar approach could be found in *Sharp Corpn* v *Viterra BV* [2024] Bus LR 871, where the Supreme Court expressed the matter thus:

> "83. Two fundamental principles of the law of damages are the compensatory principle and the principle of mitigation of damage.
> 84. The compensatory principle aims to put the injured party in the same position as if the breach of duty had not occurred…
> 85. The principle of mitigation requires the injured party to take all reasonable steps to avoid the consequences of a wrong."

[86] In short, had the wrongful interdict not occurred, none of the losses would have been incurred. Although no domestic analysis of the temporal distinction as such had been found, the Dean of Faculty offered a comparative analysis of jurisprudential discussion of the matter from the United States which, in short, he submitted supported his positon ("Comparative Negligence and Mitigation of Damages" 31 QLR 783, *Ostrowski* v *Azzara*, 545 A.2d 148, 152 (N J 1988), *Del Tufo* v *Twp. of Old Bridge* 685 A.2d 1267, 1282 (N J 1996)).

[87] In any event, the approach to mitigation urged by the defender did not accord with the view already expressed by the Inner House in this case, in particular where it expressed

the view, in relation to the duty incumbent upon the wrongdoer to bring an end to the wrongful act, that:

> "… to obtain and then continue to insist in an interim interdict is a continuing act… The imposed restrictions subsist until the order is recalled or the action finally determined. It is obtained at the peril of the party seeking it … and must be kept under review. Thus if at any time it becomes apparent that interdict is not warranted, the court should be asked to recall it; an application which the court will readily grant. As the Lord Ordinary observed, the holder of such an order cannot wash his hands of responsibility for its continuing consequences…"

[88] For all those reasons, the Dean of Faculty submitted that the approach of the defender to this question was not principled, was wrong in law and should be rejected. In any event, even if that were not enough to dispose of the question, there was no question of the pursuer having acted unreasonably in not seeking recall when he engaged solicitors and they did not advise him to do so. Nor was he required to spend money to protect the wrongdoer from the consequences of his wrong (*Jewelowski* v *Propp* [1944] KB 510).

[89] The Dean of Faculty then turned to quantification of the pursuer's losses. Dealing firstly with distress, anxiety and inconvenience he submitted, under reference to *Aird Geomatics Limited* v *Stevenson* [2015] CSOH 167, that both distress and anxiety and damage to reputation were separate recoverable heads. In the present case the interdict was in place for considerably longer than in *Aird*, having been persisted in for more than 5 years rather than the one year in *Aird*. A reasonable award would be £5,000 per year, rounded down to £25,000.

[90] On the question of damage to reputation, the Dean of Faculty submitted this was akin to the situation in *Munro* v *Brown* [2011] CSOH 117, where Lord Doherty found that damaging allegations persisted in for 3 years should result in solatium of £20,000. Taking into account that the allegations here were again persisted in for a longer period of time and that there were repercussions to trade for the pursuer beyond those in *Munro*, as well as the

lapse of time since the award in *Munro* was made, a figure of £50,000 was submitted as an appropriate award under this head.

[91] Turning to loss of earnings, the Dean of Faculty accepted that this would require to be assessed as a loss of a chance, since it was dependent on action taken by a third party and should not therefore be assessed on the basis of a balance of probabilities (*Centenary 6 Ltd* v *TLT LLP* 2024 SLT 681 at [68]-[71].). Of the three scenarios proffered by Mr Bell in relation to loss of earnings based on various net profit margin figures, the Dean of Faculty submitted that scenario C should be adopted, based on a profit margin of 23.65% and a resulting company profit of £849,401. The effect of personal income tax reduced that figure over the 3 years of the contract to £515,264. Taking the conventional broad axe to that figure (*Grier* v *Lord Advocate* 2023 SC 116 at [144]), in which the highest profit margin figure is used but the possibility of the contract being worth £4.4 million (as was the basis Mr Bell had proceeded upon) and discounting the possibility that the figure of £8.2 million mentioned in the letter from Mr Ruddy being the value of the contractor, led to a "sensible" starting point of £500,000.

[92] The Dean of Faculty maintained that the likelihood of the pursuer being awarded the contract could, on the face of the evidence, be taken to be 100%, but as a fall back, no more than a 20% deduction should be made for loss of a chance which would entitle the pursuer to 80%, or £400,000.

[93] The final head of loss, relating to loss of employability, was available on a *Smith* v *Manchester* basis. It was submitted that the unchallenged evidence before the court was that (i) Mr Ruddy was looking to award a contract for groundworks as part of overseeing various Virgin Media projects, and (ii) due to the good working partnership he had with Mr McGowan over the years and knowledge of his experience and strong work ethic, he

would have had no hesitation in offering Mr McGowan contract work had it not been for the interdict. Adopting the same "broad brush" approach, a figure similar to that of the York contract should be awarded to represent the loss of employability suffered by the pursuer, on the basis of evidence supporting the loss of opportunities even leaving the York contract to one side.

[94] The sum of the foregoing heads exceeded the sum concluded for, namely £750,000. The pursuer however did not seek to amend the sum sued for but rather sought an award of that sum, £750,000 by way of damages. Added to that, the pursuer sought interest from the date of the granting of the interdict, at 8% (*Sheridan* v *News Group Newspapers Ltd* [2018] CSIH 76). Having regard to the voluntary capping of damages at the sum concluded for, interest at the judicial rate represented a fair outcome.

Submissions for the defender

[95] Mr Webster adopted his written submissions and invited the court to sustain his second plea-in-law (the pursuer's averments, so far as material being unfounded in fact, the defender should be assoilzied from the conclusions of the Summons), which failing his sixth plea (in any event, esto the defender is liable to make reparation to the pursuer, the sums sued for being excessive decree should not be pronounced as concluded for).

[96] Mr Webster's primary position was that the pursuer had not proved that he had suffered a loss; but that (i) esto the pursuer has suffered a loss, it was not caused by the defender; (ii) esto the pursuer suffered a loss caused by the defender, he contributed to the loss and failed to mitigate it; and, (iii) esto, the pursuer suffered a loss caused by the defender, the sum sued for is excessive.

[97] Mr Webster submitted in relation to causation the uncontroversial proposition that in order to recover damages for negligence, a party must prove that but for the wrongful conduct he would not have sustained the loss or harm in question (*Fairchild* v *Glenhaven Funeral Services Ltd* [2002] UKHL 22, at [8]). The onus of proof is on the pursuer (*McGlinchey* v *General Motors UK Ltd* [2012] CSIH 91, at [36]). The standard of proof is on the balance of probabilities (*McWilliams* v *Sir William Arrol & Co* 1962 SC (HL) 70, page 82).

[98] On the proper approach to cases involving loss of a chance, Mr Webster submitted that loss of chance occurs when the breach of a duty deprives the party of the chance of securing a favourable outcome (*Centenary 6 Ltd* v *TLT LLP* [2023] CSOH 28 at [32]). A loss of a chance requires a real and substantial chance (*Perry* v *Raleys Solicitors* [2019] UKSC 5, at [34]). However, a claim which has no underlying substance is not and cannot be a real chance (*Perry* v *Raleys Solicitors* [2019] UKSC 5 at [26]). Hypothetical actions of third parties are assessed based on the need to prove a substantial chance and not on the balance of probabilities (*Wellesley Partners* v *Withers LLP* [2015] EWCA Civ 1146, at [99]).

[99] Mr Webster began by considering the question of loss of earning, on the basis that the approach to that question was likely to colour the approach to the other heads claimed. Mr Webster's overarching submission was that the pursuer had not proved, on balance of probabilities, that he had suffered a loss of earnings. In making that submission he placed reliance on the HMRC schedule relating to the pursuer which disclosed the following:

2015/2016 - £7,242.00

2016/2017 - £23,596.12

2017/2018 - £34,383.96

2018/2019 - £43,790.13

2019/2020 - £23,777.38

2020/2021 - £0

2021/2022 - £30,124.65

2022/2023 - £58,440

[100] Mr Webster suggested that the one exception to the trend was 2020/21 which could be attributed to the Covid pandemic, despite that being disputed by the pursuer in his evidence. His unwillingness to accept that as the cause for no recorded income was to the detriment of his credibility and reliability. He submitted that Mr Bell's evidence that income after the interdict was pronounced would likely have been taken principally in the form of dividends was not supported by the evidence and could not be said to have been affected by the interim interdict.

[101] Turning to the York contract, it was submitted that on the pleadings the correspondence between the pursuer and Mr Ruddy could be seen as no more than an occasion for a loss and not as an act giving rise to a liability to make good by way of damages. The overall position of the defender however was that in light of all the evidence it could not be said that an occasion for a loss had even arisen. Further and in any event the pursuer had failed to prove that there was a real and substantial chance that McNicholas would have awarded the contract to Rumarc Utilities Ltd. The submission went further: on the basis of the evidence there was in fact no chance of the contract being awarded as Mr Ruddy was not working at McNicholas when the offer was made, or he was working as a consultant and did not have authority to engage sub-contractors. In any event none of the signatories of the letter of 28 February 2016 had signing authority for the value of the contract proposed by the pursuer, and in any case the York contract was coming to an end by March 2016 (on the evidence of Mr Petticrew) and there was no chance therefore of such a significant contract being awarded.

[102] Even if there was a chance of the contract being awarded (which the defender denied) the loss of it did not arise from the interim interdict but from the pursuer's own voluntary disclosure of the fact of the interim interdict on 11 March 2016. He was not required to disclose the interdict and no loss had therefore arisen as a result of its' existence. In any event the withdrawal of the offer by Mr Ruddy was conditional, in that his letter stated that the offer would be withdrawn until the interdict was lifted. The pursuer, in failing to seek recall of the interdict had therefore failed to mitigate his loss.

[103] In further support of the submission that the pursuer had suffered no loss, Mr Webster pointed to the evidence of the pursuer when he said that there were contracts out there and that he could have got any job he wanted with large contractors. The reason he wanted to go for the York contract was because he had worked with Mr Ruddy before. Separately there was only one set of accounts produced that were "independently verifiable" and those were the accounts for MMCG Contracts Ltd for 2010, which had been lodged with Companies House. This, it was contended gave those accounts some public claim to accuracy and showed a net profit of just 0.87%. Using that figure and carrying out the same exercise as Mr Bell had carried out on the assumption of a contract valued at £4.4 million brought out figures for each of the 3 years of 2017-2019 that were lower than his actual net earnings as shown in the schedules from HMRC. Therefore using the only "independently verifiable corporate accounts" the pursuer had suffered no loss.

[104] On the question of loss of employability, it was submitted that the only loss of employability claim was linked, on the pleadings, to Mr Ruddy and the York contract. No other contractual or potential contractual relationship was relied upon. Since, on the defender's analysis, the pursuer had not established the loss of a chance of securing the York contract, it followed that the "condition precedent" for a loss of employability claim had not

been proved. In any event the HMRC records showed that the pursuer had in fact earned more after the interim interdict was imposed than before.

[105] Mr Webster then addressed the claim for damage to reputation. He submitted that the pursuer's claim that while he was working with the defender they were twice awarded house builder of the year, and that he had 70 men working at Springfield sites was not borne out by his recorded earnings of £7,242 in the year 2015/2016. In any event, Mr Todd, who the court was invited to conclude was an impressive witness, suggested that in fact the pursuer had stopped working for the defender in 2014 because he had made a complaint against a site manager that was not upheld and separately had not taken up an offer of work on a site in Edinburgh. Although Mr Webster recognised that Mr Ruddy spoke highly of the pursuer, the court was invited to find his evidence in general unreliable and incredible. The positive evidence on this aspect from Mrs McGowan and to some extent the pursuer's son should be discounted as lacking objectivity. There was no evidence to support the pursuer's averment that the defender had made the fact of the interdict known in the industry. The pursuer had led no independent evidence of his standing in the industry. So far as his relationships with his family were concerned, there was little evidence to support the averment in his pleadings that relations were damaged because the family assumed the grounds for the interdict to be true. On the other hand the pursuer's evidence that possible contracts had been discussed, if the pursuer carried out the work through his wife or son was corroborated by his earnings through a company of which his wife was the owner paying him £43,790.13 in 2018/19 and £23,777.38 in 2019/20. In summary, there was no evidence to support a claim for damage to reputation.

[106] Finally, so far as distress, anxiety and inconvenience was concerned, Mr Webster criticised the pursuer as being an unimpressive witness and that he should be held to be

incredible and unreliable. Despite the alleged impact upon him of the interim interdict, he was unable to answer questions or answered them only vaguely, when the questions related to matters that should have been within his knowledge. In any event the pursuer could have ameliorated any alleged impact by seeking to recall the interdict and his failure to do so meant that he had failed to mitigate his loss.

[107] In the event that the defender was found liable to pay damages to the pursuer, then the evidence of Mr Todd tended to support the contention that the interdict proceedings were not gratuitous; that it related to wider concerns than just asbestos; that the defender was motivated by a desire not to alarm householders; that it acted on the basis of legal advice; and that the delay in recalling the interim interdict was caused by the distraction of the Covid pandemic. No suggestion of criminal activity on the part of the pursuer had been made, so no aggravated award of damages for loss of reputation was justified. Were the court minded to make an award of damages, a global sum of £20,000 would be appropriate.

Additional written submissions

[108] The parties' submissions focussed, understandably, on the course that each invited to the court to take in light of the evidence. Neither side however addressed any alternative scenario, even on an *esto* basis, particularly so far as considering the proper approach to interest in the event that damages required to be assessed, and fell to be assessed on a basis other than that contended for by each. Parties were accordingly invited to submit additional submissions on that topic, in writing, and on the understanding that any such submission would be considered without prejudice to the oral and written submissions already advanced, if they wished to do so. Both parties took up that invitation, and I am grateful to each for their helpful additional submissions. Although both sides broadly agreed on the

underlying principles applicable to any award of interest, they diverged on the application of those principles to the present case.

[109] The additional submissions for the pursuer might be summarised as follows: There was no doubt about the Court's inherent power to award interest (Wisely v John Fulton (Plumbers) Ltd 2000 SC (HL) 95), and the relevant statutory power was to be found in section 1(1) of the Interest on Damages (Scotland) Act 1958 which provides:

> "Where a court pronounces an interlocutor decerning for payment by any person of a sum of money as damages, the interlocutor may include decree for payment by that person of interest, at such rate or rates as may be specified in the interlocutor, on the whole or any part of that sum for the whole or any part of the period between the date when the right of action arose and the date of the interlocutor."

[110] The effect of the common law and statutory provision combined was that a pursuer may recover interest by way of damages where he is deprived of an interest-bearing activity. The relevant legislation extended the power to seek interest from the date of citation to an earlier date by enabling the court to award interest for the whole or any part of the period between the date when the right of action arose and the interlocutor awarding damages. The right of action may well arise long before the pursuer has cited the defender in an action for damages. In a non personal injuries case interest is awarded from a selected date without any break at the date of decree. In the normal case therefore when decree is pronounced interest will run at 8% per annum (*Boots the Chemist Ltd* v *GA Estates* 1992 SC 485; *Sheridan* v *News Group Newspapers Ltd* 2019 SC 203).

[111] As to the appropriate rate of interest, it was accepted that the court has a discretion in relation to the applicable rate but that matter requires to be put in dispute by the parties in their respective pleadings (*Farstad Supply* v *Enviroco Ltd* 2012 SLT 348 at [26] upheld by the Inner House in 2013 SC 302 at [30]). The defender has pled a case that the judicial rate

would be unreasonable in these circumstances. The default rate of 8%, as set out in Rule 7.7 of this court's rules, should therefore apply.

[112] Equally, however, where past losses have occurred over a period of time, the usual approach is to award interest at one half of the judicial rate whilst they were accruing: *Smith* v *Middleton* (No2) 1972 SC 30, described as "authoritative" by the Inner House in *JM* v *Fife Council* 2009 SC 163 at [24].

[113] The pursuer's position, therefore, on the basis of the authorities set out above is as follows:

a. Interest should run from the point of occurrence of the loss for which the damages are being awarded;

b. The default rate of interest is the judicial rate of 8% and that should be the starting point; and

c. Where the loss was incurred over a period of time, one half of the judicial rate should be applied.

[114] An application of those principles to the present case would result in interest being applied on any award for distress, anxiety and inconvenience at 4% while the interdict was in place, and 8% after recall. No apportionment between past and future should be made, recall resulted in vindication and brought this head of claim to an end. The same approach should be taken to the claim for damage to reputation, as a non pecuniary loss the same principles applied as to distress, anxiety and inconvenience.

[115] So far as interest on loss of earnings was concerned, this head emerged from the loss of the York contract, and was all in the past. Given that the contract was due to run over a period of 18 months, rather than a month by month assessment of interest it would be

consistent with principles to apply all interest at half the judicial rate whilst the losses were being incurred (the first 18 months) and thereafter at 8%.

[116] Finally, any loss of employability award was properly viewed as a capitalised valuation of the reduction of the pursuer's worth in the job market. It was thus a pecuniary loss and should attract interest at 4% while the interdict was in place, and 8% thereafter (*A and B* v *C* 2018 SLT 1194 at [41]).

[117] For the defender, its primary position is that other than the pursuer's claim for distress, anxiety and inconvenience, interest should run only from the date of citation, that being, according the defender, the date from which interest is sought in the pleadings. It is only fair to observe at this juncture that such was not the position in the pleadings before the court for the purposes of proof, rather, following earlier amendment, interest was sought from 5 February 2016 (the date of the interim interdict) until payment. That matter aside, the defender conceded that the start point should be that any award should bear interest at 8% from the date of decree, and that in the present case, interest at a lower rate was appropriate.

[118] The present proceedings being an action for wrongous interdict section 1(1A) of the 1958 Act was not applicable, relating as it did to damages for personal injury. More generally interest should run from the date of quantification by the court (*Sheridan* v *News Group Newspapers Ltd* 2019 SC 203 at [35]-[36]; [43].)

[119] On the question of loss of reputation, in the event that the court found such established, only a broad apportionment of half to the past, and half to the future could be achieved. As to the applicable rate, the mismatch between the judicial rate and prevailing commercially interest rates was relevant, especially since the financial crisis of 2008 (*Farstad Supply AS* v *Enviroco Ltd* 2013 SLT 421, [6], [27]-[30]. In *Farstad* the court took 4% as an

appropriate rate of interest for the period after December 2008. Where an award is in respect of past losses sustained over a period of time, the appropriate rate prior to decree is one half of the rate that might be applied to ongoing losses (*Smith* v *Middleton* 1972 SC 30, Lord Emslie at page 40). Therefore in the event that interest fell to be applied the appropriate rate was 2% a year from the date of decree and in any event no more than 4% a year (half of the judicial rate). The commencement date should be the date of citation, and the end date the date of decree.

[120] Turning to the claim for distress, anxiety and inconvenience, in the event that the court found such established, then the same principles as submitted in respect of damage to reputation should apply. Specifically, half of the award should be attributed to the past with the same approach to the rate of interest as already contended for.

[121] The defender's primary positon in relation to the loss of earnings claim based on the loss of a chance of obtaining the York contract was of course that it had not been established. In any event, even if the court took a different view, absent reliable evidence as to when and in what amounts payments under the contract would have been made, it was not possible to identify any date for the calculation of the commencement of the period from which the contract should run. Thus interest would only fall to be applied after decree and until payment. On the basis of *Farstad*, 4% a year was commended.

[122] Lastly, the claim for loss of employability was predicated on business opportunities in the future, and thus there was no basis to award interest, which could only be applied to past losses.

Objections to the evidence

[123] There were two objections of substance during the course of the proof. The first arose during the course of the cross-examination of the pursuer. It was put to the pursuer that it would be unusual for a contract of the magnitude suggested in the letter from Mr Ruddy to be awarded in the absence of a tendering process. This line elicited an objection from the Dean of Faculty on the basis that the questioning seemed designed to allege explicitly or at least invite the inference that the documentation passing between the pursuer and Mr Ruddy was a sham. There was no mention in the pleadings of any challenge to the veracity of the documentation and a serious allegation of that nature required as a minimum fair notice in the pleadings. The Dean of Faculty also submitted that if a document or documents were to be competently challenged that ought to be by way of a plea *ope exceptionis* (see, *inter alia Eastern Motor Company Limited* v (*1) Colin Donald Grassick, (2) David Douglas Grassick and (3) Jane Hartree Haig* 2021 CSIH 67; *Neil* v *McNair* 1901 3 F 85; *Donald* v *Donald* 1913 SC 274).

[124] Mr Webster did not initially demur from the suggestion that he wished to challenge the underlying veracity of the documents relating to the York contract. However he responded by submitting that his averment of "Not known and not admitted" was broad enough to enable him to make the sort of challenge in question. In any event he contended he was entitled to challenge credibility and reliability more generally and thus the line of questioning would simply provide the foundation for a later submission challenging the credibility and reliability of the pursuer and, in due course, Mr Ruddy.

[125] In upholding the objection, I concluded that the broad averment relied upon by the defender could in no way be considered to give fair notice of the fundamental challenge which was now being foreshadowed. That alone was sufficient to dispose of the matter

without considering whether a plea *ope exceptionis* was also a prerequisite for this sort of challenge. A general challenge to credibility and reliability was of course entirely permissible, but not insofar as it had the aim of laying the foundation for a submission that the documents themselves were a sham when such had never been suggested in the pleadings.

[126] The second objection of substance emerged during the course of the evidence in chief of the final witness, Mr Petticrew. Mr Webster made a motion to lodge documentation relating to the York contract. This drew an objection from the Dean of Faculty on the basis that the motion came far too late in the day, was manifestly prejudicial to the pursuer, and that no sound reason was offered as to why it should be received. The motion was, in short, an attempt at ambush. I concurred with that characterisation of the motion. No reason could be proffered as to why, if these documents were of relevance or significance, they could not have been produced in accordance with the usual timetable. I upheld the objection and refused to allow the document to be lodged as a production.

[127] One final matter that elicited an objection was the Dean of Faculty asking questions of Mr Todd as to his knowledge of the various reports and documentation confirming the presence of asbestos on the Milton of Campsie site prior to the interim interdict being obtained. It was suggested that, in light of the wrongfulness of the interdict being established, this line was irrelevant. The Dean of Faculty's response was that the *mala fides* of the wrongdoer were potentially relevant in the assessment of causation and loss and thus he should be permitted to ask the questions. It seemed to me that this issue was of potential relevance for the reasons advanced by the Dean of Faculty, and I repelled the objection.

Credibility and reliability

[128] The pursuer had a tendency to provide answers that were at times overly loquacious, occasionally somewhat rambling, and sometimes not directly related to the question he had been asked. He repeated on a number of occasions that from the outset his only concern had been for the safety of those working on the site, and that had the defender simply engaged with him on that, all of the litigation that followed could have been avoided. He found cross-examination challenging at times. I did not form the impression that his tendency to respond to questions saying that he did not understand them was a deliberate attempt to prevaricate, rather that he genuinely struggled with what were occasionally quite complex propositions that were being put to him. Overall I had no concerns about his credibility, although for the foregoing reasons I had doubts at times about the reliability of his recall on certain matters. These were not matters on which, ultimately, much turned. However, as I will come on to discuss, there was support for his position from other witnesses who assisted in filling many of the gaps that there were in the pursuer's overall recall, and who gave evidence consistent with the general tenor of the evidence provided by the pursuer.

[129] In similar vein I found Charles Ruddy to be generally credible and reliable. There were some inconsistencies in his evidence compared with others, notably Mr Petticrew but all of the witnesses were of course speaking about events that happened some 9 years ago and some inconsistency is to be expected. The most significant inconsistency between Mr Ruddy and Mr Petticrew is whether the York contract (tranche 2) was beginning or ending in 2016. If Mr Petticrew is correct, then the correspondence between Mr Ruddy and the pursuer could only be some sort of device, created in anticipation of a claim for wrongful interdict some 5 years in the future. Not only was there no basis in the pleadings upon which such a proposition could be advanced, it stretches credulity that such a scheme would

be devised, given the balance of the other evidence which I accept. In the result therefore, I find Mr Ruddy to be reliable on this matter. I will address Mr Petticrew's evidence in more detail below. Mr Ruddy was also prepared to make concessions when it was appropriate to do so. Importantly, he did not ultimately insist that the figure of £8.2 million mentioned in his first letter to Mr McGowan represented the value of the contract to the pursuer, and that it was more likely that it represented the overall value of that tranche of the contract. He was also clear that this letter was a proposal only, not a contract, which would come later down the line.

[130] Ruth and Marc McGowan I found to be credible and reliable on the matters to which they spoke. Their description of a close-knit family upended by the imposition of the interdict was entirely credible and reliable, as was their description of the change brought about in the pursuer by these events. Whilst it is true to say that, given their relationship with the pursuer, there was likely to be some subjectivity in their assessment, such did not affect their credibility and reliability overall on the key matters upon which they gave evidence.

[131] Mr Bell was an impressive witness. He delivered his evidence in a coherent and cogent manner. He was able to substantiate his approach by reference to accepted accounting practice. He came under sustained pressure in cross-examination to make concessions in relation particularly to the proposition that the HMRC schedules should be preferred over any other material as evidence of the pursuer in fact having suffered no loss over the relevant period. He was also pressed to accept that the only set of accounts lodged with Companies House that were not said to be "draft" or "unaudited" carried greater weight than other material available. He was also asked to perform calculations effectively, "on the hoof" from the witness box based on the defender's proposition that the net profit

margin from the accounts of 2012 for MMCG Contracts limited ought to be used in the calculations of loss. Mr Bell resisted all of these invitations to make concessions of the sort desiderated. What was of note was that he did so whilst remaining calm and measured, and that he was able to explain in a reasoned way why he did not accept the propositions that were being put to him. I have no hesitation in accepting him as entirely credible and reliable. It is implicit in that assessment that I accept his evidence as to the proper accounting approach to be taken in performing the calculations he carried out, on different hypotheses. There was no professional contradictor to him on such matters, but of more significance was the measured, rational, and logical way he responded to contrary propositions put to him in cross.

[132] The defender's witnesses, Messrs Beaty and Dunleavy gave evidence that was short in compass. Their respective credibility and reliability was not suggested to be in doubt and I accept them as both credible and reliable in relation to the evidence that they gave. Mr Dunleavy presented as a careful, thoughtful individual who I can reasonably infer brought that approach to his business affairs. That assessment is of some relevance to questions of causation and loss, which I discuss below.

[133] Mr Todd I do not doubt was credible in the sense of telling the truth about the matters on which he was questioned. However his evidence did not at all times coincide with that of the pursuer, for example in relation to whether the two ever had a face to face meeting. Nothing ultimately turns on that matter but in other respects Mr Todd had a tendency to present his evidence, particularly in cross-examination, in a somewhat defensive manner. This might to some extent be expected, given that he was the sole representative from the defender brought to give evidence, and having regard to his role with the defender. However he indulged in unnecessary semantics at times when cross-examined, and was

slow to make concessions which he ultimately, and properly, made, such as the defender's knowledge of the findings of the asbestos specialists at the Milton of Campsie site. His attempt to transfer responsibility for the obtaining of the interim interdict entirely to the defender's legal advisers was also unfortunate. Ultimately however, the purpose of leading Mr Todd seemed to be to cast aspersions over the pursuer's character, such as eliciting suggestions he attempted to blackmail Mr Todd, to mitigate quantum overall in the event that an award of damages were made by the court, and to temper any suggestion that the defender acted *mala fides* in obtaining the interdict. For the avoidance of doubt, the somewhat curious chapter of evidence relating to conversations and correspondence between Mr Todd and the pursuer which were said to amount to an attempt to blackmail Mr Todd were in the result not directly relevant to the key matters in dispute. In any event, Mr Todd sought to draw an inference that, looked at objectively and fairly, the discussions did not merit. The pursuer was clearly keen to discuss some form of compensation for what he had been through, but the tenor of the conversations do not, looked at fairly, merit the label "blackmail."

[134] The final witness, Mr Petticrew, gave his evidence in a measured manner. There was no obvious reason to doubt his credibility, in the sense that there is no reason to question that he was telling the truth as he recalled it, and was doing his best to assist the court. However it is equally the case that his evidence was inconsistent with other evidence in the case in a number of material respects, such as the time frame over which the contract ran, and the signing powers of various personnel in the McNicholas hierarchy, such as Mr Dunleavy. He was unable to explain why the press release to which he was referred suggested a different timeframe over which the contract was due to run. Some of these issues were significant, and go to the heart of matters in dispute between the parties, such as

the assessment of whether or not there was a chance at all of the pursuer securing the York contract, and what a proper assessment of that chance might be. His evidence, under reference to an email from McNicholas setting out the various signing authority levels in the company at that time, was directly contradicted by the evidence of Mr Dunleavy, who was asked whether he could have signed a contract to the value of £4.4 million and he said that he could. Mr Dunleavy was of course asked a follow up question, whether he might accept the level was different to that, to which he assented, on the basis that he was recalling matters from a long time ago. However Mr Petticrew's position, and the email that he spoke to in evidence, were never put to Mr Dunleavy. Therefore no specific alternative signing power for someone in his position, was ever put to him. The position in relation to the anticipated duration of the contract was also unsatisfactory. Mr Petticrew was clear that the contract was close to an end by March 2016 and therefore the likelihood of such a significant sub contract being awarded was minimal at that stage. However that was not the position of any other witness and nor was that proposition put to them. In any event, it might be anticipated that a witness such as Mr Dunleavy, described as a meticulous individual careful to "dot all the I's and cross the t's" either literally or inferentially, by both Mr Ruddy and Mr Petticrew, might have been expected to volunteer the information that the contract was in fact coming to an end by March 2016 if that was the position. None of the key aspects of Mr Petticrew's evidence (and which could have been anticipated on the basis of presumed pre proof precognition of him) was put to any other witness who might have been able to comment upon it. There is a sense of unfairness arising from that state of affairs. More significantly, the failure to put matters such as the contract effectively coming to an end by February/March 2016 is significant, and gives rise to clear prejudice to the pursuer. Therefore, in the result, whilst I do not doubt Mr Petticrew was doing his best to tell the

truth, his position was not canvassed with other witnesses who might reasonably have been able to comment, and therefore inasmuch as his evidence did not fit with, or was contradicted by, other evidence which I accept, such as that of Mr Dunleavy, I have set it to one side (*Grier* v *Lord Advocate* [2022] CSIH 57).

Analysis and decision

[135] It is appropriate to address firstly the one substantive legal argument on which the parties differed, that being the question of whether there was any obligation upon the pursuer to mitigate his losses. The pursuer argued that there was no such obligation, the defender contended that there was, and that the failure in the present case lay in the pursuer failing to take steps at any point to seek recall of the interim interdict. There was some discussion in relation to whether the defender was seeking to conflate the concepts of contributory negligence and mitigation, but ultimately I did not understand Mr Webster to dispute that, his plea anent contributory negligence having been repelled, the focus of his argument lay on the alleged failure to mitigate.

[136] As to the proper approach to this question, I respectfully adopt and apply the analysis set out by Toulson J (as he then was) in *Standard Chartered Bank* v *Pakistan National Shipping* [1999] 1 All ER (Comm). There, he said:

> "The orthodox view is that the rule as to avoidable loss is merely an aspect of the fundamental principle of causation that a plaintiff can recover only in respect of damage caused by the defendant's wrong. The rule is not that the plaintiff owes any obligation to the wrongdoer to mitigate his loss (despite the much repeated use of the phrase 'duty to mitigate'), but that he cannot recover for a loss avoidable by reasonable action on his own part because, if he could reasonably have avoided it, it will not be regarded as caused by the wrongdoer."

[137] Application of that approach of course necessitates an assessment of what the "wrong" is, and when it occurs. Although not binding on me, the analysis offered by

Professor Adar in his article "Comparative Negligence and Mitigation of Damages" 31 QLR 783, despite being written from an "Anglo American" perspective, is entirely consistent with orthodox principles as they would be understood in this forum. In that article he wrote:

> "It is universally accepted that the 'duty to mitigate' arises only after the completion of a legal wrong against the plaintiff, that is, in the context of a tort action, only once the tort is complete."

[138] In the present case, the Inner House considered the question of whether or not the pursuer's claim was time barred, and concluded that it was not. At para [7] of its opinion the Inner House said:

> "[7] In agreement with the Lord Ordinary we are satisfied that to obtain and then continue to insist in an interim interdict is a continuing act within the meaning of section 11(2) of the 1973 Act."

The court continued at para [8] as follows:

> "It is worth noticing the surprising outcome if Springfield's contention is correct. As noted in Scott Robinson, Interdict, page 152 and Walker, Civil Remedies, page 246, a claim for loss caused by a wrongful interdict requires to await its recall or reduction. However, if one proceeds on the hypothesis that the wrongful act is completed when the order is obtained, the effect of section 11(1) of the Act when taken with section 6 is that the five year period began when loss and damage first occurred. In a case such as the present that would be when the interdict was granted. Thus, unless section 11(2) applies, since the order stood for more than five years, any obligation Springfield owed to Mr McGowan was extinguished before he could make a claim based on it. Clearly that would be a nonsense. Counsel for Springfield suggested that an action for damages need not await recall of the interdict, but that strikes us as wholly unrealistic. He also pointed out that a defender can seek recall, which is true, but any such attempt may prove unsuccessful."

[139] It would be wholly inconsistent with that binding expression of the law to conclude that any obligation to mitigate loss arose from the moment the interim interdict was granted. The Inner House has confirmed that the wrongful obtaining of the interdict was a continuing wrong that subsisted until the interdict was recalled. In unequivocal language it states that to conclude otherwise would be "a nonsense." There was no suggestion by the

defender that any failure to mitigate arose in the period after recall and before the raising of this action (a matter of a few months). Accordingly, for all those reasons, I conclude that any argument that there was any obligation upon the pursuer to mitigate his losses by seeking recall of the interim interdict at any point after it was granted, and before it was recalled, is unsupported by authority and would run contrary to the binding decision of the Inner House on the question of prescription in this case.

Causation and loss

Distress, anxiety and inconvenience

[140] I turn now to the interlinked questions of causation and loss. On the evidence of the pursuer, his wife and his son, which I accept, the obtaining of the interim interdict caused the pursuer distress, anxiety and inconvenience. Despite the observations made above in relation to how the pursuer presented, the effect of the interim interdict upon him was clear, indeed one might say palpable, and in any event was supported by the evidence of his wife and son, who I accept, and who spoke clearly of the change in the pursuer after the interim interdict was served, compared with the man he was before. The obvious temporal connection between his demeanour before and after the interim interdict was served, and his almost obsessive determination to prove that he was right all along all fit with that conclusion. Mrs McGowan was plainly, and appropriately, upset when speaking about the effect on the pursuer, and the evidence both she and her son gave about the previous strong family bonds and the effect on those, was similarly credible and persuasive. The interdict was wrongful, and persisted in for a period of 5 years despite the defender's engagement with the prosecution authorities in relation to negotiating a plea of guilty to, inter alia matters raised by the pursuer. The defender took no active steps to seek recall at any time,

despite the responsibility upon them to do so, as confirmed by the Inner House in this case. That was an egregious wrong that has had a significant effect upon the pursuer. Drawing all of the evidence under this head together, I accept the pursuer's submission that £25,000 is a reasonable estimate of the loss under this head.

Damage to reputation

[141] The defender's contention that it is doubtful that the pursuer had a reputation of value at all takes matters too far, since the pursuer was not seriously challenged on the evidence that he gave about growing his business by word of mouth and in reliance on his reputation. He was not challenged on his evidence about various well-known companies with whom he had worked in the past. However the only objective support for that came from Mr Ruddy, who spoke of knowing the pursuer by reputation and from working with him previously and knowing therefore that he would manage the York contract well. Whilst I accept that evidence and therefore I am satisfied that there is evidence apt to support a claim under this head, once again the level of that award is necessarily impressionistic. The pursuer relied upon *Munro* v *Brown* [2011] CSOH 117 in support of a submission that an appropriate award under this head would be £50,000. This was based on the award in *Munro* (£20,000) and "taking account of the change in the value of money since then". However allowing for inflation only increases the value of the award in *Munro* to just over £34,000. I am not persuaded that the harm to the pursuer's reputation, taken at its' highest, exceeds that as described in *Munro*, where the pursuer, an international sportswoman, had allegations about her publicised widely in the press. The two factual scenarios are different, but I conclude that allowing £20,000 under this head, or £4000 a year for the duration of the interdict is an appropriate reflection of the evidence on this matter.

Loss of earnings

[142] Turning then to the most significant head of claim, loss of earnings, this is advanced on the basis of the loss of a chance of obtaining the York contract, under reference to *Centenary 6 Ltd* v *TLT LLP* [2024] CSIH 13. The evidence on this aspect of matters was often complicated or confused by the tendency to conflate the loss of opportunity to submit prices for the contract with the chances of being awarded the contract itself. Thus the defender contended that there was no evidence upon which an award could be made because, amongst other matters, Mr Ruddy did not have authority to award a contract in the order of £4.4 million, he was by March 2016 at best a consultant working for McNicholas and even Mr Dunleavy did not have authority to sign contracts of that magnitude (according to Mr Petticrew, under reference to the email from McNicholas provided in advance of the proof). Reliance was also placed on evidence, for example, from Mr Dunleavy who said that consultants did not have the authority to contract at a level of £4.4 million. However that question and answer does not engage with the evidence actually given by Mr Ruddy, which was not that he was offering a contract to the pursuer, rather that the letter of 28 February 2016 was a "proposal" to Mr McGowan (acting through Rumarc Utilities) to propose prices for the sub-contract work. Until the contractual documentation was all signed, there was no "deal". Getting to that stage involved the proposed sub-contractor submitting prices on McNicholas schedules, as well as certain due diligence, health and safety checks and so on. Once Mr Ruddy had secured an agreement with a contractor to submit prices, the matter would be handed over to the commercial team to complete the "contract." Thus when Mr Dunleavy agreed that consultants did not have the power to sign contracts, that evidence was entirely consistent with Mr Ruddy's position. Mr Ruddy was also clear, and was not contradicted by other witnesses, that the securing of potential sub-contractors in this way

was part of his remit. They had a regular chain of suppliers they could rely on. As to whether a contract was ultimately signed with a particular sub-contractor came down to the prices they quoted, as well their ability to fulfil all of the other pre-contractual checks and requirements of the McNicholas commercial team.

[143] For the reasons set out above, I accept the evidence of Mr Ruddy and the pursuer that, on balance of probabilities, this was the exercise that was being initiated by way of the letter of 28 February 2016. I recognise that there was some evidence, principally from Mr Petticrew, that this form of letter was not a familiar one. However given that, as explained above, no challenge to the validity of these documents could be or was made, that evidence remains at odds with the evidence I do accept. Equally, no one other than Mr Petticrew suggested that it would not have been possible for McNicholas to be looking for sub-contractors for the York project in February/March 2016 on the basis that the contract was coming to an end at that point. Further, I accept that had it not been for the interim interdict, Mr Ruddy would not have withdrawn the proposal to the pursuer. It follows that I accept that the balance of the evidence supports the conclusion that the pursuer lost the chance to propose prices for the York contract as a consequence of the interim interdict being in place. However, there was no evidence as to what prices he would have proposed and on the other hand there was evidence that more than one contractor as a matter of fact submitted prices. It is also clear that further checks and diligence would be carried out before any contract was actually awarded. Therefore, whilst it may well have been that a recommendation from Mr Ruddy would have carried some weight, Mr Ruddy was by this stage, to use his own words, "in the departure lounge." He may not have been around at the time the contract was actually awarded. Drawing all of that evidence together means that the pursuer's submission that the chances of him being awarded the contract were

essentially 100% is, with respect, overly optimistic. Factoring in the hurdles that had to be completed, as well as the other contractors, and the departure of Mr Ruddy, means that objectively the chances were lower than that. However I do not accept the defender's submission that the fact that the pursuer was honest and told Mr Ruddy about the existence of the interdict should be held against him in the assessment of the loss of the chance of securing this contract, or in other words, that the loss of the contract was his own fault.

[144] Because of the nature of the evidence, I do not consider, that an overly mathematical approach, for example ascribing a particular percentage to each of the factors is appropriate or even possible. They are all facets of the same contingency, namely the overall chance of the pursuer, through Rumarc Utilities, being awarded the York contract (*Century 6* v *TLT LLP* 2024 SLT 681, at paragraph 70). Only a broad view of that can be taken on the basis of the evidence. The evidence showed that three companies in fact proposed prices for the contract. Mr Ruddy would no doubt have supported the pursuer to the extent that he was able before his departure. Against that one of the other companies who ultimately offered prices might have offered better prices than the pursuer. A fair recognition of these variables leads me to the conclusion that a deduction of one third is appropriate, or more accurately, that the pursuer's chances of securing the contract should be assessed at 66%.

[145] The final aspect of the loss of earnings claim relates to the appropriate figure to which to apply the percentage set out above. Whilst as explained above, I have no hesitation in accepting Mr Bell's evidence as to the different possible scenarios, he, quite properly, does not go so far as to suggest which scenario is most likely. I note also his evidence that the pursuer told him he would generally look for a profit margin in the region of 23% and that this could be seen to have been achieved from some of the financial material available. However using the lowest profit margin drawn from the available financial records, or the

highest, risks under or over rewarding the pursuer. I conclude that the fairest approach is to base this calculation of the average of those two calculations or, as described by Mr Bell, scenario B. Applying the percentage set out above to scenario B results in a figure for loss of the chance of being awarded the York contract of £247,080.

Loss of employability

[146] The claim for loss of employability was also characterised by the pursuer as a "loss of a chance" claim, relying upon the evidence of the pursuer that had it not been for the interim interdict, and even if he had not pursued the York contract, the pursuer would have had opportunities available in other contracts. It was suggested that an amount equal to the lost value of the York contract be awarded under this head. Whilst I am prepared to accept the pursuer's belief in his ability to generate other work was sincerely held, and that evidence honestly given, there was little other evidence to support exactly what form those other opportunities might have taken. That said, his evidence about the companies he had worked for in the past was unchallenged. The pursuer was also clear he worked almost exclusively for the defender for at least a couple of years, and that the York contract would have lasted a similar length of time. His family supported the notion that the pursuer was "a worker" but in the absence of some comparative material from which to begin, the wielding of the proverbial 'broad axe' is not straightforward. It would be going too far to assume that exactly the same level of earnings would seamlessly be achieved had it not been for the interdict. Amongst other matters, the Covid pandemic intervened from 2020 onwards. Thus whilst I am prepared to accept that the evidence does, in principle and on balance of probabilities, support an award under this head, it will necessarily, for all the foregoing reasons, and at the risk of mixing metaphors, require to be very "broad brush.". It

is also the case that no authority was cited to me in which an award of loss of employability anywhere in the region of that suggested on behalf of the pursuer has been made. Therefore in the result, I accept on the evidence that but for the interdict, either alongside the York contract or once it was finished, other opportunities would have been available to the pursuer, and that the existence of the interdict negatively impacted upon those opportunities. The application of the broad brush to all of those factors results in an award under this head of £50,000.

Interest

[147] I turn now to the question of interest. Both at common law and by way of statutory provision, there is a discretionary power vested in the court to award interest in respect of periods prior to, as well as post decree. The prevailing judicial interest rate is the starting point (section 1(1) 1958 Act (as amended); *Sheridan* v *News Group Newspapers*). The judicial rate of interest is 8% and has been fixed at that rate for some considerable time, notwithstanding the financial crash and its' after effects (see *Farstad Supply Services* v *Enviroco*). Drawing the language of statute and relevant authority together, the presumption is that the prevailing judicial rate of interest is the starting point, but may be departed from in appropriate circumstances. An obvious situation where the judicial rate is departed from is where interest is awarded on past losses incurred over a period of time, where the usual approach is to award interest at one half of the judicial rate (*Smith* v *Middleton* (No2) 1972 SC 30). In the present case the damages claimed are not damages for personal injury but do fall within the terms of section 1(1) of the 1958 Act as amended.

[148] No sound reason has been advanced to depart from those long standing principles. The defender's argument that the start point for the calculation of any interest awarded

should be the date of citation is misconceived, having regard to the terms of the first conclusion as amended. The appropriate start point is the date at which the wrong occurred which is 5 February 2016.

[149] As to the appropriate rate of interest, the defender contends that, following *Farstad*, a rate lower than the judicial rate should apply to both pre and post decree interest. The pursuer takes issue with that proposition on the basis that it has been advanced with no notice in the pleadings, nor any evidence adduced in support of the suggestion that a rate lower than the judicial rate is appropriate. The Lord Ordinary (Hodge) made clear in *Farstad* at paragraph 26 that:

> "I do not consider that it is within my power as a Lord Ordinary to award interest on a novel basis, such as at the rate of one per cent above the base rate. That would require the sanction of the Inner House or could be part of a wider statutory reform of the law of interest."

He went on to state in the same paragraph that he would consider the issue (the mismatch between market rates and the judicial rate) having regard to the fact that the defender had raised the issue in its defences. His approach was upheld on appeal. It follows that a Lord Ordinary cannot, as a generality, adopt a novel approach to the application of interest which is at odds with the common law or statute and in particular cannot, or should not, depart from the prevailing judicial rate of interest except perhaps in relation to past losses incurred over time, or in some exceptional circumstance, and particularly not where the departure invited is unheralded by way of argument in the pleadings.

[150] I therefor accept the submission that interest can and should be awarded, following the compensatory principle, to the award for distress, anxiety and inconvenience. This is not an award of 'solatium', as described (perhaps in error) by the pursuer, but rather an award falling within the terms of section 1(1) of the 1958 Act (as amended). In accordance with

Smith v *Middleton*, the appropriate rate is one half of the judicial rate, or 4%, in respect of the proportion of the award to the past. The pursuer submits that the whole of the award should be to the past, the pursuer having been vindicated by recall of the interim interdict. I agree.

[151] In respect of damage to reputation, this too is a non pecuniary loss, and I accept the pursuer's submission that the same principles should be applied as to the question of distress, anxiety and inconvenience.

[152] So far as loss of earnings is concerned, the pursuer contends for a "broad brush" approach to the assessment of interest, and invites an award of 4% while the losses were being incurred, and 8% thereafter as the losses were fully suffered by that point. I accept that submission in principle, as being a pragmatic and fair approach to the question, particular where the loss of earning is assessed on the basis of the loss of a chance. However the evidence of Mr Bell, which I accept, was to the effect that the contract was anticipated to run for around 2.5 years. I therefore consider that is the appropriate period of time over which the past interest should be calculated, not the period of 18 months suggested by the pursuer.

[153] Finally, on the question of loss of employability, I respectfully concur with and adopt the approach taken by Lord Doherty in *A and B* v *C,* and will award interest at 4% during the period the interim interdict remained in place, and 8% thereafter.

Quantum

[154] The consequence of the foregoing analysis is as follows:

Date of interdict	05/02/2016
Date of Recall	26/05/2021
Period of loss	5.30 years
Period since recall	4.23 years

Distress, anxiety and inconvenience	
	25000
Interest during interdict	5300
interest post recall	8460

Damage to Reputation	
	20000
Interest during interdict	4240
Interest post recall	6768

Loss of earnings	
	247080
Interest while being incurred	24708
Interest thereafter	138957

Loss of employability	
	50000
Interest during interdict	10600
Interest post recall	16920
TOTAL	558033

Disposal

[155] In light of the foregoing conclusions, I will sustain the third plea-in-law for the pursuer, repel the sixth plea-in-law for the defender and award the sum of £558,033 together with interest from the date of decree in full satisfaction of the first conclusion of the Summons. I will reserve the question of expenses meantime.