OUTER HOUSE, COURT OF SESSION

[2023] CSOH 12

A270/21

OPINION OF LADY CARMICHAEL

In the cause

MARTIN MCGOWAN

Pursuer

against

SPRINGFIELD PROPERTIES PLC

Defender

Pursuer: Welsh; Harper MacLeod LLP
Defender: Webster KC; Davidson Chalmers Stewart LLP

14 February 2023

[1] Mr McGowan seeks damages for wrongful interdict from Springfield Properties plc ("Springfield") arising from an action in this court in which Springfield were the pursuers and he was the defender (the interdict action).

[2] Springfield is a company that builds houses. In 2012 and 2013 companies owned by Mr McGowan contracted to provided services to Springfield. Mr McGowan raised concerns about health and safety at one of Springfield's sites at Milton of Campsie.

[3] On 1 February 2016, Mr McGowan sent an email to Springfield in the following terms:

> "I am writing this letter to inform you that due to the recent developments and charges raised against Springfield Properties regarding the asbestos, crude oil and other hazardous materials which have been either demolished or buried on a number of your current and existing building sites that I have been left with no choice but to inform current home owners, family's and children whom have no knowledge of the hazardous risks which lie in or on the grounds of there new homes. As they have a right to know i will be sending a detailed letter to each and every home owner who have purchased a house from Springfield from Uddingston, Motherwell, West Linton and any potential buyers of Milton of Campsie.
> To inform them of the potential risks that they have bought into without any transparency from yourself. I will explain to the unfortunate clients that the asbestos riddled building that once stood on the Uddingston site was demolished by an excavator spreading asbestos fibres all over the site. I will provide a map to each client showing exactly where asbestos from another site in question was buried. Including a map to show the whereabouts of the crude oil. I will also provide photo copied proof of all original paper work from the skip company's with the addresses in which the contaminated material arrived from and also how many tons of which have literally been dumped on there door step. I will also provide phone numbers for SEPA, HSE and local councils in which they can raise there questions to and also my own contact details if they wish for more information. I will also be explaining in the letter that the reason I know and have all said information is that Springfield properties have conducted the same neglect to your safety as they have to several of my own employees. I will state how our employees where sent onto site to demolish old factory's without any knowledge, proper training or proper safety equipment and these men working, eating breathing and returning home to there family's and children where In fact working with potentially lethal asbestos. I will explain that although after months of delegation and investigations Springfield have only now admitted to this wrong doing and are in the process of being charged but still haven't issued any apology to any of the men or family's who they have potentially harmed. The letter will also have an in depth explanation of the hazards that asbestos and contaminated material possesses and what danger it can cause to the lungs. And finally i will be explaining to the home owners how when this was brought to the attention of your own health and safety officer and SEPA it was brushed under the carpet and there where no follow ups to the claim. We therefore had to take it further ourselves and by doing so we have now gained the backing in the Scottish Parliament who have now taken action and a local MP has now requested all paper work not only to the Milton of Campsie development but also Uddingston, Motherwell and West Linton where a fuel tank may have been buried on site under instruction by Springfield Properties. If any of you personally would like to talk about these facts then please don't hesitate to contact myself. For Milton of Campsie is only the begging and the Uddingston site will be persuade next for which we have paper work proof for misconduct regarding hazardous material also."

[4] On 2 February 2016 Springfield warned Mr McGowan that they might raise proceedings against him if he did not desist from making allegations relating to those concerns. On the same date, in a further email, he insisted that his allegations were true.

[5] Springfield raised the interdict action. In the present action, Mr McGowan refers to and incorporates the pleadings in the interdict action, which themselves incorporated the email of 1 February 2016. In the interdict action Springfield summarised the allegedly defamatory allegations as follows at Article 7 of condescendence.

(a) Hazardous materials, and in particular asbestos and crude oil, were negligently and unsafely removed from the Milton of Campsie site and the Uddingston site, exposing occupiers of these sites to danger and endangering their health.

(b) Hazardous material has been "dumped" on [Springfield's] sites, exposing occupiers of these sites to danger and endangering their health.

(c) [Springfield] failed in their health and safety obligations in the respect of [Mr McGowan's] employees, "putting [his] (sic) employees' lives at risk".

(d) An investigation into allegations was made by [Springfield] and the Scottish Environment Protection Agency, the outcome of which was "brushed under the carpet".

In Article 8 of condescendence in the interdict action Springfield pled that those allegations were serious and defamatory. They also pled that the reference to "charges raised against" in the email was untrue, because Springfield had not, at the time of the email, been prosecuted.

[6] The Lord Ordinary granted Springfield's motion for interim interdict on 5 February 2016. Mr McGowan was not present or represented. The summons in the interim interdict action contained averments that it would be reasonable and proportionate to pronounce

interim interdict ex parte without hearing submissions from Mr McGowan. The motion for interim interdict was one to which section 12 of the Human Rights Act 1998 applied. The interlocutor prohibited Mr McGowan, and anyone acting on his behalf, under his direction, authority or control or at his instigation from

> "Making any statement or publishing, circulating or distributing any document including any digital communication containing false, defamatory and misleading statements relating to and about [Springfield's] business; and, without prejudice to the foregoing generality, … from making any statement or publishing any document which repeats in whole or in part any of the statements and assertions contained in [Mr McGowan's] emails to [Springfield] of 1 and 2 February 2016 in relation to [Springfield's] developments at Lillyburn Works, Campsie Road, Milton of Campsie, East Dunbartonshire and Oakbank Crescent, off Bellshill Road, Uddingston, South Lanarkshire."

[7] In October 2020 Springfield pleaded guilty to an offence under section 3(1) and 33(1)(a) of the Health and Safety at Work etc. Act 1974 in respect of risks created for certain of Mr McGowan's employees between 29 April and 3 June 2013 when they were employed in removing material. That is not disputed. It is the subject of averment by Springfield, and Mr McGowan believes it to be true. No extract conviction was produced, but it was common ground that the conviction related only to the site at Milton of Campsie. Mr Webster accepted that a document produced (6/4/1) headed "Health and Safety Executive Details for Case No 4474517" related to the conviction. It includes, under the heading "description",

> "Failed to carry out a suitable assessment to determine the presence, type, quantity and condition of any asbestos on site and did allow employees to be exposed to the risk of inhaling dangerous respirable asbestos fibres."

[8] The Lord Ordinary recalled the interim interdict on 26 May 2021. The interlocutor records that in doing so he was interponing authority to a joint minute. Although there is not a complete concurrence of averment and direct answer to averments in relation to the matter, it is clear from the averments in Article 3 of condescendence and the answer to it

that Mr McGowan entered into an undertaking that he would not, and would not direct, authorise, instigate or otherwise control any person acting on his behalf to, make any statement, publish or circulate or distribute any document, including any digital communication, containing false or misleading statements relating to and about Springfield's business. The undertaking did not reproduce the part of the Lord Ordinary's interlocutor that specifically prohibited statements and assertions about the sites at Milton of Campsie and Uddingston.

[9] On 2 November 2021 Springfield's agents accepted service of the summons in this action. Both parties advanced preliminary pleas when the case called on the procedure roll. Springfield submitted

(i) that any right to damages had prescribed by 2 November 2021;

(ii) that Mr McGowan's case was irrelevant because he was not offering to prove that the interdict was wrongful and that the statements he had made about Springfield were true; and

(iii) that Mr McGowan's averments of loss were irrelevant and lacking in specification;

Mr McGowan submitted that Springfield had averred no relevant defence and that proof should be restricted to quantum. Where an interdict had been recalled, that was almost always conclusive proof that the interdict had been wrongfully obtained. He also submitted that Springfield's plea-in-law regarding contributory negligence should be excised.

Prescription

[10] The question for the court is whether the conduct on which Mr McGowan relies is a continuing act of the sort contemplated by 11(2) of the Prescription and Limitation (Scotland) Act 1973.

[11] Springfield submitted that section 6 of that Act applied by virtue of Schedule 1, paragraph (d). The appropriate date for the purposes of section 6(1) was when the obligation became enforceable: section 6(3). An obligation became enforceable when damnum and injuria concurred: *Dunlop* v *McGowans* 1980 SC (HL) 73. The obligation to make reparation became enforceable when the interim interdict was pronounced. The seeking and obtaining of the order was the civil wrong, namely the invasion of Mr McGowan's right to communicate truthful information: *John Macdonald Ltd* v *Lord Blythswood* 1914 SC 930, Lord President at page 933. Once the interdict was granted, it was an order of the court, and not any wrong perpetrated by Springfield. It was the court that maintained the order in place. Although it had continuing consequences, it was not a continuing act of the sort contemplated by section 11 of the 1973 Act: *Johnston* v *Scottish Ministers* 2006 SCLR 5, Lady Dorrian, paragraph 17.

[12] Mr McGowan submitted that the interdict was wrongful until it was removed. It was a continuing act, neglect or default which ceased when the interdict was recalled. Section 11(2) of the 1973 Act applied. The essence of the wrong was not the pronouncement of interdict by the court, but that the person interdicted was being stopped from what he might otherwise do: *Clippens Oil Co Ltd* v *Edinburgh and District Water Trustees* (1906) 8 F 731, at 751; *Aird* v *Tarbert School Board* 1907 SC 305, at 310. A party sought the remedy *periculo petentis* and required to keep the matter under review.

[13] Neither party identified an authority directly in point so far as the application of the 1973 Act to a claim for wrongful interdict was concerned. *Johnston* was a claim for losses that the pursuer said he sustained because he was subject to a prohibition under the Inshore Fishing (Prohibition of Carriage of Monofilament Gill Nets) Order 1986. He pled that the Order was in breach of EU law, and, in response to a plea of prescription, that the Scottish Ministers had acted unlawfully until they revoked the Order in 1996. The Lord Ordinary determined that section 11(2) did not assist the pursuer in that case. The promulgation of the Order was a completed act, and could not be characterised as a continuing act, neglect or default. Springfield submitted that the analysis in *Johnston* applied with more force to an interdict. The revocation of the order was in the gift of the Scottish Ministers, whereas the recall of the interdict was in the gift not of Springfield, but of the court.

[14] In practice, it is unlikely that the court would decline to recall an interim interdict on the unopposed motion of the party who had been granted the interdict. Although the court would require to pronounce an interlocutor recalling the interim interdict, it is not, in reality, a matter beyond the control of the party holding and benefiting from the order. I do not accept that the analysis in *Johnston* applies with greater force in a case of wrongful interdict.

[15] The analogy with the Order in *Johnston* is not precise. While it is the court that grants an order, it is a party who seeks it. He does so *periculo petentis* (at his own peril). The policy considerations underlying that rule were articulated by Lady Dorrian in *Mirza* v *Salim* 2015 SC 31 at paragraph 67:

> "A petitioner for interdict perils his case, and places himself at risk of damages if it prove to be otherwise, that he will eventually be vindicated in his claim. It seems to me that there is good reason why that should be so: without it the court would be faced with real difficulties in deciding, on the strength of *ex parte* statements, where the balance of convenience lies."

Lord McGhie's reasoning to similar effect appears at paragraphs 88 and 89.

[16] *Mirza* was concerned with determining whether an interdict had been wrongfully obtained: see paragraphs 24 to 26 below. There are cases in which interdict may be wrongfully obtained, but not interfere with any right. *John Macdonald Ltd* is an example. John Macdonald Ltd built a sawmill on a particular site. Lord Blythswood, as tenant of the site, obtained an interim interdict which included a prohibition on building the sawmill there. It transpired that Lord Blythswood was not in possession of the site, as the Land Court had declared that it formed part of a statutory small tenant's holding. The interdict was recalled. John Macdonald Ltd sought damages for wrongful use of interdict. They did not, and could not, aver any legal right to enter the land or erect a sawmill. The interdict had no proper basis but it did not follow that it had deprived John Macdonald Ltd of the ability to exercise a right that the company had.

[17] Damages are not given for the pronouncement of interdict, but for being prevented from exercising a right: *Clippens Oil Co Ltd* at 751; *Aird* v *Tarbert School Board* at 310. *John Macdonald Ltd*, at 933.

[18] The wrong that can sound in damages, if it causes loss, is the act of interfering with a right. That act continues until the interdict is brought to an end. It is a continuing act for the purposes of section 11(2) of the Prescription and Limitation (Scotland) Act 1973.

[19] The policy considerations identified in *Mirza* support that construction. They militate against Springfield's construction of section 11(2) as having no application in relation to a wrongful interdict. A petitioner is not permitted to wash his hands of responsibility for the continuing interdict simply because the court has intervened to grant it. The peril subsists so long as the interdict is in force and the petitioner has not been vindicated in his claim. He has the option to bring the peril to himself to an end at any time by seeking recall.

[20] It follows that Mr McGowan's claim has not been extinguished by prescription.

Relevancy - merits

[21] Springfield submitted that the onus of proof was on Mr McGowan. He required to prove that the statements he made were not defamatory. Recall of interdict without proof on the merits was not conclusive proof that the interdict was wrongful. In this case it was recalled following a joint minute and an undertaking. There had been a change of circumstances.

[22] Mr McGowan submitted that Springfield had no relevant defence. Recall was conclusive proof that the interdict should not have been granted in the first place. It did not matter that the recall had followed a joint minute, or that Mr McGowan had entered into an undertaking. It was an undertaking which on its face simply reflected his general obligation in law to refrain from making false or misleading statements. Proof should be restricted to quantum.

[23] It became clear in the course of the debate that the case so far as based on wrongfully interdicting Mr McGowan from making allegations so far as the conduct of Springfield at the Milton of Campsie site raised distinct issues, as the conduct, or at least some of it, had resulted in a conviction.

[24] The leading modern authority is *Mirza* v *Salim*. The facts in *Mirza* are potentially important in understanding the context in which the majority of the court expressed reasoning on which Mr McGowan seeks to rely. The owner of a shop and yard granted a lease of the shop. It erroneously included the yard. The lease was registered in the Land Register. Mrs Salim acquired the tenant's interest by means of an assignation. Mr Mirza then acquired ownership of the shop and yard. He started building work in the yard, and

Mrs Salim obtained interim interdict prohibiting him from entering the yard. After proof the sheriff recalled the interdict and ordered rectification of the lease and the Land Register. Mr Mirza then raised an action for wrongous interdict. He was unsuccessful before the Lord Ordinary, who held that the interest in the register provided a proper basis for seeking interdict, and that the rectification did not convert a rightful interdict into a wrongful one. Mr Mirza's reclaiming motion was successful. A significant part of the discussion related to the effect of the retrospective rectification on the character of the interdict. Lady Paton, dissenting, accepted that interim interdict and interdict are granted *periculo petentis*, but considered that the question of whether the interim interdict was wrongous and whether or not damages should be awarded required consideration of all the circumstances of the case, including the circumstance that a deed had been rectified subsequently, and the good or bad faith of the parties: paragraphs 56 and 57.

[25] The majority concluded that the retrospective effect of rectification applied for all purposes, and there was no exception in the context of interdict: Lady Dorrian, paragraphs 63-67. Immediately following the passage already quoted from paragraph 67, is this:

> "It is clear from the authorities that, other than on a change of circumstances, recall of an interim interdict is conclusive proof of its having been wrongfully obtained. It is not necessary to prove malice or want of good faith, consistent with a petitioner acting at his own peril if he seeks this particular remedy. **If the court were eventually to conclude** … 'that even at that time the legal position had been different from the position disclosed in the title sheet', it would mean that there had never been a basis for seeking the protection of the court, and the recall of the interim interdict would be sufficient indication that it had been wrongously obtained. If the interdict turns out to have been unjustified the petitioner will be liable in damages for any loss which has been caused." (Emphasis added.)

Lady Dorrian went on to discuss exceptions in relation to possessory remedies which are not material for present purposes.

Lord McGhie's reasoning appears at paragraph 75;

> "I am satisfied that the normal rule is that recall of an interdict after **proof on the merits** gives rise to liability for any loss properly attributable to the interim grant and that the real issue in this case is the scope of any exception to that rule: in other words, the question of when the *periculo petentis* rule, as commonly understood, does not apply." (Emphasis added.)

[26] The reasoning in *Mirza* relates to cases where there has been a judicial determination which has resulted in recall. Lord McGhie's opinion is explicit on that matter. It is clear also from the language used by Lady Dorrian that it is where a court has reached a conclusion that recall will be conclusive proof that the interdict was wrongly obtained.

[27] In *Aird Geomatics Ltd* v *Stevenson* 2015 SLT 329 Lord Pentland considered *Mirza*, *Aird* v *Tarbert School Board* 1907 SC 305; *Miller* v *Hunter* (1865) 3 M 740; and *Wolthekker* v *Northern Agricultural Co* (1862) 1 M 211. He granted summary decree in an action for damages for wrongful interdict where the Lord Ordinary had recalled an interim interdict on an opposed motion having been satisfied that there was a *prima facie* case, but considered that the balance of convenience favoured the defender. Lord Pentland considered an argument that the rule that recall amounted to conclusive proof that the order was wrongfully obtained applied only after an examination of the facts. He described that argument as misconceived: paragraphs 18 and 19.

[28] Senior counsel presented a detailed analysis of a number of the authorities to which Lord Pentland referred, and submitted that they were cases in which there had been a judicial determination on the merits. I do not require to express a view about that analysis. Recall in the present case did not follow on a judicial determination, whether of the merits of the underlying dispute after proof or on a contested motion resulting in a judicial decision. It resulted from an agreement recorded in a joint minute. Recall is not conclusive proof that

the interdict was wrongfully obtained in the circumstances of this case. The onus is on Mr McGowan to demonstrate that he has been wrongfully interdicted.

[29] Mr McGowan had submitted that I should restrict proof to quantum if I accepted his argument as to the effect of recall. I make the following observations. It does not follow from the reasoning in *Mirza* that in any case where interdict has been wrongfully obtained that a right will have been interfered with. In many cases the reason for recall on the merits will relate directly to the right of the person interdicted. That was the case in *Mirza.* It was apparent, once it was accepted that rectification had retrospective effect, that Mr Mirza had, and had always had, the right to enter, occupy and build on the yard. As I have already observed, that will not always be the case: cf *John Macdonald Ltd*.

[30] I have concluded, for the following reasons, that Mr McGowan has averments on record which permit him to prove that the interdict was, at least in large part, wrongful.

[31] The case so far as based on interdicting Mr McGowan from making allegations so far as the conduct of Springfield at the Milton of Campsie site requires separate consideration insofar as that conduct was the subject of the conviction in 2020. Section 10(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 applies. So far as the subject matter of the conviction is concerned it would be for Springfield to rebut the presumption that they did not engage in the conduct to which they pleaded guilty. They have no averments that permit them to lead evidence to do so. So far as the interdict prevented Mr McGowan from repeating allegations that Springfield exposed employees of his company to risk between 29 April and 3 June 2013 when removing material, Springfield state no relevant defence.

[32] Mr McGowan pleads in Article 2 of condescendence that the conviction relates to the sting of his email of 1 February 2016. He offers to prove that his employees had been tasked to pick up material lying on the ground at Milton of Campsie and that the material was

asbestos: page 6B of the Closed Record. On the analysis above Mr McGowan does not require to prove that, subject to the precise terms of the conviction.

[33] He makes a series of positive averments from page 6E onwards about conditions at the Uddingston site. Those averments are relevant to demonstrating the truth of his allegations that his company's employees were exposed to risk from asbestos when working on Springfield's site at Uddingston.

[34] Mr McGowan avers in Article 3 of condescendence that his position in the interdict action was that what Springfield sought to interdict him from repeating was true. Although the averment is framed by reference to his position in the interdict action, it provides notice that his position is that what he said was true. He elaborates on that by averring that documents which he recovered from the Health and Safety Executive in 2021 demonstrate the following:

(a) On or around 8 October 2020 Springfield had been prosecuted and fined by the Health and Safety Executive for failing to carry out a suitable assessment to determine the presence, type, quantity and condition of any asbestos onsite and had allowed employees to be exposed to the risk of inhaling dangerous respirable asbestos fibres;

(b) In or around September 2014 the Health and Safety Executive had investigated a complaint about Springfield, lodged by Mr McGowan, and had found that the site was contaminated with asbestos, Springfield employees and those of Mr McGowan's company were exposed to risks from working with and inhaling dangerous asbestos fibres;

(c) A specialist report found that the exposure incident referred to above was very serious and is likely to have implications for the health of those workers who

carried out the work and others who visited the site whilst the work was being carried out;

(d) Springfield did not take the necessary reasonably practicable steps to ensure that Springfield's employees were adequately protected against the risk of inhaling dangerous asbestos fibres when working at the Milton of Campsie site;

(e) Springfield used an untrained, unskilled and unprotected workforce to carry out this work with asbestos;

(f) Waste material was transferred for various purposes between the Uddingston, Motherwell and West Linton sites in that crushed demolition material and excavated waste soils were imported, deposited and used as infill material, road base material or buried on site at the Motherwell, Uddingston and West Linton sites.

[35] Framing those averments by reference to the documents arguably gives rise to the criticism that they involve pleading evidence. I am satisfied, however, that Mr McGowan's averments provide fair notice that he is offering to prove that the sting of what he said in his email of 1 February 2016 was true. So far as the reference to "charges being raised" is concerned, it is plain that the email comes from a person who is not legally qualified and who is not using a term of art. He offers to prove that at the time of his email the Health and Safety Executive had already investigated a complaint. The absence of an averment that Springfield had not been formally charged by February 2016 is of no significance.

[36] Mr McGowan does not specifically aver that land remained contaminated after houses had been built. Hazard to occupiers was part of what he alleged in the emails of 1 and 2 February 2016. Similarly, he does not specifically aver a basis for saying that Springfield brushed his concerns under the carpet. That is not a basis for dismissal of the

action. He was made subject to a wide ranging prohibition, and he is entitled to prove the respects in which he says that prohibition was unjustified and wrongful, on the basis that at least a number of his original allegations were true.

Relevancy and specification - loss

[37] Springfield made a series of criticisms of the averments of loss. All were complaints of lack of specification.

[38] Articles 7 and 8 relate to Mr McGowan's claimed loss of personal income in the past and the future. I have read them together. He pleads that as a result of the interdict, companies with which he formerly had a working relationship were and are hesitant to work with him again. He also offers to prove that his workforce found new jobs and that several are reluctant to work with him again. Several distrust him because he was not able to be truthful with them because of the interdict. He says that he is, as a result, not able immediately to return to the level of earnings that he was able to achieve prior to the interdict. He pleads that his personal income has as a matter of fact reduced by £20,000 per year between 2017 and 2020. He anticipates that he will continue, personally, to lose income for another 5 years. I am satisfied that he provides fair notice as to the extent of his claimed loss. There is sufficient notice to permit investigation of the amount of income he has received by means of, for example, recovery of his tax returns. He does not, however, specify any companies with whom he has been unable to contract, or the identities of any employees who are no longer willing to work with him. Although the claim may in principle be relevant, Mr McGowan has no averments to permit him to lead any evidence about the position so far as any particular companies are concerned, with whom he (or companies which he controlled) formerly contracted but have not since the interdict. Any

attempt by Mr McGowan to give or lead evidence about the basis for his contentions that he has lost income because particular firms or workers have lost confidence in him because of the interdict would be met with objection for want of fair notice. Springfield are entitled to fair notice in relation to these matters.

[39] Article 9 of condescendence relates to loss of reputation. Although it is pled as a loss of reputation, it is difficult to discern how its basis differs from the loss pled in Article 8. The concern is expressed as having to worry about new work in a way that did not arise before the interdict, and loss of reputation in the industry. The pleadings in relation to this claim require to be sufficiently specific to allow an assessment of whether there is, as there appears on the face of matters to be, an element of double counting with the claims for financial loss.

[40] Articles 10-12 are relevant and sufficiently specific to permit inquiry. The claim ultimately is for loss of income that is personal to Mr McGowan. It is said to arise from loss of a specific contract. The works to which it related are specified, as is the individual with whom Mr McGowan says he was negotiating. Mr McGowan offers to prove that the contract would have been with a company controlled by him, and sets out the basis on which he calculates the personal loss of income relative to the value of the contract and the profit margin for the company so far as the contract was concerned.

[41] In Article 13 Mr McGowan claims damages for anxiety and stress caused by trying to have the interdict recalled. The pleadings include claims that those matters were exacerbated by worry about the exposure of employees, including his son, to asbestos. The averments in question are the words "his workers' health" and:

> "In particular, Mr McGowan has been significantly anxious as a result of his workers being exposed to asbestos by Springfield and what could happen to them as a result

> of that exposure. As condescended upon above, one of those workers was Mr McGowan's own son."

The exposure of workers to asbestos is not a result of the interdict, but of the conduct of Springfield on site, and those averments are irrelevant.

Contributory negligence

[42] Springfield have a plea of contributory negligence. In each of Answers 7 to 13 inclusive they plead, "Explained and averred that *esto* the pursuer's statements were true, he failed to minimise any loss by insisting upon recall of the interim interdict." There is no averment as to what is said to constitute the fault on the part of Mr McGowan which would engage section 1 of the Law Reform (Contributory Negligence) Act 1945. Senior counsel submitted only that fault in that sense encompassed a failure to mitigate loss. Failure to mitigate loss and contributory negligence are distinct concepts. I am not satisfied that there is a relevant basis in Springfield's averments for the plea.

Disposal

[43] I am satisfied, other than in relation to the losses claimed in articles 7, 8 and 9, that Mr McGowan's averments are sufficient for proof before answer. In relation to those claimed losses I will give Mr McGowan the opportunity to consider whether to ask for leave to amend. I am satisfied that the defences are sufficient for proof before answer, save in relation to the pleas regarding prescription and contributory negligence. I shall put the case out by order to discuss the appropriate interlocutor and further procedure in the light of my decision.