

OPINION OF THE COURT

delivered by

THE LORD PRESIDENT

in causa

BRIAN HOUSTON AND PATRICK CHALMERS

Pursuers

against

BRITISH BROADCASTING CORPORATION

Defenders

Elections – role of media – impartiality – whether extended interview with Prime Minister or Panorama Programme shortly before local government elections would be in breach of duty, under licence, to treat controversial subjects with due impartiality – locus standi of pursuers.

Background facts

*The British Broadcasting Corporation (BBC) planned to broadcast an extended interview on the Panorama Programme with the British Prime Minister on the eve of local government elections in Scotland. An action was brought against the BBC to prevent the programme being broadcast as planned. The action was based on two issues, namely, that, if the BBC were to broadcast in Scotland an extended interview with the Prime Minister on the Panorama Programme that evening, they would be in breach of their duty, under conditions of their licence, to treat controversial subjects with due impartiality; secondly, if such a **prima facie** case had been made out, the balance of convenience favoured the granting of interim interdict to prevent the programme being broadcast until after 9 p.m. on Thursday 6th April following the close of the poll in the local government elections which were to take place in Scotland on that day. The Lord Ordinary reached a discussion in favour of the pursuers in both of those issues and granted interim interdict in the terms sought.*

*The Lord Ordinary's decision was then brought before this Court on a reclaiming motion for review on a new issue, namely the ground that the pursuers, who were candidates at the local government election, had **locus standi** which was required to bring the proceedings against the BBC.*

Held

*That on the new issue a **prima facie** case had been made out which was sufficient to justify the granting of **interim** interdict on the balance of convenience. Motion for appeal to the House of Lords refused.*

Cases cited in the Judgement

Wilson v Independent Broadcasting Authority [1979] SC 351

Ross v Ross [1927] SC (HL) 4

American Cyanamid Co. v Ethicom Ltd. [19750 AC 396

Group 4 Total Security Ltd. v Ferrier [1985] SC 70

Hadmor Productions Ltd. v Hamilton [1983] 1 AC 191

4 April 1995

When this case came before the Lord Ordinary yesterday afternoon he was asked to consider two issues. The first was whether the pursuers had made out a *prima facie* case that, if the Corporation were to broadcast in Scotland an extended interview with the Prime Minister on the Panorama Programme that evening, they would be in breach of their duty, under the conditions of their licence, to treat controversial subjects with due impartiality. The second was whether, if such a *prima facie* case had been made out, the balance of convenience favoured the granting of *interim* interdict to prevent the programme being broadcast until after 9 p.m. on Thursday 6 April following the close of the poll in the local government elections which are to take place in Scotland on that day. The Lord Ordinary reached a decision in favour of the pursuers in both of these issues and granted *interim* interdict in the terms sought by them.

The Lord Ordinary's decision was then brought before this court on a reclaiming motion for review. Mr. Taylor made it clear at the outset of his argument that he was not seeking to challenge the decision of the Lord Ordinary on either of the two issues which had been debated before him. What he sought to do was to present a further argument, to the effect that the pursuers had not made out a *prima facie* case that they had a title and interest to bring these proceedings before this court. He accepted that there was a duty on the Corporation to act with due impartiality in terms of the licence. The issue was whether the pursuers, who are candidates at the local government election, had the locus standi which was required to bring proceedings against the Corporation based on an apprehended breach of conditions of the licence to which they were not a party.

The matter came before us half an hour before the programme was due to be broadcast. For obvious reasons it was not possible for the important issue which was raised by Mr. Taylor to be debated in detail under reference to a full citation of authority. We were however persuaded, under reference in particular to *Wilson v Independent Broadcasting Authority* 1979 SC 35, to which we were referred by the Dean of Faculty, that on this new issue a *prima facie* case had been made out which was sufficient to justify the granting of *interim* interdict on the balance of convenience. We were not asked to decide, and did not decide, any issue about the content of the programme. Nor were we asked to reach, or were we in a position to reach, a final decision on the issue of principle. The only issue for us was whether a *prima facie* case existed on a point which was not frivolous or vexatious but was open to argument. The issue of balance of convenience was not in dispute before us.

The Corporation have now enrolled for leave to appeal to the House of Lords against our interlocutor. That leave to appeal is required is not in question, as it was not disputed that both in form and substance our interlocutor was an interlocutory judgement. Section 40(1)(b) of the Court of Session Act 1988 requires leave of the inner House before an interlocutory judgement of this court can be appealed to the House of Lords. On that matter our decision is final and not subject to review by the House of Lords; see *Ross v Ross* 1927 SC (HL) 4 per Viscount Dunedin

p 6. The question is whether we would be justified in granting leave, having regard to the nature of the issue which was before us in the reclaiming motion and various practical considerations to which we shall refer.

The issue which was before us in the reclaiming motion was described by Mr. Taylor as a matter of considerable public importance, not only in Scotland but throughout the United Kingdom. For our part, we do not doubt for a moment that an important point of law has been raised in this case. It is one on which there is, so far as we are aware, no clear previous authority. The Dean of Faculty did not seek to challenge Mr. Taylor's submission as to the importance of the issue. It is equally clear however that it is not a matter which can be the subject of a final or definite decision at this stage. It is well established, both in England and in Scotland, that it is no part of the Court's function at the interlocutory stage in a litigation to try to resolve difficult questions of law which call for detailed argument and mature consideration: *American Cyanamid Co. v Ethicom Ltd.* 1975 AC 396 per Lord Diplock at p. 407; *Group 4 Total Security Ltd. v Ferrier* 1985 SC 70 at p.76. It was not possible for us in the time available to attempt to resolve that issue, nor was it possible for either side to present us with a carefully researched and fully developed argument. Nor indeed would it be possible for the House of Lords to resolve the issue in the event that we were to grant leave to appeal. The House of Lords would be in no better position than we were to determine the importance issue of principle. It is also clear that the question for the House of Lords in the exercise of their appellate function, in a matter of this kind which depends so much on the exercise of a discretion by this Court, would not be whether they would have decided the issue differently but whether we have gone so far wrong that they must set aside our decision to adhere to the decision of the Lord Ordinary to grant the *interim* interdict: *Hadmor Productions Ltd. v Hamilton* 1983 1 AC 191 per Lord Diplock at p 220 B-E. For these reasons, any idea which the Corporation may have at this Court has decided the issue of principle by coming to a definitive view upon it is misconceived. So also is any idea that the House of Lords in an appeal against our interlocutor affirming the decision of the Lord Ordinary would be able to come to such a view.

The importance of the issue and its novelty points clearly, in our opinion, to the conclusion that it is one which should be carefully and thoroughly debated in a proper manner without the pressure of urgency which has inevitably arisen in this case at the interlocutory stage. As the Dean of faculty put it, the importance of the issue makes it all the more important that it should be addressed after full argument. It was not disputed on either side that, whatever the result of today's proceedings, that issue was capable of being properly litigated before the Court at the appropriate stage.

Mr. Taylor then said that there were considerations pointing to the balance of convenience which justified our granting leave to appeal. He said that the Corporation were anxious to broadcast the programme as early as possible. It dealt with topical matters, and it was at least possible that they would lose their topicality if the broadcasting of the programme was to be further delayed. We were not impressed by this argument. In the first place the Lord Ordinary's decision on the

balance of convenience was not challenged in the reclaiming motion before us. In the second place it is far from clear – and Mr. Taylor was unable to elaborate on this point – that the issues which were discussed in the programme were of such a nature that it is a matter of urgency that they be broadcast. Further, the closer the broadcasting comes to the election day the stronger the pursuers' case becomes that the risk of prejudice would arise which has led them to bring the matter before this Court.

Then there are the practical considerations. Whatever the situation may be in England, the position in the case of an appeal to the House of Lords from the Court of Session in Scotland in terms of the statute requires various stages to be gone through. The first is the seeking of leave from this Court, where this is required. If leave is granted, the papers must then be made up for the use of the Appellate Committee in London. Among these there will require to be a written opinion from this Court giving the reasons for the decision so that there may be a basis for discussion in the appeal. The Appellate Committee must then decide whether the matter is of such urgency that it is willing to sit to deal with the appeal at very short notice. Its decision must then be reported to the House on a motion which may be open to debate before the judgement can be pronounced. Even then matters are not over, because a judgement of the House of Lords has no effect in Scotland until this court has pronounced a further interlocutor under rule 56.1 of the Rules of the Court of Session to apply the judgement. Before a motion to that effect can be enrolled copies of the judgement must be lodged in process in this Court.

It seems to us to be clear that, unless this could be regarded as a case of extreme urgency and importance – which is to, in our opinion – there is no reasonable prospect of all these steps being completed today. At best for the Corporation therefore the process would be completed tomorrow in time for the programme to be shown on Wednesday evening, but that is the evening before the local elections are due to be held. In our opinion these considerations far outweigh any advantage that the Corporation are likely to achieve by showing the programme twenty-four hours earlier than they could lawfully do so in terms of the Lord Ordinary's interlocutor.

For these reasons we shall refuse the motion for leave of appeal to the House of Lords.