

*876 Walford v David



No Substantial Judicial Treatment

Court

Court of Session (Outer House)

Judgment Date

20 January 1989

Report Citation

1989 S.L.T. 876

Outer House

Lord Cowie

20 January 1989

River, loch and sea—Sea—Navigation rights—Material interference with public right of navigation—Mooring of fish farm cages—Onus of proof—Extent of interference necessary.

A resident on the island of Scalpay sought declarator that fish farm cages moored by the defender within an area of sea bed leased by the defender from the Crown Estate Commissioners were a material interference with the public right of navigation between the islands of Scalpay and Skye, and interdict preventing the mooring of the cages. The pursuer averred that the cages were a hazard in that they were sited close to the route used for crossing between the islands in bad weather.

At proof the pursuer argued that the onus was on the defender to prove that the cages would not constitute a material interference with the public right of navigation. A question also arose as to the extent of interference necessary.

Held:

- (1) that the question of where the onus lay depended on the circumstances of the case; and that where the pursuer was not relying on clearly marked sea routes and the defender had a right to moor his cages the onus was on the pursuer to establish those routes and prove interference in the normal way, particularly where any interference only arose in certain specific weather conditions (p. 877A and C-E);
- (2) that what amounted to material interference was a question of degree dependent on the circumstances of each case, but that mere inconvenience or nuisance was not enough to satisfy the test of material interference (p. 878G-I); and
- (3) that on the evidence the situations founded on by the pursuer as amounting to material interference in bad weather conditions, while likely to cause inconvenience, did not constitute a material interference with the public right of navigation (pp. 878K, 879A and 880D-G and K-L), and defender *assoilzied*.

Observed, that the presence of an alternative route was a factor to be taken into account when considering the question of material interference (p. 879K-L).

Reserved, whether a boat out of control and drifting with the wind or tide could be said to be navigating (p. 879D-E)

Action of declarator and interdict

James Anthony Walford, a resident of the island of Scalpay, brought an action against Colin David seeking declarator that the mooring of fish farm cages on an area of sea bed, leased by the defender from the Crown Estate Commissioners in Caolas Scalpay, constituted a material interference with the public right of navigation, and interdict against the defender mooring fish farm cages in the area.

The case came to proof before the Lord Ordinary (Cowie).

Cases referred to

Crown Estate Commissioners v. Fairlie Yacht Slip Ltd., 1979 S.C. 156 .

Orr Ewing & Co. v. Colquhoun's Trustees (1877) 4 R. (H.L.) 116 .

On 20 January 1989 the Lord Ordinary *assoilzied* the defender.

LORD COWIE.

[His Lordship considered the evidence relating to the location of the cages and weather conditions in the area and continued:]

Before considering the main question I should deal with a preliminary submission which was put forward by counsel for the pursuer.

The argument was that it was for the defender to prove that cages in the leased area would *not* constitute a material interference with the public right of navigation between Scalpay and Skye; in other words, that the onus in this case rested on the defender.

Counsel submitted that the public have an inherent right of navigation on the sea, and that anyone who puts down an object in the sea must undertake the burden of proving that it does not interfere with that right. In support of this submission counsel referred to the case of *Orr Ewing & Co. v. Colquhoun's Trs.* , in which the proprietors of the *alveus* of a non-tidal river had erected a bridge over it and the pursuers inter alia sought declarator that the defenders had no right to execute any works which would interfere with or obstruct the navigation thereof. They also sought decree that the defenders should be ordained to remove the bridge. In that case Lord Hatherley in his speech at p. 117 certainly does appear to suggest that the onus of proving that the bridge would not obstruct the right of navigation lay on the defenders when he said: "I apprehend that one may take it to be correct as a point of law, with reference to these works, that the duty is cast upon the defenders of shewing that when they have placed these works in the *alveus* they will not obstruct that right which is exercised by the public." On the other hand in the next sentence he did not appear to be so positive because he said: "At all events, I will assume that that burden is thrown upon them, and will consider how far they have or have not discharged it." It would seem therefore that Lord Hatherley had not reached a concluded view upon the matter and proceeded upon an assumption.

I do not regard that dictum of Lord Hatherley's as being of universal application or as binding on me in the present case. It was not necessary for the *877 purpose of deciding that case, since all the evidence was before the court and it was capable of being decided on the weight of that evidence. In any event, in my opinion, the question of where the onus lies in a case involving material interference with the public right of navigation on the sea or in rivers tidal and non-tidal, depends on the circumstances of each case. For example if someone puts down an object in a river where the navigable channel is clearly defined, or is limited in size, it may well be that the onus would be on the person placing it there to prove that it would not materially interfere with the public right of navigation. Likewise if someone put down an object in a clearly marked channel in the sea or in the recognised approach to a harbour, the same thing might apply. In my opinion however it does not apply to objects wherever they may be placed in the sea. The sea is an asset which can be exploited in many ways and by all sorts of people, and while the public right of navigation on the sea is very wide it does not give the public the right to sail over every square inch of its surface (see Lord President Emslie in *Crown Estate Commissioners v. Fairlie Yacht Slip Ltd.* at p. 178).

For these reasons I am not prepared to accept that in every case of this sort the onus rests on the person putting the object into the sea to prove the negative, namely, that the object does *not* constitute a material interference with the public right of navigation. In particular, I am not prepared to take that view in the present case. In the first place it seems to me that in this case, where the pursuer is not relying on clearly marked sea routes he must first of all establish these routes since he is not entitled to sail over every square inch of the sea. In the second place the siting of fish cages for farming salmon is becoming a common method of exploiting the sea and in the present case they have been sited by the defender as of right. He has a lease of the sea bed for his moorings and the consent of the Department of Transport to place them there.

In these circumstances I have no hesitation in saying that if the pursuer maintains that these cages constitute a material interference with the public right of navigation he must prove it in the normal way, particularly when any interference there may be only arises in certain specific weather conditions. In any event, now that all the evidence has been led the question of the onus of proof is not of great importance since the answer to the ultimate question in the case falls to be decided on the weight and reliability of the evidence as a whole.

Proceeding on that basis therefore, the first thing that the pursuer must prove is the use of the sea routes between Scalpay and Skye on which he founds.

I should say at the outset that although there were some suggestions in the evidence of the defender's witnesses that the pursuer and the other inhabitants of Scalpay did not use sea routes which involved hugging the southern shore where the fish farm is situated, or crossing between the beach and the Red Shed, I am quite satisfied that that matter has been established, I do not think that at the present time these routes are used very often, but, in my opinion, the pursuer has led sufficient evidence which I accept to establish that these routes are used to an extent which justifies me in holding that they are recognised sea routes. Of course it is only in bad weather that the fish farm is said to create any problem with regard to these sea routes and so it is important to consider next whether the pursuer has proved that the defender's fish farm constitutes a material interference with the public right of navigation on the sea route specified by him when the weather is bad.

In that connection, I have attempted to extract from the evidence the situations on which the pursuer founds in contending that in bad weather the fish farm would be liable to constitute a material interference with the sea routes between Scalpay and Skye. I have put this proposition in the future tense not only because that is the way the first conclusion of the summons is worded, but also because it may be of some significance that, although one cage had been in position for 16 months prior to the beginning of the proof in this action, and the raft of cages for two months or so, there was no evidence led of any boat having been put in difficulties by the cages or the marker buoys at any time.

That is not to say however that such difficulties cannot be envisaged. There was a good deal of evidence from the pursuer's witnesses of the dire consequences which were likely to result from the presence of the fish farm in the leased area when the weather conditions were bad. It is comparatively easy to extract from that evidence what the difficulties envisaged were and what effect it was said those conditions would have on a small boat making passage in the vicinity of the cages, but the real problem is to assess to what extent these apparent difficulties and alleged conditions were an accurate and reliable presentation of the position particularly in the light of evidence from the defender and his witnesses who claimed that no problem existed.

The only method that I can adopt in trying to resolve this highly controversial section of the evidence is to consider what difficulties the pursuer foresaw in the conditions which were outlined in the evidence led on his behalf, and then test that evidence against the weather conditions which I have already decided do in fact exist in the area.

First of all it was said that wind conditions of over force 6, coupled with darkness, can result in serious loss of visibility. Strong wind conditions result in heavy gusts and squalls causing spray and spindrift and they are often accompanied by driving rain or in winter sleet or snow. If these conditions exist visibility is reduced and in that situation cages in the leased area would present a positive hazard to small boats because of the risk of collision. In any event it was said that they would be an inconvenience to a boat attempting to navigate in those conditions near the leased area since a particularly close lookout would have to be *878 kept for the cages; a decision would then have to be taken whether to go inshore of them or outside of them; and an alteration in course would have to be made. The second difficulty which it was said cages in the leased area would cause is in effect supplementary of the first. It was maintained that in the wind conditions specified large seas would be generated and, in addition to the effects already mentioned, a boat would have to reduce speed and as the bow mounted to the crest of a wave the wind could "flip it round", forcing it off course. This situation, it was said, would also present a hazard to a small boat if cages were in the leased area. The third difficulty which the pursuer foresaw in the presence of the cages in the leased area was related to engine failure or difficulty in starting the outboard engine of a boat. The evidence with regard to this problem was particularly directed to the navigation of the crossing between the beach and the Red Shed, but it has wider implications. In the first place it was said by the pursuer that for one reason or another the outboard engine of a boat might fail during its journey or might not start when the boat is being launched from the beach or being hauled off it on a back anchor. In that situation in strong winds it was said that the boat might be carried down out of control onto the cages and be dashed against them in high seas. Accordingly it was submitted that cages in the leased area would present a hazard to such a boat.

Before dealing with these specified objections it would be appropriate at this stage to say something about the pursuer's approach to this case and what he has to establish to be successful. It is a matter of agreement between the parties that the proper test to

apply is whether cages in the leased area would constitute a material interference with the public right of navigation, but it is not at all clear what is meant by “material interference”. I do not think that it would be seriously disputed that anything which created a hazard or danger to vessels navigating in its vicinity would satisfy the test, but it is far from clear that something which is simply a nuisance or caused inconvenience would do so. The distinction is illustrated by Lord Hatherley in *Orr Ewing v. Colquhoun's Trs.* at p. 121 where he said: “The right of navigation is simply a right of way you must not interfere with in any manner by any course you take. The question seems to be simply this, Does this Dillichip Bridge interfere with that right of navigation as exercised or as capable of being exercised in the stream? A man having a right of way over my field cannot say that I shall not have the power to put swing-gates across his path so as to inconvenience him in walking along it. I cannot set gates to shut up the path in such a way as would interfere with his exercising his right, but if I do not interfere with that it cannot be said that I shall not put up gates.”

I mention this because counsel for the pursuer appeared to found strongly on the fact that certain witnesses, in particular Commander Paton, expressed the view that even if cages in the leased area would not present a hazard, they at least would amount to an inconvenience and he submitted that that evidence foreclosed the case in the pursuer's favour.

If that is what counsel meant I cannot agree. Mere inconvenience or nuisance is not enough to satisfy the test of material interference. It must amount to something more although not necessarily a hazard or danger. It may be that counsel for the pursuer was simply using the word “inconvenience” as a synonym for “material interference”, but if he was, he cannot simply rely on the use of the word by the relevant witnesses as substantiating his case. Indeed in view of what Lord Hatherley said, the pursuer must go on to show that the word was being used to indicate circumstances which amounted to more than the ordinary meaning of the word “inconvenience” or “nuisance” and amounted to “material interference”. Those words have never been judicially defined to my knowledge and I think that it would be difficult to do so in such a way that they could be applied as a general rule. In my opinion what amounts to material interference with the right of navigation is not only a question of degree, but it must also depend on the circumstances of each case. Accordingly for this reason also it will be necessary to examine closely the basis of the difficulties which the pursuer alleges are caused by the presence of cages in the leased area.

In analysing these difficulties I propose to proceed in the light of my assessment of the weather conditions which I consider are prevalent in Caolas Scalpay. On that basis there is, in my opinion, absolutely no justification for saying that in the circumstances envisaged in the third situation, the fish farm would constitute a hazard to persons using the bad weather sea routes. With the possible exception of an east wind the only winds which would have the effect of carrying a boat which was out of control down onto cages in the leased area would not generate waves of any significance because of the landlocked nature of that area of water. Thus if a boat was carried down onto the cages by any wind other than an east wind there would be no question of it being dashed against the cages by large waves. Accordingly the fish farm cannot be said to amount to a hazard in that situation. Nor would it amount to a material interference with the public right of navigation. It would not even amount to an inconvenience. Far from it. In my opinion in the circumstances envisaged and in the absence of large waves, the cages would be a positive advantage, in that the boat could if the occupant so desired easily be taken alongside the cages and moored there while repairs to the engine were carried out. Even in an east wind I do not accept that the fish farm would constitute a hazard or a material interference with the public right of navigation in the situation envisaged under this head. The waves generated in Caolas Scalpay by an east wind would not exceed 4 to 5 ft and then only in exceptional circumstances. Bearing in mind the position of this fish farm, if a boat was close enough into the shore to be blown on to it in the event of an engine failing then it would have the protection of the small *879 headlands as described by Mr McPherson and the waves would be reduced in size. In that situation I do not see the fish farm as creating a hazard nor would it constitute a material interference with the right of navigation. Again I should have thought that if anything it would be an advantage to a small boat to have it there in these circumstances. Furthermore, I fail to follow the logic of the suggestion that if a boat was using the route between the beach and the Red Shed and was being launched from the beach by employing a back anchor, cages in the leased area would present a hazard or constitute a material interference with the right of navigation in the event of an engine failing to start. The evidence was that the back anchor would be on a rope, possibly up to 80 yds long. If a boat is being pulled off the shore by means of a back anchor the rope is presumably being gathered in and if the engine will not start the boat can be held in position by the anchor to prevent it drifting. In case it is thought that I have overlooked the possibility of the back anchor dragging, I would only say that if the anchor is firmly enough embedded to be used to pull the boat off the beach, it is unlikely to drag. If however it did so and the boat was carried down onto the cages by the wind, in the light of what I have already said about the lack of waves from a wind direction capable of doing that I am satisfied that it would come to no harm. Accordingly there is no basis for this alleged difficulty and I reject the pursuer's contention that on this ground the fish farm would constitute a material interference with the public right of navigation.

In view of the conclusions which I have reached on the facts relating to this particular alleged difficulty it is unnecessary for me to deal with the question which was discussed at the hearing on evidence, namely whether a boat which is out of control and drifting with the wind or tide can be said to be navigating, having regard to the ordinary meaning of that word. This would seem to me to be a matter of some importance if interference with the right of navigation is in issue but as I have said I do not need to reach a decision on this question on this occasion and I shall accordingly reserve my opinion on it.

As regards the other situations in which the pursuer said that the fish farm would constitute a material interference with the right of navigation, namely reduction in visibility due to spray, spindrift and driving rain or sleet plus darkness on the one hand, and loss of control due to high winds and large seas on the other it must be borne in mind first of all, that according to the evidence the fish farm lies in an area which is sheltered from northerly winds. It must also be borne in mind that it is only in those winds and possibly in an east wind that a boat has to seek shelter along the shore where the fish farm is situated or make use of the crossing between the beach and the Red Shed.

As regards the latter route, reduction in visibility should cause no difficulties for a small boat. There is ample sea room amounting to at least 147 m between the notional course and the nearest of the cages, and even if a boat is so far off course as to come close to the fish farm, the lights on the marker buoys will give due warning of the presence of the fish farm. In the event of the lights not working a boat would not come to any harm because, in my opinion, even in reduced visibility it would still be possible to see the fish farm in time to allow a boat with an outboard, which is very manoeuvrable, to steer clear without any difficulty. The same situation would apply if it was necessary in strong winds to lay off the normal course in order to make a landfall on the beach. Quite apart from the fact that, as Commander Paton said, the normal way to deal with that situation would be to steer into the wind as much as possible and crab towards the destination, even if that was not done and a boat came close to the fish farm it should cause no problems for the reasons specified above.

As regards the route along the south shore of Scalpay in any winds other than northerly or from the east, there is no need for a boat to be in the vicinity of the fish farm at all because there would be no waves to speak of and Scalpay would not provide shelter from the winds. Indeed it would be unwise in such winds for a boat to go close to Scalpay because it would be a lee shore. The obvious route in those other winds would be the direct route or even to seek the shelter of Skye. Accordingly so far as reduction in visibility is concerned on the route along the south shore of Scalpay it is only the northerly winds and the east wind which are relevant.

Unfortunately when weather conditions are being described it is very easy to make them sound horrendous. Indeed in some of the conditions described by certain of the witnesses it would be an act of the utmost folly to take a small boat out in them at all. The fact that it might be necessary to do so was justified by explaining that an emergency might arise leaving no option but to face the elements. While that might be so, I think it is worth remembering that if an emergency arose in extreme weather conditions, it would not be necessary to take a boat from Scalpay House to Skye along the southern shore of the island. As has already been explained there is an alternative and much shorter route from the beach to the Red Shed which could be used as it sometimes is at the moment, and that route for the reasons given earlier would avoid the difficulties envisaged by the pursuer through reduction in visibility. In my opinion the presence of an alternative route in bad weather conditions which is reasonably safe, quite apart from being shorter and probably in the end of the day quicker than another, is a relevant factor to be taken into account when considering whether the fish farm would constitute a material interference with the public right of navigation in bad weather conditions.

Quite apart from this factor however, I am not satisfied that in the case of a boat using a route along the southern shore of Scalpay the conditions created by a northerly or an east wind would so ***880** affect visibility as to turn the fish farm from an innocuous object into something which constitutes a material interference with the public right of navigation. In northerly winds Caolas Scalpay is protected by the island at least up to the mid-line, and any winds that there were in the vicinity of the fish farm would be of the squally gusting type. This would no doubt cause spray and spindrift, but squalls do not last long and visibility is only reduced temporarily. So far as an east wind is concerned it rarely blows with much strength according to Mr Barrington and in particular it is not funnelled through the mountains and so is not so likely to cause whirlwind and spindrift to the same extent as other winds. Indeed apart from rain and darkness I do not think that the evidence suggests that the east wind causes much loss of visibility at all. In my opinion therefore in northerly winds or in an east wind a helmsman hugging the south shore of Scalpay would have sufficient visibility to spot the fish farm or the lit marker buoys if working, in time for a manoeuvrable boat, such as are used by the inhabitants of Scalpay, to avoid the fish farm. On that route having regard to the way in which the fish farm is lying the maximum width would be around 30 yds, assuming that all six cages were in position. A small boat could easily avoid such an obstruction even at short notice and there is ample sea room on either side to enable it to continue its journey safely. On the inshore side there is at least 105 m between the fish farm and on the other side the Kyle is protected up to at least its mid-line.

In any event the problem of lack of visibility, as some of the witnesses indicated, particularly Mr Barrington and Commander Paton, mainly arises when the presence of an object is unknown and is encountered unexpectedly. That is not the situation here. In the present case the position of the fish farm is well known to the pursuer and those likely to be using the two bad weather routes, and so it can be anticipated and looked for even in the most inclement conditions. There is no question of this fish farm creating a trap for the unwary seaman and, in my opinion, it can be avoided easily by exercising normal navigational care and keeping a proper lookout. Accordingly I am not prepared to hold, as the pursuer contended, that the fish farm would constitute a hazard to navigation due to weather conditions which are liable to reduce visibility.

On the question of loss of control due allegedly to high winds and large seas I am likewise of the opinion that the fish farm would not constitute a hazard to navigation on either of the bad weather routes. As I have already stated the only wind which gives rise to significant seas is an east wind and in that wind the waves are smaller in the vicinity of the fish farm because of the effect of the small headlands on Scalpay. In any event loss of control in a directional sense in a small boat with an outboard engine is only a momentary thing. If control is not quickly regained much more serious consequences are likely to arise than colliding with the fish farm, such as going broadside to the seas and capsizing. Accordingly with regard to this alleged difficulty as I have already said I am not prepared to hold it established that the fish farm would constitute a hazard to navigation.

That however is not the end of the matter, because, even though an object may not be a hazard or a danger to navigation it could, in my opinion, still constitute a material interference with the public right of navigation.

In this case the pursuer contends that even if the fish farm does not constitute a hazard it does at least amount to an inconvenience in that a helmsman using the route along the south shore of Scalpay in bad weather and reduced visibility has to keep a close lookout for the fish farm, which he did not have to do before. This, it is said, can be a worry and then when the fish farm is spotted the helmsman has to make up his mind which side of it to go. Having done that he has to deviate from his normal course, and if he goes inshore of the fish farm he has to go closer to the coast than he did before the fish farm was put there. I have no doubt, quite apart from Commander Paton's evidence, that these factors taken together amount to the fish farm being a real inconvenience, but that does not satisfy the test which has to be applied in the present case. Whatever word is used the object in question must, in my opinion, amount to more than a nuisance or a mere inconvenience in order to constitute a material interference with the public right of navigation, and the question is, does this fish farm satisfy that test? As I have already indicated I do not think that it is possible to lay down a general rule as to what "material interference" means, but, in the present case, I would expect something more than what is said to have been established by the evidence. I should interpolate here that there was no evidence in the case that any of the factors said to cause danger or material interference with the public right of navigation have in fact been experienced by anyone during the time that the cages have been in position. In particular the employee of the pursuer who lives on Loch na Cairidh and travels to Scalpay House every day along the southern shore of the island was not a witness in the case, although I would have thought that he would have had more experience of having to avoid the fish farm than anyone. It seems therefore that any evidence of danger or material interference with the public right of navigation which the fish farm is likely to cause is more theoretical than practical. Be that as it may, I am nevertheless satisfied that the fish farm is likely to cause inconvenience, but I am not prepared to hold that it would go any further than that and satisfy the test which I have to apply in relation to the sea route specified by the pursuer in the weather conditions which are applicable.

In order to satisfy that test I would expect a boat to have to take exceptional steps to avoid the fish farm such as having to take a different course or at least to make a marked deviation from the original one. This seems to me to be consistent with Lord Hatherley's illustration of the gate across a right of **881* way. If it is a fixed gate it is an interference with the right of way either because it obstructs the right of way or because exceptional steps have to be taken to avoid it. If on the other hand it is a swing gate and easily dealt with, it is only an inconvenience. In the same way I am of the opinion that when it is easy to avoid a comparatively small object in the sea by safely going round either side of it, while that may be an inconvenience or a nuisance it does not materially interfere with the right of navigation. After all it is not unusual for a boat to have to avoid objects in the sea of varying types and sizes, and provided no marked deviation from the original course is necessary the object cannot be said materially to interfere with the vessel's right of navigation on the surface of the sea.

For all these reasons, I am of the opinion that it has not been established that the defender's fish farm constitutes a material interference with the public right of navigation, and he is entitled therefore to be absolved from the first conclusion of the summons. It follows from that decision that he is entitled to moor cages in the leased area for the rearing of salmon and accordingly interdict against him in that respect under the terms of the third conclusion would not be appropriate. As regards the wider aspects of the third conclusion, I am of the opinion that there is no evidence to support the view that cages elsewhere in Caolas Scalpay would prejudice the public right of navigation therein. The only evidence about this matter related to cages which had been moored in Caolas Scalpay close to the Skye shore, but no evidence was led to indicate that they constituted a

material interference with the public right of navigation between Scalpay and Skye and so interdict would not be appropriate in that respect. As regards the possibility of other cages being moored in Caolas Scalpay over and above the six for which consent has been obtained by the defender and those near the Skye shore, I am of the opinion that there is no evidence to indicate that that is likely to occur and therefore interdict on that basis is unnecessary. Obviously such a decision would not prevent the pursuer from bringing a further action if there was a move to place further cages in the leased area or elsewhere in Caolas Scalpay provided he considered it appropriate to do so. In these circumstances I shall repel the first and third pleas in law for the pursuer; sustain the second and fourth pleas in law for the defender and assoilzie him from the conclusions of the summons.

Representation

Counsel for Pursuer, Bruce, Q.C. , Scott ; Solicitors, Brodies, W.S. —Counsel for Defender, Osborne, Q.C. , Fitzpatrick ; Solicitors, Drummond Co., W.S. (for McLeod & Co., Inverness).

W D S

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