EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2009] CSIH 37

PD1519/07

OPINION OF THE COURT

delivered by LORD DRUMMOND YOUNG

in

Reclaiming Motion

by

JEROEN VAN KLAVEREN

Pursuer and Respondent;

against

SERVISAIR UK LIMITED

Defenders and Reclaimers:

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Lord Wheatley

Lord Reed

Lord Drummond Young

Act: Peoples Q.C.; Lefevre Litigation

Alt: Dunlop; Simpson & Marwick

7 May 2009

[1] The pursuer was employed by the defenders as a baggage handler at Aberdeen Airport. He has raised the present action against them for damages for personal injuries resulting from an accident that was sustained, he claims, in the course of his work. He avers that on 12 August 2004 he was instructed to unload cargo from an aircraft. The cargo carried by the airline that operated the aircraft regularly included offshore equipment including explosive and radioactive materials. The pursuer avers that when he opened the cargo hold door he inhaled potent chemical fumes coming from the hold of the aircraft. His head was thrown backwards by the strength of the smell, and he staggered backwards, experiencing irritation at the back of his nose and throat and to his eyes as a result of the fumes. He called his supervisor, who in turn called the defenders' ground controller. The latter instructed the pursuer to continue unloading the cargo. As the pursuer was unloading an item of cargo which was to be placed in a special container for explosive or radioactive materials he was approached by a fireman and instructed to evacuate from the area. The pursuer was unaware of the precise nature or source of the fumes, and he avers that he thought that he was going to die. He was taken to the main terminal building, and on the way he experienced unpleasant physical symptoms. He became dizzy and collapsed, and experienced difficulty breathing. He was given oxygen by the fire crew, and was taken by ambulance to a decontamination area. On entering that area he collapsed again. He underwent decontamination and was then taken by ambulance to the Accident and Emergency Department at Aberdeen

Royal Infirmary. The pursuer avers that the fumes that he inhaled were a substance hazardous to health in terms of regulation 2(1)(e) of the Control of Substances Hazardous to Health Regulations 2002.

[2] On 28 July 2005 the pursuer's representative, Quantum Claims, intimated a claim to the defenders' insurers, Zurich Insurance Company. Correspondence followed between Quantum Claims and Zurich. On 11 August 2005 Zurich wrote to Quantum Claims to state that they were currently completing their inquiries and would endeavour to convey their decision on liability at the earliest opportunity. On 14 November 2005 Zurich requested full allegations of negligence; Quantum Claims replied to that request by a letter of 22 November 2005. Thereafter, by letter dated 23 February 2006, Zurich stated that their inquiries into the circumstances of the accident were continuing. On 7 March Quantum Claims intimated that, if progress could not be made within the next four weeks, they could see no alternative to raising proceedings. On 23 March 2006 Zurich wrote to Quantum Claims in the following terms:

"We accept that our Insured is liable for the purposes of this claim, and will pay damages, to be assessed when we receive details of the claim. We will also be paying your costs in accordance with the Civil Procedure Rules".

Thereafter the writer of the letter referred to two preferred suppliers of medical evidence, and indicated that if any report obtained from them were disclosed to Zurich that would facilitate settlement. The writer concluded:

"Please do not simply acknowledge receipt of this letter, as we will not consider your costs in so doing".

[3] Further correspondence followed that letter; this related principally to the provision of medical evidence relating to the pursuer's condition. By letter dated 5 April 2006 Quantum Claims gave a general indication of the pursuer's symptoms following the incident; these included psychological as well as physical symptoms, and the letter stated that reports were to be obtained from both a general practitioner and a psychiatrist. On 6 April 2006 Zurich replied, suggesting that a neurologist would be a more appropriate expert than a general practitioner. Zurich also indicated that, before they agreed to the instruction of a psychiatric report, they required details of counselling provided to the pursuer and the provision of medical records and the counsellor's report. On 13 April 2006 Quantum Claims suggested that a neurologist would not be appropriate and stated that a copy of the pursuer's general practitioner's record was being obtained. They further suggested that they would have no problem in using one of Zurich's preferred suppliers of medical evidence. On 25 September 2006 Quantum Claims advised by telephone that a medical examination was to take place in October. On 15 January 2007 Zurich requested sight of the report that was being prepared following that medical examination. On 25 January 2007 Quantum Claims wrote to Zurich to state that a psychiatrist's report had been obtained but that it would not be released immediately. A summons was signeted on 7 August 2007 and was served shortly thereafter. Finally, on 2 November 2007, the agents acting for the defenders wrote to the pursuer's agents to state that the letter of 23 March 2006 was written under the mistaken belief that early compliance with certain English procedures was needed and without the benefit of a fuller investigation that had now been carried out. Consequently the defence on liability was to be maintained.

[4] The pursuer avers that the letter of 23 March 2006 constituted a binding obligation on behalf of the defenders, with the result that the defenders were liable to him for the consequences of the accident. Founding on those averments the pursuer enrolled a motion for summary decree in terms of Rule of Court 21.2 and a consequential restriction of the proof to issues of quantum. The motion for summary decree was granted by the Lord Ordinary. She concluded that the parties' representatives through their correspondence had reached an agreement that the defenders were liable for the purposes of the present claim. The defenders' insurers' letter of 23 March 2006 amounted, considered objectively, to an acceptance of liability, and that acceptance of liability was itself accepted by the pursuer's agents. Thereafter the parties conducted their negotiations on the basis that liability was not an issue. That remained so until the defenders' agents, some considerable time later, had attempted to defend the case as if liability had not been agreed. Counsel for the defenders had submitted that the correspondence disclosed a mere extrajudicial admission and not a binding

contract. The Lord Ordinary rejected that argument; she thought that the only reasonable interpretation of the parties' correspondence was an agreement in which liability was accepted. Consequently by interlocutor dated 12 September 2008 she granted summary decree in favour of the pursuer, finding liability established and allowing the parties a proof of their respective averments restricted to quantum. By interlocutor dated 23 September 2008 she found the defenders liable to the pursuer in the expenses of the motion for summary decree.

[5] The critical question is the proper analysis of the defenders' insurers' letter of 23 March 2006, read in the context of the correspondence between the insurers and the pursuer's representatives. In theory, that letter might be categorized in three different ways: first, as a letter setting out the terms of a bilateral agreement concluded between the parties' representatives to the effect that the defenders would accept liability; secondly, as a letter containing a unilateral obligation on the part of the defenders to accept liability; and thirdly, as a mere extrajudicial admission of liability. The distinction between the third of these categories and the first two is of importance. The legal consequences of an extrajudicial admission of liability have been stated in the following terms in Walker and Walker, The Law of Evidence in Scotland, 1st edition, at pages 28-29:

"An extrajudicial admission, when proved, does not preclude the party making it from stating a case which contradicts it. Its probative effect depends upon its terms and its importance in relation to the facts in issue in the cause, and to some extent on whether the cause is civil or criminal. In a civil cause the party who made the admission is entitled to establish that it was made for some secondary reason and was not true, and the whole circumstances in which it was made are relevant to qualify or explain its terms....[I]t is thought that an admission shown to have been made under a mistaken view of the facts may be of little importance, if the true facts are established".

In *Liquid Gas Tankers Ltd v The Forth Ports Authority*, 1974 SLT (Notes) 35, Lord Kincraig approved of the statement of the law by Walker and Walker at pages 27-29 and stated:

"Such an admission is merely part, albeit an important part, of the proof of negligence against the defenders in a case which is based on negligence, but cannot per se found a claim for damages".

[6] A further example of an extrajudicial admission is found in *Gordon v East Kilbride Development Corporation*, 1995 SLT 62. In that case, following an accident, the defenders' insurers entered into correspondence with the pursuer's agents in which they admitted liability for the accident. They also made one payment of interim damages to the pursuer. In the defences, however, the defenders denied liability and pled contributory negligence. Lord Caplan held (at page 64) that a measure of confidentiality is accorded to admissions or concessions made by parties in the course of abortive negotiations that precede litigation. Consequently such material can generally not be referred to or founded on in the subsequent litigation. The reason is that such admissions must be taken as qualified when they are made for the limited purpose of securing a settlement. That privilege, however, did not attach to the correspondence under consideration in that case. In the present case the defenders did not seek to argue that the letter of 23 March 2006 attracted any privilege of confidentiality. Lord Caplan then continued:

"However my view on that matter leaves open the question of just what effect the admission had. I do not think that in admitting liability the insurers were intending to bind their clients to an irrevocable contractual commitment. One has to look at the whole background circumstances. The pursuer had not even quantified his claim nor was any information on the prognosis for the pursuer's injuries available. It was conceded by pursuer's counsel that if the defenders had admitted liability in their pleadings after litigation had begun they could have withdrawn such admission by way of adjustment before the record closed. If the pursuer is correct in suggesting that the admission is equivalent to [an] irrevocable contractual commitment, then even if the pursuer's injuries had proved more serious than anyone could have anticipated ... the defenders could not have modified their stance on the question of liability. If a new witness had become available then likewise

they could not have withdrawn their admission. I do not think that it can be inferred that the defenders' insurers were intending to bind the defenders contractually to the pursuer".

Lord Caplan accordingly held that the letter containing the admission should be considered a representation as to the defenders' position, and like any extrajudicial admission the admission contained in that letter would not be conclusive in the subsequent litigation.

[7] We agree with those statements of the law. An extrajudicial admission of liability may have contractual force, but for that to occur the admission must be constituted either by a bilateral agreement or by a unilateral undertaking that is intended to bind the party giving the undertaking. If an extrajudicial admission does not have contractual force, it may be withdrawn at any time prior to the closing of the record. This rule has an obvious rationale. An extrajudicial admission is made in the course of the preparation and presentation of the parties' cases. At that stage the facts have not been conclusively determined, and investigation may disclose additional information which indicates that the existing view of the facts is incorrect. Similarly, the opinion of a party's legal advisers on the law can change; that may occur as a result of the decisions in other court cases or may simply be the result of reflection on the case which results in the modification of the legal advisers' views. In a similar fashion, expert opinions may change as the case develops. In these circumstances it would be unreasonable to hold a party to an admission made at a relatively early stage in the case, before it had been fully investigated and before the other party's final position was known.

[8] Moreover, in relation to admissions made in pleadings before the closing of the record, the same rule applies. The law on this matter is stated in *Dickson* on Evidence, at paragraph 282:

"It is only those admissions to which a party commits himself in a closed record, or by a formal judicial admission of the nature above described, which are conclusive against him. Admissions made in defences, but retracted in the answers to the pursuer's condescendence, were held not to be conclusive, although the circumstance that they had been made and retracted might be used against the party, and might be material, if not satisfactorily explained".

If an admission in an open record is not conclusive, the position of an extrajudicial admission would appear to be *a fortiori*.

[9] Parties can, of course, agree to settle a case, in whole or in part, and in doing so they can agree that liability will be admitted by the defender. In Scots law, differing from the common law systems, it is also possible for a defender to undertake a unilateral obligation not to contest liability. The leading case on unilateral obligations is *Morton's Trustees v The Aged Christian Friend Society of Scotland*, 1899, 5 F 82. The relevant principles were explained by Lord Kinnear as follows (at page 85):

"If a promise is intended... as a final engagement it is binding, but it is not binding if it is a mere expression of a probable intention which the promisor might or might not fulfil. It is a familiar doctrine in the law of Scotland, differing in that respect from the law of England, that an obligation is binding although it may not proceed on a valuable consideration, or may not be expressed in a solemn form, such as a deed under seal. What is necessary is that the promisor should intend to bind himself by an enforceable obligation and should express that intention in clear words".

The requirement that the intention of the promisor to bind himself should be expressed in clear words is plainly important, because a unilateral obligation is normally gratuitous and a clear intention must be shown if a gratuitous obligation is to be undertaken. That view was also accepted by Lady Paton in *Ballast PLC* v *Laurieston Properties Ltd*, [2005] CSOH 16, at paragraph [141]. If, however, parties reach a binding agreement that the defender admits liability, or if the defender enters into a binding unilateral promise to the same effect, that agreement or obligation is binding, and there is no room for the principle that an extrajudicial admission may be withdrawn at any time.

[10] It is accordingly critical to determine whether the letter of 23 March 2006 amounted to a binding obligation, unilateral or bilateral, on the part of the defenders or whether it amounted to a mere extrajudicial admission. In our opinion it clearly amounts to no more than an admission. In the first place, the terms of the letter are exactly as would be expected for an extrajudicial admission. The critical sentence, the first, states "We accept that our Insured is liable for the purposes of this claim, and will pay damages, to be assessed when we receive details of the claim". That wording amounts to a straightforward admission of liability. There is no suggestion in the letter that it is an offer requiring acceptance. Indeed, the last sentence reads "Please do not simply acknowledge receipt of this letter", and the remainder of the letter is concerned with the provision of medical and other evidence relative to quantum. Nor does the letter contain any wording to suggest that the defenders were undertaking a binding obligation to pay damages. The acceptance of liability is not the same as a binding undertaking. In this connection, it is important to bear in mind the principle that, to use Lord Kinnear's expression, "clear words" are required for a unilateral obligation. In our opinion the letter of 23 March does not contain any clear words that indicate a binding undertaking to pay damages.

[11] In the second place, the reasons for the rule that an extrajudicial admission may be withdrawn appear to us to be relatively powerful; any admission of liability made before the parties' positions are finally set out must normally be provisional, open to modification if new material emerges. That supports the construction that we have adopted. In the third place, in the correspondence that followed the letter of 23 March, nothing was said by the pursuer's representatives that can reasonably be construed as an acceptance of any offer that might have been contained in that letter. Instead, the correspondence focused on questions of quantification of the pursuer's loss. It is obviously possible to accept an offer by implication, but nothing in that correspondence appears to us to amount even to an implied acceptance of any offer. Moreover, in the pursuer's pleadings it is not suggested that there was any offer and acceptance; it is averred that the letter "constituted a binding obligation on behalf of the defenders". Those factors in our opinion point strongly to the conclusion that the letter was not intended to operate as an offer that might give rise to a binding agreement.

[12] In the fourth place, the letter of 23 March 2006 leaves open two critical matters, the assessment of damages and expenses. Nothing is said about the amount of damages. Not only is the quantification of loss left open; questions of causation of loss are likewise not covered. In relation to expenses, the letter states "We will also be paying your costs in accordance with the Civil Procedure Rules". That is plainly a reference to the way that costs are calculated in English proceedings. An affidavit was obtained from the writer of the letter, who stated that she considered herself to be complying with the pre-action protocol applicable to personal injury claims in England and Wales. She did not have Scottish proceedings in contemplation. What she wrote in the letter can clearly have no bearing on the expenses that would be recovered in Scottish proceedings. In these circumstances it is difficult to see how the letter might be enforced by specific implement. Even if some form of conclusion might be devised, the fact that important matters are left open by the letter appears to us to be a clear indication that it was intended as an extrajudicial admission, and nothing more.

[13] For the foregoing reasons we are of opinion that the letter of 23 March 2006 amounts to a mere extrajudicial admission, which may be withdrawn by the defenders at any time prior to the closing of the record. That has happened in the present case, as a result of the defenders' agents' letter of 2 November 2007. In these circumstances we will allow the reclaiming motion, and we accordingly recall the Lord Ordinary's interlocutors of 12 and 23 September 2007. We consider that the appropriate course of action is to remit the action to the Lord Ordinary, to be heard By Order on a specified date. That will enable consideration to be given to further procedure. In this connection, we note that the pursuer has averred that the defenders are personally barred from denying liability for his accident, and the future of that argument will require discussion. In addition, the timetable in the action will require to be reset, and that matter can be dealt with at the By Order hearing.