

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 47
A61/14

Lord Menzies
Lord Brodie
Lord Glennie

OPINION OF THE COURT

delivered by LORD MENZIES

in the Reclaiming Motion

CHRISTOPHER BRITS

Pursuer and Respondent

against

KILCOYNE & CO

Defenders and Reclaimers

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Pursuer and Respondent: Milligan QC; Digby Brown LLP
Defenders and Reclaimers: Paterson; Clyde & Co

4 July 2017

[1] In this action for damages for professional negligence the pursuer sues his former solicitors in respect of their failure to raise timeously an action for damages for personal injuries which he sustained in an accident in the course of his employment. The accident occurred on 9 April 2009. The triennium expired on 9 April 2012. The defenders failed to raise a court action against the

pursuer's employers by that date. On 17 April 2012, the pursuer instructed different solicitors to act on his behalf in this matter and on 1 May 2012 a summons was served on the employers. Defences were lodged on behalf of the employers, which contained a defence of time bar. That action was eventually concluded by extrajudicial settlement at a figure less than the full value of the claim.

[2] The issue before this court is the effect of the averments on behalf of the defenders in answer 3 of their defences, as follows:

> "Explained and averred on 26 April 2012 Adrian Hotson, London Market Casualty Manager, Cunningham Lindsey LLp emailed David Wilson of Digby Brown LLp. Mr Hotson confirmed the correct designation of the pursuer's employer and the address for service. Mr Hotson stated that his client would 'not be taking the time bar defence'. *Ex facie* Mr Hotson's email contained an unequivocal waiver of Harsco's right to plead a limitation defence upon which the pursuer was entitled to found in the pursuit of his claim. The pursuer did not do so. Instead, in response to Harsco's averments regarding time bar the pursuer pled that it was just and equitable that the action should be allowed to proceed against the defenders. Reference was made to section 19A of the Prescription and Limitation (Scotland) Act 1973. No reference was made to Mr Hotson's email. The pursuer failed to plead that the email constituted a waiver of Harsco's right to plead a limitation defence. That failure was unreasonable. It broke any causal connection that existed between the defenders' failure to raise proceedings prior to 9 April 2012 and any loss sustained by the pursuer. *Esto* the causal chain was not so broken, by not pleading waiver the pursuer failed to mitigate his loss."

[3] The effect of these averments was discussed at a Procedure Roll debate on the pursuer's first plea-in-law, which was in the following terms:

> "The defenders' averments anent waiver being irrelevant *et separatim,* lacking in specification, should not be admitted to probation."

[4] Having heard submissions for both parties, by interlocutor and opinion dated 16 February 2017, the Lord Ordinary sustained that plea-in-law and refused to admit to probation the defenders' averments in respect of waiver in answer 3 of the closed record. It is against that decision that the defenders now reclaim.

[5] Counsel for the reclaimers submitted that the Lord Ordinary erred in law in reaching this determination; that the email in question constituted a valid, unequivocal, unambiguous and irrevocable waiver of the insurer's rights to plead time bar at any time in the future and that the Lord Ordinary's reasons for reaching the conclusion which she did were insufficient.

[6] In support of these grounds of appeal, counsel referred to the *dicta* in the following cases: *Gordon* v *East Kilbride Development Corporation* 1995 SLT 62; *Van Klaveren* v *Servisair UK Ltd* 2009 SLT 576, particularly at paras 5 and 7-9; *City Inn Ltd* v *Shepherd Construction Ltd* 2011 SC 127, particularly at paras 70-74; and *Regus (Maxim)* v *Bank of Scotland* 2013 SC 331, particularly at paras 36-38 and 50-51. From these authorities counsel found support for the following propositions: (1) statutory provisions can competently be waived; (2) a wide view should be taken as to what can and cannot be waived; (3) there is nothing in these authorities to suggest that an extrajudicial

admission cannot be binding; (4) there is nothing in them to suggest that the right to plead limitation cannot be waived; and (5) the authorities make it plain that the determination of whether a statement is binding depends on a construction of the statement in its relevant context. For our part we have no difficulty in accepting these as general propositions.

[7] In the present case, counsel for the reclaimers accepted that this did not concern a bilateral contract. It was, he maintained, a unilateral obligation which was and remains binding. He drew a distinction between an extrajudicial admission and other unilateral obligations. He maintained that the words of the email of 26 April 2012 could not be clearer. However, he submitted that the court required to construe it in context and required to hear evidence on that context. We emphasise, first, that for a statement to constitute a binding waiver of a legal right, it must be expressed in clear and unambiguous language (see *Regus (Maxim)* at para 37 and Lord Kinnear's well known *dictum* in *Morton's Trustees* v *The Aged Christian Friend Society of Scotland* (1899) 2 F 82, quoted at para 9 of *Van Klaveren*). In many cases, it will be necessary to construe the statement by reference to the context in which it was made on the basis of what a reasonable recipient, with knowledge of the background, would have understood by the document in question. However, if a party intends to rely on surrounding facts and background, as context for the proper construction of a document, it is necessary for that party to make averments as to what those facts and circumstances are and why they are relevant to the construction of the document.

[8] In the present case, the reclaimers make no averments as to any circumstances which might be relevant in this regard. They aver simply that *ex facie* Mr Hotson's email contained an unequivocal waiver of Harsco's right to plead a limitation defence. We know that the email was written shortly after the expiry of the triennium and shortly before the raising of court proceedings, but there is no averment of other relevant background. Looking to the terms of the email, as quoted in the answers, we are unable to conclude that this is a clear unequivocal, unambiguous, irrevocable waiver of the right to plead limitation in all time coming. Indeed, we regard that construction as an inherently unlikely one.

[9] We can find no error of law in the Lord Ordinary's treatment of this issue. The point is a short one. She dealt with it quite shortly, but her reasoning appears clear enough to us. In all the circumstances, we are not persuaded by the submissions for the reclaimers and we shall refuse this reclaiming motion.