SHERIFF APPEAL COURT

[2018] SAC (Civ) 21
DBN-A80-17

Sheriff Principal M M Stephen QC
Sheriff Principal M W Lewis
Appeal Sheriff W H Holligan

OPINION OF THE COURT

delivered by APPEAL SHERIFF WILLIAM HOLLIGAN

in the appeal in the cause

PROMONTORIA (HENRICO) LIMITED

Pursuers and Appellants

against

COLIN JOHN WILSON

First Defender and Respondent

and

DAVID SYMINGTON WILSON

Second Defender and Respondent

Pursuers & Appellants: Macgregor, Advocate/Walker, Addleshaw Goddard LLP
Defenders & Respondents: Young, Advocate, Pinsent Masons

22 August 2018

Note

[1] This appeal concerns an action by the pursuers (appellants) pursuant to a guarantee executed by the defenders (respondents) in favour of the Clydesdale Bank Plc ("the bank") dated 7 July 2005 ("the guarantee"). In terms of the guarantee the respondents undertook to guarantee payment of certain obligations owed by D C W Limited ("the company") up to a

maximum sum of £120,000. The appellants aver that, pursuant to an assignation dated 1, 2 and 5 June 2015, the bank assigned to the appellants the benefit of the guarantee.

[2] For the purposes of this opinion it is not necessary to set out in detail all the background to this matter. Put shortly, the company was obliged to pay certain monies to the bank in full by 30 October 2011. The sums amounted to £1,132,628.02. The company failed to make payment timeously or at all. In terms of the guarantee the appellant demanded payment of the sums guaranteed thereby from the respondents by letter dated 29 April 2016. The present action against the respondents was warranted on 18 May 2017 and later served upon the respondents.

[3] The respondents defended the action. They tabled a number of pleas including title to sue and prescription. In support of their preliminary pleas the respondents lodged a chapter 22 note which, *inter alia*, specified the basis for their plea as to prescription. The respondents averred that the failure by the company to repay the loan in full by 30 October 2011 was a breach of the obligations owed by the company to the bank. The company had an obligation to pay. That obligation was enforceable by the bank. The obligation has now prescribed pursuant to section 6 of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). The respondents went on to aver that as the principal debt had been extinguished the appellant had no right to seek payment pursuant to either the principal agreement with the company or the guarantee. The prescriptive period began to run from 30 October 2011. The appellant's answer to that averment was that the obligation to make payment in terms of the guarantee arose following a demand for payment made by the appellants which demand was not made until 29 April 2016.

[4] The matter proceeded to debate before the sheriff. It is important to note that, before the sheriff, the appellants conceded that the obligation by the company to make payment

(which we will refer to as "the principal obligation") had prescribed. The appellants' argument was that the demand for payment on 29 April 2016 began a new prescriptive period and that that obligation remained enforceable until 2021. The respondents argued that the principal obligation to make payment had been extinguished by prescription which had the effect of extinguishing the obligations of the respondents pursuant to the guarantee. The sheriff heard argument on this and other points but it is sufficient for present purposes to say that the sheriff accepted the arguments for the respondents as to prescription and granted decree of absolvitor. Against that interlocutor the appellants appealed. Much of the argument before the sheriff concerned consideration of the decision of the Inner House in *The Royal Bank of Scotland Ltd* v *Brown* 1982 SC 89: the appellants relied heavily upon this decision for the proposition that the claim pursuant to the guarantee had not prescribed.

[5] The matter came before this court on 10 July 2018. It is clear from the documentation lodged in pursuit of the appeal that the appellants adhered to the concession they had made before the sheriff namely that the principal obligation had prescribed. Indeed, that concession was repeated in the hearing before the court. Counsel for the appellants completed his submission, inviting us to allow the appeal. Counsel for the respondents had almost completed his submissions at which point the court rose for the usual luncheon adjournment. After lunch counsel for the appellants informed us that his instructions had now changed and that he was instructed to seek to withdraw the concession that the principal debt had prescribed. The appellants now wished to argue that, by letter dated 20 August 2015, there was a relevant acknowledgement of the debt by the company, all within the meaning of section 10 of the 1973 Act. As we understand it, this information had come to the attention of the agents for the appellants following a letter sent by agents for the administrators dated 8 May 2018. The letter was accordingly received by agents for the

appellants prior to the conduct of the appeal. Counsel for the appellants informed us it was his intention to lodge a minute of amendment. He invited us to discharge the appeal, to allow the concession to be withdrawn and to allow a minute of amendment to be received. The appellants conceded the expenses of the appeal and the debate.

[6] Counsel for the respondents opposed the motions for the appellants. We continued consideration of the motions and the appeal itself until 12 July 2018 to allow the appellants to lodge a minute of amendment and a minute seeking leave to withdraw the concession.

[7] On 12 July the appellants were represented by Ms Walker. The minute of amendment and minute seeking leave to withdraw the concession ("the concession minute") were lodged. The minute of amendment contains averments to the effect that the principal obligation has not prescribed: it purports to rely upon the letter of 20 August 2015. The letter is said to constitute a relevant acknowledgement of the debt by the company. Reference is also made to the letter from the administrators dated 8 May 2018. It records that the respondents' agents had invited the joint administrators to reject the claim made by the appellants in the administration upon the basis that the principal debt had prescribed. The concession minute seeks leave of the court to withdraw the concession made at the debate before the sheriff and maintained in the appeal. The concession minute records that the appellants had accepted that the respondents' legal analysis of prescription of the underlying debt was correct. The appellants accept that the amendment comes at a late stage. However, there has been no proof in the case. It is competent for the concession to be withdrawn but whether it should be withdrawn is a matter for the discretion of the court. The concession minute makes reference to the following authorities: *Cusick* v *Strathclyde Joint Police Board* 2013 SC 140; *The Secretary of State for the Home Department* v *Akram Davoodipanah* [2004] EWCA Civ 106; *Pittalis* v *Grant* [1989] QB 605; *New Zealand Meat Board* v

Paramount Export Limited (New Zealand) [2004] UKPC 45. In summary, the Scottish courts have recognised that a concession in the course of litigation may competently be withdrawn. A distinction is drawn between concessions in relation to factual issues and points of law. The court will be more reluctant to allow a factual concession to be withdrawn on appeal. However the withdrawal of any concession is ultimately a matter for the discretion of the court. In the present case the concession was made on a point of law, namely whether the debt had prescribed. The concession was made in the context of a legal debate. It was not a concession of fact made at a proof or proof before answer which prejudiced the respondents in the conduct of proceedings before the sheriff, save and except in relation to expenses. If the concession is withdrawn there would be no prejudice to the respondents which could not be cured by an award of expenses. The minute of amendment will have to be answered; if appropriate, evidence can be led. In the appellants' submission it is in the interests of justice to allow the concession to be withdrawn. After the concession had been made further material was made available to the appellants, namely the letter from the administrators of the company; it suggested that the concession was wrongly made as there had been a relevant acknowledgement of the debt by the company that had not been appreciated at the point the concession was made. The new information suggested that the concession is erroneous in law. The appellants again accept that the respondents should be awarded the expenses of the debate and of the appeal. In the course of her oral submission, Ms Walker expanded a little on the written submissions. The letter from the solicitors for the administrators only came to Ms Walker's attention on the 8 June 2018. This was after the debate but prior to the appeal. Prior to the appeal the appellants were of the view that the sheriff had erred in relation to the interpretation of *The Royal Bank of Scotland Ltd* v *Brown*. That is why they insisted on the argument. It was a considered decision. When asked for her

analysis as to the status of a concession Ms Walker did not accept that a concession amounts to a judicial admission, rather, a concession amounted to a premise upon which a party was inviting the court to proceed (*Slack and Partners Limited* v *Slack* [2010] EWCA Civ 204).

[8] For the respondents Mr Young opposed the appellants' motions. In the event that the motions are allowed the matter will require to be sent back to the sheriff. The respondents should be awarded their expenses for the whole appeal including the diet of debate at first instance on an agent and client, client paying scale. Mr Young set out the chronology of events in this matter extending over the period from 2005 to 2018. It is not necessary to set this out in detail. Mr Young had five propositions. Firstly, the appellants required the consent of this court to withdraw the concession. He noted that there is scant authority in Scots law on the approach to the withdrawal of concession. Reference was made to *Roofcare Limited* v *Gillies* 1984 SLT (Sh Ct) 8 at page 9; *Pollok School* v *Glasgow Town Clerk* 1946 SC 373 at page 387; *Walker and Walker* The Law of Evidence at paragraphs 11.2.1-11.2.5. Leave is always required whatever the nature of the concession (cf *Roofcare Limited*). Concessions are properly treated as a form of judicial admission equivalent to an admission in pleadings and minutes of admission. These forms of admission require the consent of the court in order to be amended or withdrawn and it would be anomalous if the position were different in relation to concessions made orally and in written argument. The concession was one of both fact and law. The appellants have provided no good reason for the lateness of their motion. Although the appellants rely upon the letter from the administrators, seen by the agents for the appellants in June 2018, that merely narrates a legal argument based on an earlier letter sent directly to the appellants in August 2015. The appellants (or their agents) must have had that letter for nearly three years. It is not new information. If it does constitute a relevant acknowledgement the appellants ought to have said so long ago. Even

after receipt of the administrator's letter the appellants decided to proceed with the appeal. No information has been provided about the basis for the appellants' concession, the reason the concession was maintained at the outset of the appeal or the reason it was maintained even after the legal argument of the administrators was drawn to their attention. The only conclusion that could be drawn is that the concession was made and maintained on the basis of considered advice from responsible solicitors and counsel. It is not a good reason that they have reconsidered and would now like to run a different case. The respondents will suffer prejudice that cannot be cured by an award of expenses. Detailed reference was made to the decision of the High Court of Australia: *Aon Risk Services Australia Limited* v *Australian National University* [2009] HCA 27. Similar reasoning is found in the case of *General All Purposes Plastics Limited* v *Young* [2017] SAC (Civ) 30. As to prejudice, the respondents are individuals. They have limited means and are struggling to fund their defence to the proceedings. They face the prospect of significant hardship and possible insolvency. They have engaged responsibly with the court process. They have maintained their point as to prescription throughout proceedings from the time of lodging defences. If the motions are granted the last year of procedure will have been wasted. The sort of strain, frustration, uncertainty and delay is of the kind referred to in *Aon Risk Services* and cannot be compensated for in expenses. Interest on the sum sued for will also increase the longer the delay. On the other hand, if the debt has not prescribed the appellants will still be able to make a claim and make substantial recovery from the administration process. They may have a remedy elsewhere. The appellants are part of a large commercial organisation which specialises in purchasing very large books of "distressed" debt from banks at a substantial discount. The business model involves seeking to enforce aggressively every possible right purchased in order to make a profit. They are no stranger to litigation and ought to be

particularly aware of court procedure. Their approach to enforcement has attracted numerous criticisms in different courts (see *O'Mahony* v *Promontoria (Gem) DAC* [2018] IEHC 63). The amended case is at best an extremely weak one and does not even address title to sue. The *prima facie* strength of the proposed case is a relevant consideration for the court; the letter of August 2015 upon which the appellants rely is marked "without prejudice". Such a letter may not be available as a basis for a relevant acknowledgement. The appellants rely upon *Richardson* v *Quercus Limited* 1999 SC 278. That was a very different case. A letter marked without prejudice cannot be characterised as a written admission which is "unequivocal" and "clearly acknowledges" the debt. The appellants' conduct of the litigation has been incompetent and unreasonable. If granted, an award of expenses upon an agent and client basis is justified.

Decision

[9] None of the authorities is directly in point. Indeed, a striking feature of the authorities to which we were referred is that there is no analysis of the nature of a concession. Concessions are part of a broader picture. The purpose of the rules of procedure is to ensure that parties give fair notice to each other of their position both in fact and law. The principal vehicle to achieve this object is the pleadings. In addition thereto, the parties may enter into a joint minute of admissions. A party may also make a concession. That concession becomes an integral part of the conduct of the litigation. In its ordinary grammatical meaning a concession constitutes an admission or acceptance by one (or more) parties of a particular state of affairs. Somewhat obviously, there are no rules of court which regulate the subject of concessions. Concessions by a party to litigation may be made in various forms. We are not dealing with concessions made in pleadings: such concessions

are governed by the rules of procedure governing written pleadings (see *Walker and Walker* above). Concessions may be made in writing or more often, as in the present case, orally. Concessions may emerge at any stage in the course of proceedings. They may relate to minor or major matters. They are important because, by their very nature, they play a role in determining the conduct of the litigation. In particular, the party who is the beneficiary of a concession may conduct the litigation on the basis of the concession. A concession may be on a matter of fact, or on a matter of law, or of both. As a matter of procedure the court has the power to regulate the withdrawal or material modification of a concession.

[10] In our opinion, where a concession has been made by whatever means, and the party who made the concession wants to withdraw the concession, if the withdrawal is opposed then permission of the court should be sought. It should be done by the lodging of a minute in the process. The minute should specify the concession made, when it was made and why leave is being sought to withdraw it. The minute should also address issues of prejudice should leave be granted and the minuter's position on expenses.

[11] Whether leave to withdraw a concession should be granted is a matter for the discretion of the court. Each case will turn upon its own facts and circumstances. Given the wide variety of concessions which may be made and their differing forms, both in fact and law, whether leave should be granted will depend upon the facts and circumstances of each case and in particular the importance of the concession to the conduct of the case and the stage of proceedings at which withdrawal is sought. Whereas the basic proposition is that the court should do justice to the parties based upon a full and accurate exposition of the law and the facts, it has to be acknowledged that litigation involves tactical decisions on the part of the parties and their advisors as to its conduct. In the case of *Aon Risk Services* the High Court of Australia made certain observations as to the conduct of litigation which are

apposite in this jurisdiction also. Gone are the days when courts were content to entrust to parties the conduct of the litigation. A party has a right to commence litigation but not an untrammelled right to determine its pursuit. The court has an interest in ensuring justice between the parties which includes consideration of the strain and uncertainty continued litigation imposes upon litigants. Delay is a relevant factor. Litigation involves the use of public funds; the court has an interest in the efficient use thereof (see French CJ at paragraph 30 and the majority at paragraph 112).

[12] Returning to the present case, the appellants conducted both the debate and the appeal upon the concession that the principal obligation had prescribed. It seems to us that decision was a tactical decision as to how the litigation should be conducted. The concession was only abandoned after counsel for the respondents had almost finished his submission. The basis for the withdrawal of the concession (a relevant acknowledgement by the respondents) was known to the appellants well before the commencement of the appeal. The thrust of the appeal was that the sheriff had erred in his application of *The Royal Bank of Scotland* v *Brown*. The letter upon which the appellants found as constituting a relevant acknowledgement is a document dated in 2015 which must have been in the custody or control of the appellants or those previously involved. The respondents are individuals. The continued progress of this litigation will cause them considerable hardship. The appellants are a commercial organisation well versed in the conduct of litigation. They are not the original creditors but appear to have acquired rights to the debt by assignation (although title to sue remains an issue). Whether the material within the minute of amendment does constitute a relevant acknowledgement within the meaning of section 10 of the 1973 Act has yet to be determined and constitutes an innovation in the appellants' case. The concession was a fundamental part of the litigation. It was not a minor or incidental

matter. Having regard to all of the foregoing we are not inclined to exercise our discretion in favour of the appellants in relation either to the concession minute or the motion for leave to amend. We regard both minutes as being interlinked. Accordingly, we shall refuse the minute seeking leave to withdraw the concession and refuse to allow the minute of amendment to be received. As the appeal itself was continued a new diet will require to be assigned unless parties are agreed as to its disposal.