SHERIFF APPEAL COURT

PIC-PN2612-18

Sheriff Principal C D Turnbull
Sheriff Principal N A Ross
Appeal Sheriff B A Mohan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal in the cause

THOMAS WARD

Pursuer and Appellant

against

ADR NETWORK

Second Defender and Respondent

Pursuer and Appellant: Hofford KC; Thompsons
Second Defender and Respondent: Tosh, advocate; Kennedys Scotland

15 December 2022

Introduction

[1] This action arises out of an accident in which the pursuer and appellant ("the appellant") was injured in the course of his employment. The appellant was employed by the second defender and respondent ("the respondent") as an HGV driver in vehicles

operated by the first defender (who are not a party to this appeal). All parties attended a Pre-Trial Meeting ("PTM"), in the course of which settlement terms were agreed as between the appellant and the first defender. The respondent lodged a minute contending that the entire case had settled by way of compromise between the first defender and the appellant. The appellant contended that the settlement was only in relation to action as directed against the first defender.

[2] In light of the dispute which existed in relation to the question of settlement, a proof was allowed on the respondent's minute and the appellant's answers thereto. Ultimately, the relevant facts were agreed by joint minute. No oral evidence was led by either the appellant or the respondent. The joint minute was in the following terms:

> "1. The [appellant] was injured in the course of his employment on 16 October 2015. At the material time he was employed by the [respondent] as an HGV driver in vehicles operated by the First Defenders. The [respondent was] responsible for pay. In other respects control of the [appellant]'s working conditions was by the First Defenders.
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> 2. The present action was raised on 4 October 2018.
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> 3. The basis of the action against each Defender is set out in the Record.
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> 4. All parties attended a PTM held on 12th December 2019, the First Defenders settled the action brought against them by the [appellant].
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> 5. The terms of settlement were that the First Defenders would pay £110,000 net of CRU.
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> 6. Deductible CRU was £12550.37.

7. There was no agreement between the [appellant] and the First Defenders that there would be a deduction for contributory negligence although the question of an appropriate reduction in respect of contributory negligence was raised in discussions.

8. Subsequent to the PTM it was agreed by the [appellant] at the request of the First Defenders that for the purpose of reducing the First Defenders' liability to the CRU the [appellant] would agree to a deduction of 30%. This did not affect the terms of settlement agreed with the [appellant] nor the amount which the [appellant] was to receive in damages from the First Defender

9. At an early stage in the PTM Counsel for the [appellant] indicated at the PTM that, in his opinion, the full value of the [appellant]'s claim was above £360,000. Counsel for the [appellant] also observed to Senior Counsel for the [respondent] that the [respondent]'s defence to the action was skeletal and included no plea of contributory negligence. Senior Counsel for the [respondent] indicated his clients were not prepared to contribute to any settlement and then left the [appellant] and First Defenders to continue their discussion alone. The [appellant]'s claim against the First Defenders was settled. Thereafter, Counsel for the [appellant] advised Senior Counsel for the [respondent] that the case would be proceeding against the [respondent] for the remaining portion of the claim. He offered settlement on the basis of no expenses due to or by for the process.

10. A draft Minute for the PTM was signed by Counsel for the [appellant] advising the Court that the 4 day Proof was still required. Senior Counsel for the [respondent] declined to sign it."

[3] In addition to the agreed facts set out above, in reaching his decision the sheriff also placed reliance upon the terms of the joint minute entered in to between the appellant and the first defenders, in terms of which they concurred in stating to the court that the action as directed against the first defender had settled extra-judicially; and invited the court to (1) find the first defender liable to the appellant in the expenses of process as taxed; (2) certify a number of skilled witnesses, and to grant sanction for the employment of junior counsel; and (3) q*uoad ultra*, assoilzie the first defender from the craves of the Initial Writ.

[4] The sheriff addressed himself to the question: "whether the sum agreed represents satisfaction of the [appellant's] claim as pled on record". However, shortly after the sheriff issued his note, the Inner House issued its decision in *Kidd* v *Lime Rock Management LLP and Others* 2021 SLT 1499. Parties are agreed that, in light of the decision in *Kidd*, the correct question is: did the settlement agreement, when viewed in its surrounding circumstances, indicate that the appellant accepted the sum in full and final satisfaction of all his claims for the harm allegedly done by the negligence, not only against the first defender but also against the respondent? (*Kidd* per the Lord Justice Clerk (Dorrian) at 1502 J-K, Lord Malcolm at 1507 D-E, and Lord Turnbull at 1512 E-F).

Submissions for the Appellant

[5] The appellant submitted that the correct approach is to look at the terms of the settlement agreement within the factual context. The terms of the settlement agreement are central to a decision on whether the appellant is entitled to pursue the claim against the respondent. The terms of the settlement agreement between the appellant and the first defender are not in dispute. The wording is specifically directed at the first defender. It does not indicate that the appellant was waiving his rights against the respondent. There is nothing in the settlement agreement to justify the inference that the appellant was accepting its terms as representing the full measure of his claim in respect of all defenders.

[6] The settlement amount agreed between the appellant and the first defender must be construed in its appropriate factual context. The factual context of settlement discussion and valuation is relevant to that construction. Settlement was agreed at approximately one-third

of the appellant's valuation; this is a relevant pointer in support of the appellant's position that he did not consider that he had exhausted his claim against both defenders. It is for the respondent to establish that the appellant has already been fully indemnified (Lord Malcolm in *Kidd* at [45]). Settlement at approximately one-third of the valuation is inconsistent with that position. There is no basis in law why the settlement of a claim at one-third of the appellant's loss, reflecting the chances of success against a first defender and other circumstances, should impose a ceiling on the damages recoverable against the respondent

[7] Contributory negligence was discussed by the appellant and first defender at the pre-trial meeting. It is also agreed that a percentage was formulated with the first defender at a point in the aftermath of the settlement, to assist the first defender with its CRU discussions. Whether or not there was contributory negligence was not a matter that would prevent the appellant from continuing to press his claim against the respondent. Agreeing with the first defender, at some point after the claim against the first defender had been settled, not to oppose a nominal deduction of 30% for contributory negligence had no effect on the terms of the settlement that had been agreed with the first defender.

[8] A finding that the first defender paid the expenses of the action as part of the settlement is of no consequence to the issue of whether the appellant had a right to continue his action against the respondent. The appellant's expenses incurred in pursuing either one or both defenders were likely to overlap. It would have been unreasonable to both the appellant and the first defender to have reached a settlement and to have left the matter of expenses open. The sheriff was factually wrong to conclude that the first defender had

undertaken "to pay the whole expenses of the action, as taxed, not simply the expenses *quoad* the first defender". Had the first defender been willing to pay the expenses incurred in pursuing the action against the respondent, it would have specifically provided as such in the joint minute.

[9] The offer of settlement with the respondent on a no expenses to or by basis was not made until sometime after the pre-trial meeting. It did not form part of any discussion at the pre-trial meeting and took place during a period after the appellant had informed the respondent that the case would be proceeding against the respondent for the remaining portion of the claim. The minute of the pre-trial meeting also confirms that the respondent was fully aware that a 4 day proof was still required despite settlement with the first defender. There were many reasons for such an offer being made to the respondent, none of which support the speculative contention that full indemnification had already been made by settlement with the first defender.

Submissions for the Respondent

[10] The respondent submitted that the fact that the sum of £110,000 was around one-third of the valuation given to the claim by the appellant in his statement of valuation of claim is entirely neutral. The respondent founded upon three aspects of the settlement agreement which they argued supported the sheriff’s conclusion that the appellant accepted that sum in full and final satisfaction of all his claims.

[11] First, the reality of the position amongst the parties is that the claim against the respondent (as de jure employer) was subsumed by the claim against the first defender (as de facto employer). If the first defender had been found to have been negligent, the respondent would have been found to have been in breach of its common law duty to take reasonable care for the safety of the appellant (as employee). The appellant may therefore be taken to have prosecuted his claim to the full extent possible against the first defender as the primary wrongdoer. There would be no rational reason for the appellant to accept from the first defender less than what he was prepared to accept in full satisfaction of his claim.

[12] Second, by the joint minute that gave effect to the settlement agreement between the appellant and first defender, it was agreed that the first defender should be found liable to the appellant in the expenses of process (without restriction).

[13] Third, immediately after having reached the settlement agreement with the first defender, the appellant offered to abandon the action insofar as directed against the respondent.

Decision

[14] In our view, nothing turns on the formulation of the question the sheriff asked himself. He carried out a thorough assessment of the authorities quoted. The sheriff's reasoning, which is to be found at paragraphs [40] to [44] of his judgment, proceeds upon two separate considerations: first, the joint minute as between the appellant and the first

defender (see paragraph [40]); and, second, the sum agreed as a compromise (see paragraphs [41] – [42]).

[15] The sheriff's conclusion that the paragraph within the joint minute as between the appellant and the first defender that dealt with expenses was "a clear agreement to pay the whole expenses of the action, as taxed, not simply the expenses *quoad* the first defender" is one we cannot support. On any view (quite understandably) that paragraph did not address the expenses of the respondent. The whole expenses of the action were not, as a matter of fact, provided for.

[16] Applying the test in *Kidd*, the terms of the settlement agreement, viewed in its surrounding context, did not indicate that the appellant accepted the sum in full and final satisfaction of all his claims against both the first defender and the respondent. In finding that the terms of settlement agreed between the appellant and the first defender also disposed of the appellant's case against the respondent, the sheriff erred.

[17] The fact that the settlement with the first defender was for around one-third of the valuation given to the claim by the appellant in his statement of valuation of claim is, in our view, not neutral. As pointed out in *Jameson* v *Central Electricity Generating Board* [2000] 1 AC 455 (per Lord Hope of Craighead at 474 D), there can be many reasons why a pursuer may elect to accept less than the full amount claimed in settlement. The appellant did not receive the full value of his claim from the first defender. The appellant, as demonstrated by the position taken before the sheriff, expressly did not accept the settlement in full satisfaction of his claim. The onus was upon the respondent to establish that the appellant had been fully

indemnified (see *Kidd* at paragraph [45], per Lord Malcolm). The material before the sheriff was insufficient to discharge that onus. The sheriff erred in this regard also.

Disposal

[18] We shall allow the appeal; recall the interlocutors of the sheriff dated 3 September 2021 and 13 December 2021; and remit to the sheriff to proceed as accords. We shall direct that further procedure in the action shall take place before a different sheriff. The respondent will be found liable to the appellant in the expenses occasioned by the appeal, which will be certified as suitable for the employment of senior counsel.