



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 91

PD489/20

OPINION OF LORD RICHARDSON

In the cause

SL

Pursuer

against

RL

Defender

Pursuer: Brodie KC; Digby Brown LLP
Defender: Black; Clyde & Co (Scotland) LLP

14 December 2023

Introduction

[1] This case, which I heard at debate, raises a short question of contractual construction.

[2] This question arises in the context of an action of damages raised by the pursuer.

The pursuer alleges that the defender's conduct to her during the course of their relationship amounted to harassment in terms of section 8 of the Protection from Harassment Act 1997.

The pursuer and defender met in 1990. They were married in August 1995. Subsequently, they separated on 22 June 2018. The pursuer commenced divorce proceedings against the defender in September 2018. Following negotiation, the divorce proceedings were settled and the parties entered into a Minute of Agreement dated 5 February 2020. Pursuant to that

Agreement, the action of divorce proceeded as undefended and decree of divorce was granted on 17 February 2020.

[3] Clause 21 of the Minute of Agreement is in the following terms:

“The terms of this agreement are in full and final settlement of the Parties' financial claims arising from their cohabitation and the breakdown of their marriage. Subject to the terms of this agreement, each party renounces all rights he/she has now, or may acquire in the future, and discharges the other from any liability in respect of any claim for a capital sum, transfer of property, periodical allowance, aliment, pension sharing, financial provision or any other such financial claim arising from their cohabitation, their marriage, the breakdown of their marriage, their separation and their divorce, whether under statute or common law on divorce, death or bankruptcy against the other or against the executors or assignees of the other now and in all time coming. Each Party hereby irrevocably renounces and discharges all and any such rights, except insofar as provided for in this agreement. For the avoidance of doubt this provision will continue to apply irrespective of any alteration in the circumstances of either or both of the Parties.”

[4] Against this background, the defender argues that the present action is incompetent.

The defender's argument

[5] The defender's argument was straightforward: the terms of clause 21 of the Minute of Agreement were clear and they excluded the present action. The pursuer admitted the terms of the Agreement. It was accepted that there were no issues of fact to be resolved. Accordingly, this was a matter to be resolved at debate.

[6] Counsel submitted that the proper approach to the construction of a compromise agreement had been authoritatively set down by the House of Lords in *Bank of Credit and Commerce International SA v Ali* ([2002] 1 AC 251, in particular at paragraphs 8 to 10; and 37). Such an agreement fell to be construed in the same way as all other contractual provisions.

[7] On this basis, counsel submitted that two issues arose: first, was the present action one which arose from the cohabitation and breakdown of the parties' marriage; second, was the present claim a financial one?

[8] In respect of the first issue, counsel submitted that the averments which founded the pursuer's present action clearly arose from the period of the parties' cohabitation and marriage. The conduct was alleged to have commenced from 16 June 1997 (statement 4.1) and continued after the parties' separation up until some point between August 2018 and July 2019 (statement 4.9). Counsel highlighted the overlap between the averments in the present action and those made by the pursuer in the divorce proceedings. In those pleadings, the pursuer averred that the defender had been abusive to the pursuer from the commencement of the relationship (article 3).

[9] In respect of the second issue, counsel submitted that a claim for damages was plainly a "financial claim" for the purposes of clause 21 of the Minute of Agreement.

[10] When one considered the Minute of Agreement as a whole, it was apparent that the intention of the parties was to compromise all claims between the parties and, as such, to enable the parties to make a clean break. The natural and ordinary meaning of the words of clause 21 was apt to encompass the pursuer's present claim. In this regard, counsel made reference to Lord Nicholls' speech in *Bank of Credit and Commerce International* (as above at [6]) at paragraph 23.

The pursuer's response

[11] Senior counsel for the pursuer sought proof before answer.

[12] The pursuer was in agreement with the defender as to the relevant approach to construction. The critical question was to determine what a reasonable person would have understood the parties to have meant by using the language of the clause against all of the background which would reasonably have been available to them at the time (*Bank of Credit and Commerce International* at paragraph 37).

[13] Senior counsel highlighted that *Bank of Credit and Commerce International* had concerned former employees of a bank who had been made compulsorily redundant. In consideration of a payment by the bank, the employees had signed an agreement whereby they accepted that the terms set out were “in full and final settlement of all or any claims [...] of whatsoever nature that exist or may exist” (paragraph 3). In 1991, the bank went into insolvent liquidation at which point wide publicity was given to the corrupt and dishonest manner in which its business had been conducted. In the course of the liquidation, the liquidator sought to recover loans made to the employees, who counterclaimed for damages for misrepresentation and breach of contract. Accordingly, in *Bank of Credit and Commerce International* both the claims settled by the agreement and the subsequent counterclaim by the employees arose in the context of the employment relationship. The bank sought to rely on the agreements to prevent the counterclaims proceeding. The House of Lords ultimately held, by a majority, that the counterclaims by the employees were not precluded by the wording of the agreement.

[14] Senior counsel submitted that the speeches in *Bank of Credit and Commerce International* were authority for the proposition that the scope of a general release depended on the context furnished by the surrounding circumstances in which it was granted (paragraph 27 to 29 per Lord Nicholls) and, in particular, if those circumstances included a dispute, the words of a release were generally limited to those matters which were in the parties’ contemplation (paragraphs 41 and 42 per Lord Hoffman). Senior counsel also noted that there was support, albeit obiter, for the proposition that if the scope of the release was to extend to claims for personal injuries, clear wording would be expected (paragraph 65 per Lord Hoffman; paragraph 85 per Lord Clyde).

[15] From this starting point, the pursuer's position was that clause 21 had to be seen in the context of the agreement as a whole. That agreement arose in the context of the divorce proceedings which were then ongoing between the parties. This was clear from clause 2 of the Agreement which set out the narrative of the agreement: the parties' marriage; their children; their separation; and the divorce proceedings. Looking at the summons in the divorce action, senior counsel drew attention to the fact that with one exception, the conclusions of the summons sought orders in respect of the divorce and related financial matters. The exception was the thirteenth conclusion which sought to interdict the defender from assaulting or attempting to assault the pursuer. In terms of the parties' agreement, the divorce proceedings were resolved and both the financial and interdict conclusions dismissed (clause 18 and the appended Joint Minute).

[16] The agreement was concerned solely with financial provision on divorce as regulated by the Family Law (Scotland) Act 1985. The conduct of the parties is irrelevant to such provision unless it leads to a diminution of assets. The provisions of the agreement mirrored the orders which can be made under the 1985 Act: clause 3 dealt with financial provision for the parties' children; clause 4 concerned spousal aliment and periodical allowance; clauses 5 to 8 dealt with the parties' heritable property; clauses 9 to 10 dealt with moveable property; clause 11 concerned occupancy rights; clause 12 - pension sharing; clause 13 - a capital sum; clause 14 - the farm partnership; clause 15 - joint bank accounts; and clause 16 concerned a car. Clause 17 then dealt with all other moveable property and liabilities in each party's sole names. Viewed in this context and having regard to its own wording, clause 21 concerned only the parties' rights and obligations in respect of financial provision on divorce.

[17] Senior counsel contrasted this with the present action which was an action for damages founded on the statutory protection against harassment provided by the Protection from Harassment Act 1997.

[18] Considering the specific wording of clause 21, senior counsel submitted that the reference to “the Parties’ financial claims arising from their cohabitation and the breakdown of their marriage” in the first sentence was a reference to the financial claims being made in the divorce proceedings which were being settled by the agreement. This was consistent with the approach in *Bank of Credit and Commerce International* (see above at [14]). Senior counsel then drew attention to the word “such” in the second and third sentences of the clause:

“Subject to the terms of this agreement, each party renounces all rights he/she has now, or may acquire in the future, and discharges the other from any liability in respect of any claim for a capital sum, transfer of property, periodical allowance, aliment, pension sharing, financial provision or any other such financial claim arising from their cohabitation, their marriage, the breakdown of their marriage, their separation and their divorce, whether under statute or common law on divorce, death or bankruptcy against the other or against the executors or assignees of the other now and in all time coming. Each Party hereby irrevocably renounces and discharges all and any such rights, except insofar as provided for in this agreement.” (Emphasis added).

The addition of this word made it clear that the intention was to include financial claims and rights (respectively) of the type listed: namely, in respect of financial provision on divorce.

The clause contained no reference to claims for damages or anything apt to include the present claim.

Decision

[19] The issue between the parties at debate is the correct construction of clause 21 of the Minute of Agreement and, in particular, whether, properly construed, that clause precludes the pursuer from bringing the present proceedings.

[20] As a starting point, I agree with the parties that the correct approach to construing clause 21 of the Minute of Agreement is to be found in *Bank of Credit and Commerce International*. To paraphrase the speeches of Lord Bingham and Lord Hoffman, the task which the court must undertake is to give effect to what the parties intended. In order to ascertain the intention of the parties, the court reads the terms of the contract as a whole giving the words their natural and ordinary meaning in the context of all the background which would reasonably have been available to them at the time (paragraphs 8 and 38). *Bank of Credit and Commerce International* also made clear that the courts should approach clauses, like clause 21, in which parties release each other from liability in the same way as any other clause (see paragraph 26 per Lord Nicholls). On this basis, reference to the correct approach to construction might equally have been made to more recent authorities to the same effect as *Bank of Credit and Commerce International* albeit not in the specific context of release clauses (see, for example, *Wood v Capita Insurance Services Limited* [2017] AC 1173 at paragraphs 10 to 13).

[21] Turning to clause 21, I consider that the most important part of the background to bear in mind is the fact that, in terms of the Minute of Agreement, the parties were resolving the divorce proceedings which were then ongoing between them. As Lord Hoffman put it in *Bank of Credit and Commerce International*, “In such a case, the scope of the dispute provides a limiting background context to the document” (at paragraph 41).

[22] The importance of this aspect of the background can be seen from the terms of the agreement itself. As senior counsel for the pursuer identified, the context for the Minute of Agreement is set out in clause 2 entitled “Narrative” which provides:

“2.1 The Parties were married in [London] on [...] August 1995;

[...]

2.3 The Parties separated on 22 June 2018 since when they have lived apart.

2.4 [SL] has raised an action in the Court of Session at Edinburgh against [RL] in which she seeks Decree of Divorce and *inter alia* orders for financial provision...

2.5 [RL] has lodged defences in said action in which he seeks *inter alia* orders for financial provision (reference no: [...]).

2.6 The Parties have now resolved financial matters between them.

2.7 The Parties, having taken the opportunity of taking separate and independent legal advice have agreed and do hereby agree as follows: [...]” (Emphasis added).

This clause together with the agreement’s operative clauses which concern the parties’ agreed arrangements for financial provision on their divorce (see paragraph [16] above) provide the context for clause 21.

[23] In this context, I consider that the reference to “the Parties’ financial claims arising from their cohabitation and the breakdown of their marriage”, in the first sentence of clause 21, refers to the parties’ respective claims for financial provision on divorce. I do not consider that this wording was intended to have a broader scope. That construction is consistent with the list of claims in the second sentence

“[...] any claim for a capital sum, transfer of property, periodical allowance, aliment, pension sharing, financial provision or any other such financial claim arising from their cohabitation, their marriage, the breakdown of their marriage, their separation and their divorce [...]”.

These are all examples of types of claim for financial provision on divorce.

[24] I also agree with senior counsel for the pursuer that, in relation to both the second and third sentences the word “such” in the phrases “such financial claim” and “such rights” is an important qualification in each case making clear that the claims or rights being referred to are of the same kind as those listed: namely, relating to financial provision on divorce.

[25] I do not consider that, properly construed, clause 21 encompasses claims for damages, such as the present action, based upon the Protection from Harassment Act 1997. Had the parties intended to include claims of this quite different type within the scope of clause 21, I would have expected clear wording to this effect (see *Bank of Credit and Commerce International* at paragraph 85 per Lord Clyde).

[26] In this regard, I do not consider that the fact that the pursuer made similar averments about the conduct of the defender in the present action as in the divorce action is of any particular significance to the proper construction of clause 21. In the divorce action, those averments were made in the context of both establishing the irretrievable breakdown of the marriage and to justify the interdicts sought by the pursuer (see articles 3 and 7). These averments did not relate to the “financial claims” which are the subject of clause 21.

Order

[27] Accordingly, I will refuse the defender’s motion to dismiss the action.

[28] I will put the cause out By Order so that I can be addressed on further procedure and will reserve all questions of expenses meantime.