SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2024] SC GLA 5

GLW-CA67-22

JUDGMENT OF SHERIFF S REID

in the cause

ANDREW GILCHRIST

Pursuer

against

GOVAN DENTAL CENTRE

First Defender

and

RABIAH IQBAL

Second Defender

Pursuer: C Oliver, adv; Jones Whyte Law, Glasgow
Defender: S Manson, adv; Clyde & Co, Edinburgh (2nd Defender)

GLASGOW, 19 January 2024

The sheriff, having resumed consideration of the cause:

1. In terms of rule 40.16 of the ordinary cause rules 1993, Makes the following findings:

    1.1 That, on a proper construction, the release clause within the document forming item 5/7 of process (hereinafter referred to as "the bank transfer form") has effect only to discharge and release the defenders from all actions, claims, rights, demands and set-offs that would otherwise be competent to the pursuer, under statute or at common law, for the recovery, refund, or reduction of the price paid (or payable) by the pursuer for dental treatment

received by him from the second defender between 17 January 2017 and 17 March 2017; and

1.2 That, on a proper construction, the release clause within the bank transfer form does not have effect to discharge or release the defenders (or either of them) from any liability on their part to the pursuer for damages for negligence (that is, any liability in delict for failing to exercise reasonable care and/or any liability arising from breach of a contractual obligation to exercise due skill and care) arising from or connected with the dental treatment received by the pursuer from the second defender between 17 January 2017 and 17 March 2017;

2. Sustains the second defender's pleas-in-law numbers 1 and 2 so far as directed at the pursuer's averments *quoad* undue influence; Repels the pursuer's related plea-in-law number 3; and Dismisses crave 1 of the initial writ so far as founded upon undue influence;

3. Sustains the second defender's pleas-in-law numbers 1 and 2 so far as directed at the pursuer's averments *quoad* essential error as to the subject-matter of the purported discharge within the bank transfer form; Repels the pursuer's related plea-in-law number 8; and Dismisses crave 1 of the initial writ so far as founded upon essential error;

4. Sustains the second defender's pleas-in-law numbers 1 and 2 so far as directed at the pursuer's averments *quoad* section 65 of the Consumer Rights Act 2015 ("the 2015 Act"); Excludes the pursuer's said averments from probation; Repels the pursuer's related plea-in-law number 5; and Dismisses crave 2 of the initial writ, in part only, so far as founded upon section 65 of the 2015 Act;

5. Sustains the second defender's pleas-in-law numbers 1 and 2 so far as directed at the pursuer's averments *quoad* essential error as to the identity of the grantee (or beneficiary) of the purported discharge within the bank transfer form; Excludes the pursuer's said averments from probation; Repels the pursuer's related plea-in-law number 6; and Dismisses crave 3 of the initial writ;

6. Sustains the second defender's pleas-in-law numbers 1 and 2 so far as directed at the pursuer's averments *quoad* the limited temporal scope of the purported discharge within the bank transfer form; Excludes the pursuer's said averments from probation; Repels the pursuer's related plea-in-law number 9; and Dismisses crave 5 of the initial writ;

7. Sustains the pursuer's pleas-in-law numbers 1 and 2 so far as directed at the second defender's averments *quoad* sections 62 and 64 of the 2015 Act; Excludes the second defender's said averments from probation; Repels the second defender's related pleas-in-law numbers 5 and 6; Sustains the pursuer's related plea-in-law number 4; and, in terms thereof, Grants decree, in part only, in terms of crave 2 of the initial writ, whereby, Finds and Declares that the term of the bank refund form signed by the pursuer on 14 January 2019, which provided that the pursuer agreed to accept £5,221.75 in full and final settlement of any and all claims, rights, demands and set-offs arising out of or connected with certain dental treatment narrated in said form, is unenforceable against the pursuer by virtue of section 62 of the Consumer Rights Act 2015;

8. Reserves the issue of expenses;

9. Appoints the sheriff clerk forthwith to assign a case management conference to determine the issue of the expenses of the preceding debate, and further suitable

procedure; and Directs that the said case management conference shall proceed in person within Glasgow Sheriff Court before Sheriff S Reid.

SHERIFF

NOTE:

Summary

[1] This commercial action raises a number of interesting legal issues including (i) the proper construction of a document that purportedly grants a general release or discharge; (ii) the enforceability of that purported release, in light of the Consumer Rights Act 2015, sections 62 and 65; and (iii) the voidability of the purported release by reason of undue influence and/or essential error.

[2] The factual background is mundane. The pursuer received root canal treatment from a dentist. He paid £5,221.75 towards the cost. A small balance was outstanding. But the treatment was unsuccessful. The pursuer complained to the dentist. He criticised aspects of the treatment. He complained that he now faced substantial further expenditure for restorative dental surgery, extractions, and the implant of a denture.

[3] The dentist accepted that the treatment had failed; she rejected the pursuer's criticisms; but, "in the interests of pragmatism", she offered to refund the cost of the treatment "in order to resolve this issue".

[4] The pursuer accepted the dentist's offer.

[5] A few days later, the dentist emailed a document to the pursuer. The document is described in the covering email as a "bank transfer form". It runs in the name of the pursuer. It is about half a page in length. It bears to record: (i) a general release or

discharge by the pursuer of all claims and rights arising out of the dental treatment received from the dentist; (ii) an acknowledgment by the pursuer that no liability or wrongdoing is admitted by the dentist; and (iii) an instruction by the pursuer to pay the refund to a specific bank account identified on the form. The covering email stated: "…please complete and return [the bank transfer form] by email or post and we will then arrange the transfer of your refund directly to your bank account". The pursuer completed the bank details on the document, signed it, and returned it. The refund was then paid.

[6] Sometime later, the pursuer sued the dentist for damages for personal injury, alleging negligence in the provision of the dental treatment. The personal injuries action is defended on the basis *inter alia* that any obligation on the part of the dentist to make reparation to the pursuer has been extinguished by virtue of the general discharge in the "bank transfer form", as signed by him. The personal injuries action is sisted pending the outcome of this action.

[7] The purpose of this commercial action is to eliminate the general release as a possible defence to the personal injuries action. In this action, the pursuer craves an array of remedies: (i) reduction of the bank transfer form on the ground of undue influence; (ii) declarator that the pursuer was induced to execute the bank transfer form under essential error *quoad* its subject matter *et separatim quoad* the identity of the contracting parties; (iii) declarator that the bank transfer form (so far as bearing to operate as a discharge) is unenforceable against the pursuer by virtue of sections 62 and 65 of the Consumer Rights Act 2015; and (iv) declarator that the bank transfer form (so far as bearing to operate as a discharge) is limited in its temporal scope (ie it does not discharge liability pertaining to treatment pre-dating 31 January 2017) *et separatim* it is limited in its substantive

effect (ie it does not have effect to discharge the liability of the second defender to the pursuer).

[8] The case called before me at debate. For the reasons explained below, I have reached the following conclusions:

(i) First, on a proper construction, the release clause within the bank transfer form does not have effect to discharge the defenders' liability *in negligence* at all. Instead, it has effect only to discharge and release the defenders from all actions, claims, rights, demands and set-offs that would otherwise be competent to the pursuer, under statute or at common law, for the recovery, refund, or reduction of the price paid (or payable) by the pursuer for the dental treatment received by him from the second defender.

(ii) Second, as a logical consequence of my finding as to the proper construction of the release clause in the bank transfer form, the pursuer's averments *quoad* undue influence and essential error as to the subject-matter of the release are irrelevant and should be excluded from probation. Accordingly, crave 1 falls to be dismissed.

(iii) Third, for the same reason, the pursuer's averments *quoad* essential error as to the identity of the grantee (or beneficiary) of the purported discharge are irrelevant and should be excluded from probation. Accordingly, crave 3 falls to be dismissed.

(iv) Fourth, the pursuer's averments *quoad* the limited temporal scope of the purported discharge are irrelevant and should be excluded from probation. Accordingly, crave 5 falls to be dismissed.

(v) Fifth, insofar as it purports to operate as a general discharge, the bank transfer form is unenforceable against the pursuer by virtue of section 62 of the Consumer Rights Act 2015. The second defender's related averments (that the

release clause falls within the section 64 "safe harbour", and is exempt from an assessment of its fairness) are irrelevant. Accordingly, decree falls to be granted in terms of crave 2, in part only, so far as founded upon section 62.

(vi) Sixth, the pursuer's averments that the general release in the bank transfer form is void by virtue of the statutory bar in section 65 of the 2015 Act are irrelevant and should be excluded from probation. Accordingly, crave 2 falls to be dismissed, in part only, so far as founded upon section 65.

The pleadings

[9] The pleadings are dense and saturated with legal submission, which is unfortunate. But the key facts are admitted, the terms of the communications between the parties are not in dispute, and there is nothing further to add by way of relevant surrounding context.

[10] On record, it is a matter of admission that the pursuer was a patient of the first defender; that he approached the first defender for dental treatment; that the first defender arranged for him to be seen by the second defender; that the second defender provided dental care to the pursuer (including root canal treatment); that the pursuer paid £5,221.75 to the first defender for that treatment (Articles and Answers 3 to 6); that, sometime later, the pursuer complained to the first defender about the treatment received by him, claiming that the root canal treatment had failed and was unnecessary; that an offer was made to the pursuer to refund to him the sum of £5,221.75; that the pursuer accepted that offer; that the pursuer signed the bank transfer form (Articles and Answers 8 and 9); that the pursuer subsequently commenced a personal injuries action against both defenders alleging that the treatment provided to him was negligent; and that that action is defended on the basis that

any liability in negligence has been discharged by virtue of the general discharge or release in the bank transfer form (Articles and Answers 10 and 17).

[11] The terms of the written communications between the parties are also not in dispute (items 5/1 to 5/5 and 5/7 of process). These communications comprise the pursuer's email of complaint dated 12 December 2018; the second defender's reply (written on the first defender's headed notepaper) dated 9 January 2019; the pursuer's email reply thereto dated 9 January 2019; and a further email from the first defender dated 14 January 2019 attaching a document described therein as a "bank transfer form", as completed and signed by the pursuer on the same day.

[12] Since the issue is largely one of construction of contract, it is appropriate to narrate the terms of these written communications in detail.

The pursuer's complaint (email dated 12 December 2018)

[13] The pursuer sent an email dated 12 December 2018 to the first defender setting out his complaint. It reads as follows, so far as material:

> "Subject: A Gilchrist Dental Complaint
>
> …I have attached a report made by the Scottish Centre for Excellence in Dentistry…
>
> I have been told that every single tooth, root canalled in preparation for my crowns had failed before we even started. Every single tooth is infected. I have been advised that the best solution [is] to get them all taken out and a denture is made for me and I will be going ahead with this whilst my complaint is being pursued by the necessary bodies.
>
> I came to your surgery because I was conscious about the appearance of my teeth, my upper jaw and was promised a solution. I paid between 8–10 thousand pounds for the work to avoid having a denture. But now hear [sic] I am 13 thousand pounds + 9 teeth down and getting the denture that I never wanted.

It is the 0% success rate that makes me think I'm making a valid complaint.

Will wait to hear back from you."

The defenders' reply and offer (letter dated 9 January 2019)

[14] By letter dated 9 January 2019 (bearing to be signed by the second defender, written by her in the first person, but issued on the first defender's headed notepaper), a reply was issued to the pursuer's email complaint. The reply letter was transmitted as an attachment to an accompanying email headed "Response letter from Govan Dental Care"; and the email bears to be issued by the first defender. In those circumstances, on a plain reading, the reply letter purports to "speak" for both defenders, not just one. So far as material, the reply letter states:

"Dear Mr Gilchrist,

Further to your email dated 12/12/18, I am writing to you regarding the concerns that you raise. Your letter was passed to myself for my views in relation to your treatment. I take all complaints very seriously and always endeavour to resolve concerns for our patients. I should say at the outset in responding to you that I am sorry you have felt it necessary to complain, however I am grateful to you for bringing your concerns to my attention and affording me the opportunity to respond.

In your letter you advise that you have the following concerns:-

1. The root canal treatments that you received had failed before your treatment began.
2. Some items of restorative treatment have not gone according to plan and further dental treatment has been required.
3. You were dissatisfied with the outcome of your treatment…

… I appreciate the treatment has failed and this is not ideal, however I feel that there have been many factors that have led to the failure of the treatment.

Notwithstanding the above, I am sympathetic to the position you are in, and so I have decided to take a very pragmatic approach to this case. As a gesture of goodwill, I am willing to offer a refund of the treatment costs - £5.221.75, in order to resolve this issue. If you agree to this, please reply to this letter and we can arrange the refund. Once again, I would like to say that I am sorry you

> have felt it necessary to complain, however I hope this will help to resolve the issue".

The pursuer's acceptance of the offer (email dated 10 January 2019)

[15] By email dated 10 January 2019, the pursuer responded to the defenders' letter dated 9 January 2018. The pursuer's email states, so far as material:

> "Subject: Re: Response Letter from Govan Dental Care
>
> … I agree with the letter apart from the part where [the second defender] says that I had told her I hadn't been wearing my mouth guard as necessary…
>
> In any case I'm happy with the settlement and I do appreciate it. This is going to contribute to dental implants."

The "bank transfer form" and the covering email (dated 14 January 2019)

[16] By email dated 14 January 2019 from the first defender to the pursuer, the first defender sent a document called a "bank transfer form" to the pursuer. The covering email states:

> "Subject: Bank Transfer
>
> Good morning Andrew.
>
> Please find attached bank transfer form. Could you please complete and return this by email or post and we will then arrange the transfer of your refund directly to your bank account. This can take up to 7 days to process. If you are unable to print the form off please let me know and I will post it out today."

The attached "bank transfer form" document reads:

> "I, Andrew Gilchrist… accept the refund of £5,221.75 in full and final settlement of any and all actions, claims, rights, demands and set-offs arising out of or connected with the dental treatment I received from [the second defender] between 31/01/17 and present.
>
> I acknowledge that this agreement is not, and shall not, be represented or construed as an admission of liability or wrongdoing.

> I hereby authorise that payment of the £5,221.75 should be paid to the following account with the following details:-
>
> Bank Name…
> Bank Address…
> Bank Account Name…
> Bank Sort Code…
> Bank Account Number…
> Reference…
>
> Signed…
> Dated 14/01/2019"

[17] At debate, it was not in dispute that item 5/7 of process is a copy of the "bank transfer form", as completed, signed and dated by the pursuer. The document is typed but with bank account details inserted in the pursuer's handwriting above his signature.

The debate

[18] Over 3 days, I heard oral submissions for the pursuer and second defender, supplementing lengthy written submissions, and cross-referring to four volumes of authorities. I wish to thank both counsel for the rigour of their research and advocacy.

[19] The first defender did not appear. The precise legal nature of the first defender, and the relationship between the two defenders, is rather opaque, perhaps unnecessarily so, but nothing turns on this for present purposes.

Submissions for the second defender

[20] For the second defender, counsel sought dismissal of the action so far as directed against the second defender.

[21] First, it was submitted that, on a proper construction of the bank transfer form, it constituted a discharge in the broadest possible terms of all and any claims which could

arise out of, or be connected with, the dental treatment received by the pursuer. It was "plainly eloquent" of an intention to release both defenders from all claims connected with the treatment provided to the pursuer. As for the alleged temporal limitation on the discharge, it was acknowledged that the document referred to a date of "31 January 2017", but it was said to be evident that the release itself extended to all liability "connected with" the dental treatment received from the second defender, a term which was wide enough to encompass (and extinguish liability for) conduct both pre-dating and post-dating 31 January 2017.

[22] Second, while it was conceded that the second defender held a position of trust and influence sufficient to attract the application of the legal principles anent undue influence, it was submitted that there were no averments that any *undue* influence had actually been exercised by the second defender over the pursuer. There had been no averred "deflection" of the pursuer from a proper course or other abuse of the relationship of trust. The mere (admitted) fact that the second defender had not recommended to the pursuer that he should seek legal advice prior to executing the bank transfer form was unremarkable, and insufficient in law to constitute an abuse by the second defender of her position of trust and influence. While it was conceded that the second defender had secured the benefit of a general compromise, there were no relevant averments of any alleged "disconnect" between the value of that compromise and the supposed "true" value of the claim. Accordingly, the pursuer's averments of undue influence were bound to fail.

[23] Third, the pursuer's averments *quoad* the alleged unfairness and unenforceability of the discharge by virtue of sections 62 and 65 of the Consumer Rights Act 2015 were said to be irrelevant. It was conceded that the bank transfer form was a "consumer contract". However, the discharge therein was expressly excluded from the "fairness assessment"

scheme in the 2015 Act because the release clause specified "the main subject matter of the contract", and it was both "transparent and prominent" (s 64, 2015 Act). Separately, it was submitted that section 65 of the 2015 Act did not apply to this discharge. Counsel acknowledged that, on "an extremely literal view", section 65 appeared to prohibit any term of a consumer contract that sought to exclude or restrict liability for death or personal injury resulting from negligence. However, properly interpreted, it was submitted that section 65(1) was targeted at "ancillary terms and conditions" (paragraph 55, written submissions). That interpretation was reinforced by section 66 which expressly reserved the enforceability of any discharge or indemnity given by a person in consideration of the receipt by that person of compensation in settlement of an extant claim (section 66(2)). Accordingly, it was submitted that Parliament intended that a "discharge" of the nature found in the bank transfer form fell outwith both the general prohibition in section 65 and the "gaze" of the fairness assessment regime in section 62. There was no need to hear evidence on any matters at proof. The issue turned upon a proper interpretation of the parties' averred written communications; the exercise was objective; the parties' subjective views were irrelevant; and no other relevant factual matrix was averred.

[24] Fourth, the pursuer's averments anent essential error were said to be irrelevant because there were no averments of any specific misrepresentation or inducement by the second defender. The wording of the discharge in the bank transfer form was plain and prominent; its meaning was clear to any average consumer; and the pursuer chose to sign it.

Submissions for the pursuer

[25] For the pursuer, I was invited to repel the second defender's preliminary pleas, in whole or in part; to exclude from probation the second defender's averments *quoad* the non-application of sections 62 and 65 of the Consumer Rights Act 2015 (and other elements of the defence); and to grant decree as craved in favour of the pursuer; which failing, to allow a proof of the parties' respective averments.

[26] There was, perhaps, an element of overload in the pursuer's detailed submissions, which involved, at times, a dizzying series of layered arguments. I intend no disservice to the pursuer's counsel by offering the following brief outline.

[27] First, the release clause in the bank transfer form was said to be an unfair term in terms of section 62 of the 2015 Act, and therefore unenforceable. The second defender could not rely on the "safe harbour" exemption in section 64 because (i) the release clause fell within the so-called "grey list" of indicative unfair terms (Part 1, Schedule 2); (ii) it was not "transparent"; and (iii) it was not "prominent". Non-prominence and non-transparency arose from the inadequate presentation of the clause in the preceding written communications between the parties. Besides, the assessment of prominence was fact-sensitive, and merited enquiry at proof into the background circumstances (specifically, the extent to which the discharge was brought to the pursuer's attention).

[28] Second, in any event, the discharge clause in the bank transfer form was subject to "an absolute prohibition" in terms of section 65 of the 2015 Act, because it purported to exclude liability for personal injury resulting from negligence. It did not fall within the saving provision in section 66(2) of the 2015 Act, because it was not a discharge granted "in consideration of" the payment of "compensation" to the pursuer in settlement of a claim. A "refund" was said to be different in nature to "compensation".

[29] Third, on a proper interpretation, the bank transfer form did not confer the benefit of any discharge upon the second defender (as opposed to the first defender); nor was the second defender a party to (or intended beneficiary of) the discharge.

[30] Fourth, on a proper construction, the discharge clause did not preclude a claim for negligent advice, defective treatment or invalid consent pre-dating 31 January 2017, because the discharge, in its terms, explicitly bears to discharge liability only in relation to treatment *on and after* 31 January 2017.

[31] Fifth, the discharge was said to be void due to the pursuer's essential error as to the nature of the deed *et separatim* the identity of the grantee/intended beneficiary. It was submitted (i) that, properly understood, the discharge was a "gratuitous" deed, with the result that no specific misrepresentation or inducement by the defenders (or so-called "error plus") was required as a condition of reducing the deed; (ii) in any event, that the question as to whether or not the deed was "gratuitous" ought to be determined at proof; and (iii) that, even if the deed was not gratuitous, the pursuer's averments were sufficient to instruct a case of misrepresentation (or "error plus") because the deed had been mis-described as a "bank transfer form" in the defenders' accompanying communication. In short, the exercise was said to be fact-sensitive justifying enquiry at proof.

[32] Sixth, the pursuer's averments of undue influence were said to be relevant and suitable for proof. There was no requirement for the pursuer to aver "abuse, diversion and causation". Instead, aside from the existence of a relationship which created a dominant or ascendant influence (which was not in dispute), all that was required was the conferring of a "material and gratuitous benefit upon the grantee to the prejudice of the granter". The pursuer characterised the discharge clause within the bank transfer form as "gratuitous" because the pursuer was only receiving, in exchange for the discharge, the refund to which

he was already contractually entitled in terms of the parties' preceding exchange of offer and acceptance. The conferring of an additional benefit (in the form of the global discharge), for no further consideration, rendered that benefit gratuitous, and triggered the operation of the undue influence principles.

Reasons for decision

[33] At its heart, this case concerns the proper construction of a general discharge or release.

[34] By a "general" discharge or release, I mean a clause containing widely drawn words releasing all claims that one party may have against another, without apparent limitation. Read literally, it is all-encompassing. Such releases are common. They often bear to discharge known and unknown claims. There are sound policy reasons to justify their enforcement.

[35] The fundamental legal question that arises is whether the *context* in which a general release was given is apt to cut down the apparently all-embracing scope of the words of the release.

The proper construction of a general release

[36] The leading case on the interpretation of such general releases is the House of Lords decision in *Bank of Credit and Commerce International* v *Ali* [2002] 1 AC 251 ("*BCCI*"). The Law Lords held that a general release is to be interpreted in the same way as any other contract. Lord Bingham stated:

> "In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole,

> giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified. The general principles summarised by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913 apply in a case such as this."

Further guidance can derived from the subsequent decisions of the House of Lords and Supreme Court on the issue of contractual construction, notably *Rainy Sky SA* v *Kookmin Bank Ltd* 2011 1 WLR 2900, *Arnold* v *Britton* 2015 AC 1619 and *Wood* v *Capita Insurance Services Ltd* [2017] AC 1173.

[37] In summary, the court is concerned to identify the intention of the parties by reference to what a reasonable person, having all the background knowledge available to the parties, would have understood them to mean (*Chartbrook Ltd* v *Persimmon Homes Ltd* [2009] AC 1101, [14], per Lord Hoffmann). It does so by focussing on the words used, read in their textual, factual and commercial context (*Arnold, supra,* [15], per Lord Neuberger).

[38] The facts in the *BCCI* case were unusual, but the court's approach to interpretation is enlightening. A bank employee was made redundant. He received a pay-out from the bank towards various claims, together with an *ex gratia* sum, and entered into a settlement agreement with the bank in which he granted a general release to the bank from all claims that may be competent to him. The terms of the discharge were very wide. He accepted a payment from *BCCI*: "in full and final settlement of all or any claims...of whatsoever nature that exist or may exist". The following year, the bank collapsed. In the course of its liquidation, it was discovered that the bank's business had been corruptly managed. This "stigma" caused difficulties for the former employee (and others) in finding new jobs. In 1998, in a landmark judgment, the House of Lords decided that a claim for "stigma

damages" - a head of damage previously unknown to the law - was a legally permissible claim. The employee sued the bank for such stigma damages; the bank defended the action on the basis of the general release; but the Law Lords decided that, on a proper construction, the discharge, though all-encompassing in its literal terms, did not have effect to discharge the bank from liability for this particular kind of claim.

[39] Why did the all-embracing words in the general release fail to protect the bank against the employee's subsequent claim? The answer is because:

> "However widely drawn the language, the circumstances in which the release was given may suggest, and frequently they do suggest, that the parties intended, or, more precisely, the parties are reasonably to be taken to have intended, that the release should apply only to claims, known or unknown, *relating to a particular subject matter*." (*BCCI*, *supra*, [28] and [29]) (my emphasis).

The scope of a general release clause depends upon its context. As Lord Nicholls explained (*BCCI, supra*, [28]): "The generality of the wording has no greater reach than this context indicates." Put another way, the words of a general release are confined to "the true purpose of the transaction, as ascertained from the nature of the contract and the surrounding circumstances" (*Grant* v *John Grant & Sons Pty Ltd* (1954) 91 CLR 112, 129, cited with approval in *BCCI,* [28].)

[40] The relevant context in *BCCI* was that the general release was granted following the termination of the parties' employment relationship due to the employee's redundancy. From this, the court inferred that the true purpose of the release was to settle claims ordinarily competent to an employee arising from the termination of that employment relationship (such as statutory claims for unfair dismissal, common law claims for wrongful dismissal, contractual claims for unpaid wages, and the like). Despite its literal, all-embracing generality, when viewed in context, the purpose and scope of the release was limited to extinguishing claims falling within that particular subject-matter.

[41] For this reason, the general release clause in *BCCI* would not have covered a host of other claims (such as a claim of damages for libel, a claim of damages for personal injury, or a debt claim for repayment of deposits held by the employee with the bank) (per Lord Bingham, [18]; Lord Clyde, [85]; Lord Nicholls, [29]). Why? Because the scope of a general release was limited by its context; and the context in *BCCI* was the settlement of claims ordinarily arising on the termination of an employment relationship.

[42] The same approach was recently applied by Lord Richardson in *SL* v *RL* [2023] CSOH 91. A mutual general release was granted by a husband and wife in the context of a divorce settlement. The wording was very wide. The release bore to discharge parties from all liability for financial claims arising from their cohabitation, marriage and marriage breakdown. The wife subsequently raised an action of damages against her husband based upon the Protection from Harassment Act 1997 concerning alleged conduct during the marriage. The husband sought dismissal of the action, relying upon the general release. He failed. The action was competent. Lord Richardson concluded that "the most important part" of the surrounding circumstances was the fact that the general release was granted in the context of the parties' divorce proceedings and the negotiation of their respective claims for financial provision. Citing Lord Hoffman's in *BCCI*, *supra,* [41], Lord Richardson agreed that: "in such a case, the scope of the dispute provides a limiting background context to the document". So, viewed in context, the general release, however broadly worded, was properly interpreted as limited to discharging financial claims arising upon divorce (such as claims for a capital sum, property transfer, periodical allowance, etc). It did not encompass a claim of damages for harassment based upon the 1997 Act.

[43] And, in a nod to the modern iteration of the *contra proferentem* rule (see below), Lord Richardson observed (citing Lord Clyde in *BCCI*, *supra*, [85]) that, had the parties

intended to include "claims of this quite different type" within the scope of the general release, he would have expected "clear wording to this effect".

[44] In summary, a general release "cannot be read literally" (*BCCI*, [18] per Lord Bingham). It must be read contextually, to ascertain its "true purpose", "subject matter" and scope.

Further aids to construction

[45] The modern approach to contractual interpretation places emphasis on context and objective meaning. It deprecates the use of artificial or "special" rules of interpretation. "Almost all the old intellectual baggage of 'legal' interpretation has been discarded" (*Investors Compensation Scheme Ltd* v *West Bromwich Building Society* [1998] 1 WLR 896, 912, per Lord Hoffmann).

[46] But many general principles of construction survive, and have evolved in modern form, as ordinary aids to the interpretation process. Without such principles, the process of contractual construction would be chaotic, and the outcome unpredictable.

[47] Thus, while old and outmoded formulae such as the three-limb test in *Canada Steamship Lines Ltd* v *The King* [1952] AC 192, 208, and the *contra proferentem* rule, are "steadily losing their last vestiges of independent authority", their influence subsists. They have been "subsumed" within a wider modern principle of construction that clear words are necessary before a court will conclude that a contract has taken away valuable rights or remedies which one of the parties to it would otherwise have had at common law or under statute (*Triple Point Technology Inc* v *PTT Public Co Ltd* [2021] AC 1148, [111], per Lord Leggatt JSC).

[48] This principle of construction derives from *Modern Engineering (Bristol) Ltd* v *Gilbert-Ash (Northern) Ltd* [1974] AC 689. Viscount Diplock explained it as follows (at 717H):

> "It is, of course, open to parties to a contract for sale of goods or for work and labour or for both to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law…
>
> But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption."

Many other statements of the principle exist. In *Stocznia Gdynia SA* v *Gearbulk Holdings Ltd* [2010] QB 27, [23], Moore-Bick LJ in the Court of Appeal expressed the principle thus:

> "The court is unlikely to be satisfied that a party to a contract has abandoned valuable rights arising by operation of law unless the terms of the contract make it sufficiently clear that that was intended. The more valuable the right, the clearer the language will need to be."

In Scotland, the principle was expressly applied by Lord Bannatyne in *Agilisys Limited* v *CGI IT UK Limited* [2018] CSOH 112. The force of what was the *contra proferentem* rule is now largely embraced within this modern principle that a party is unlikely to have agreed to give up a valuable right or remedy that it would otherwise have had, without clear words. So, for example, the Supreme Court recently observed *(*in *Triple Point Technology Inc*, *supra*, [111], approving dicta in *Federal Republic of Nigeria* v *JP Morgan Chase Bank NA* [2019] 1 CLC 207) that: "…clear words will generally be needed before a court will conclude that the agreement excludes a party's liability for its own negligence."

[49] Other ordinary principles of contractual construction are relevant to the interpretation of a general discharge or release. For example, in *BCCI*, the House of Lords was clear that there was "a long and… salutary line of authority" to the effect that, in the absence of clear language, a court will be very slow to infer that a party intended to

surrender rights and claims of which he was unaware and could not have been aware. (*BCCI, supra*, [10] per Lord Bingham).

[50] Aside from these common law principles of construction, Parliament has intervened to legislate for a specific statutory aid to the construction of consumer contracts. In practical effect, section 69 of the Consumer Rights Act 2015 is a statutory reiteration of the former *contra proferentem* rule. It reads: "If a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail."

What is the true scope of the release in the bank transfer form?

[51] The release clause in the bank transfer form does not exist in a vacuum. It cannot be read literally. It must be read contextually. Read literally, it purports to be all-embracing. Read in context, its "true purpose", "subject matter" and scope can be seen to be limited (*Grant, supra,* approved in *BCCI*, [30]).

[52] In my judgment, on a proper construction, the release clause has effect only to release the defenders from all claims by the pursuer for recovery, refund or reduction of the price of the failed dental treatment, whether under statute (specifically, section 56 of the Consumer Rights Act 2015) or at common law.

[53] On a proper construction, it does not have effect to discharge the defenders of their alleged liability *in negligence* to the pursuer. (In this respect, "liability in negligence" means both liability in delict for failing to exercise reasonable care and liability arising from breach of a contractual obligation to exercise due skill and care: *Triple Point Technology Inc, supra,* [68] and [100]; *Henderson* v *Merrett Syndicates Ltd* [1995] 2 AC 145.) I explain my reasoning below.

What is the relevant context (or factual matrix)?

[54] The relevant context comprises the undisputed written communications between the parties (items 5/1 to 5/5 and 5/7 of process). These communications comprise the pursuer's email of complaint dated 12 December 2018; the defenders' reply dated 9 January 2019; the pursuer's email reply thereto dated 9 January 2019; and the further email from the first defender dated 14 January 2019 attaching the document described as a "bank transfer form", completed and signed by the pursuer on the same day. These documents comprise the factual matrix for the following reasons. Firstly, the email dated 14 January 2019 was the mechanism by which the bank transfer form was sent to the pursuer, but it also assists in explaining the true nature and purpose of the form. The email (which bears the heading "Bank Transfer") refers to the previously-agreed "refund"; it identifies the appended document as a "bank transfer form"; it instructs the pursuer to complete, sign and return the document; and it discloses the purpose of the completed bank transfer form as being to enable the defenders to "arrange the transfer of [the pursuer's] refund". Secondly, both the "refund" and the form itself derive from a preceding agreement concluded between the parties only a few days earlier by means of an exchange of written offer and acceptance dated 9 and 10 January 2019, respectively. Thirdly, the preceding agreement (and the related bank transfer form) must also be read in the context of the pursuer's original email of complaint dated 12 December 2018, which initiated the whole sequence of events and which the preceding agreement was designed to "resolve" (per the defenders' letter dated 9 January 2019).

Why is this general release limited in scope?

[55] The general release clause in the bank transfer form is limited for the following reasons.

[56] In the first place, the pursuer's emailed complaint dated 12 December 2018 can be seen to define the scope of the dispute between the parties. In turn, this informs the scope of the agreed release (*BCCI, supra,* [41] per Lord Hoffman).

[57] The pursuer's complaint focusses entirely on the fact that the dental treatment had failed. It says that the pursuer had wanted to "avoid having a denture"; he had been "promised a solution"; but the treatment had not worked; it had a "0% success rate"; and he was now "getting the denture that [he] never wanted". The complaint makes no express allegation, general or specific, of negligence on the part of the defenders; there is no allegation of any failure to exercise reasonable care; there is no other allegation of culpable error, omission or wrongdoing on the defenders' part; nor is any such culpability a necessary element of the complaint. All he is saying is that the treatment did not work. His money had been wasted. (Interestingly, a "report" from the Scottish Centre for Excellence in Dentistry which bears to accompany the pursuer's complaint email is not lodged in process, its terms are not adopted, and it is not averred that that report alleges any negligent failure on the part of the defenders.)

[58] The defenders' reply dated 9 January 2019 candidly acknowledges that the treatment had failed. The three-point summary of the pursuer's "concerns" (page 1, paragraph 2) also reflects the limited scope of the complaint.

[59] It was against that background that the defenders offered to "refund" the pursuer's money "in order to resolve this issue" (page 2, final paragraph).

[60] The pursuer accepted the offer.

[61] The contract was concluded.

[62] But what is the "issue" that was resolved?

[63] In my judgment, the plain inference from the surrounding context is that payment of the sum of £5,221.75 was intended to be in settlement and discharge of claims by the pursuer against the defenders for recovery, refund and reduction (to nil) of the price, whether under statute or at common law. That was the "issue" so resolved.

[64] In *BCCI*, an apparently general and all-embracing release was held to be limited in its scope to ordinary claims arising from termination of the parties' employment relationship, because that was the nature of the dispute between the parties at the time.

[65] In *SL* v *RL*, an apparently general and all-embracing release was held to be limited in its scope to financial claims arising from the parties' divorce, because that was the nature of the dispute between the parties at the time.

[66] In this case, an apparently general and all-embracing release (ie a payment "in order to *resolve this issue*") is properly construed as being limited in its scope to claims for the recovery, refund and reduction (to nil) of the cost of the failed dental treatment, because that was the nature of dispute between the parties at the time. In each case, "the scope of the dispute provides a limiting background context to the document" (*BCCI, supra*, [41] per Lord Hoffmann).

[67] In the second place, I am fortified in that conclusion by the modern common law principle of construction that clear words are necessary before a court will hold that a contract has taken away valuable rights or remedies which one of the parties to it would otherwise have had, at common law or under statute (*Modern Engineering (Bristol) Ltd* v *Gilbert-Ash (Northern) Ltd, supra).* Specifically, clear words will generally be needed before a court will conclude that an agreement excludes a party's liability for its own negligence

(*Triple Point Technology Inc, supra* [111]). No such "clear wording" appears in the offer or acceptance. Therefore, on a proper construction, the refund of the pursuer's money did not "resolve" or discharge the defenders' liability in negligence for damages *a fortiori* for personal injury. The defenders must bear the consequence of using wording in their offer dated 9 January 2019 that was not sufficiently clear to include liability in negligence within the scope of the settlement.

[68] In the third place, I am fortified in that conclusion by the statutory rule of construction that if a term in a consumer contract "could have different meanings", the meaning that is most favourable to the consumer is to prevail (section 69, 2015 Act). In this case, an evident difference of meanings arises as to the scope of the discharge or compromise effected by the offer and acceptance dated 9 and 10 January 2019 (that is, whether it effects a general or limited discharge of claims). Accordingly, that difference must be resolved in favour of the pursuer as consumer. That means that, on a proper construction, the compromise effected by the offer and acceptance is to be understood, not as a *general* discharge of all claims competent to the pursuer, but as a *limited* discharge, confined to particular claims (in this case, all claims for recovery, refund or "reduction" of the price, whether under statute or at common law). Again, the defenders must bear the consequence of using wording in their offer that was ambiguous.

[69] In the fourth place, the wider statutory context supports that construction. Section 54(6) of the Consumer Rights Act 2015 provides that the exercise by a consumer of the statutory right to a refund or "price reduction" (under s 56) does not prevent the consumer from exercising any other right or remedy, under statute or at common law, that may otherwise be available to him. Parliament helpfully provides a non-exhaustive list of other potential rights and remedies that remain enforceable. They include the right to claim

"damages" (s 54(7)(a), 2015 Act). While that may not strictly be a principle of construction, it is part of the relevant legal context deemed to be known to both parties within which their contract was concluded, and which therefore aids the construction of the parties' agreement. Again, the consequence is that, absent clear wording, the mere acceptance of a refund by a consumer does not imply the discharge, release or surrender of any other rights available to the consumer (including a right to claim damages for negligence).

[70] In the fifth place, the parties' contract (comprising the offer and acceptance dated 9 and 10 January 2019), read in conjunction with the preceding complaint email from the pursuer, provides part of the essential factual matrix in which to construe and understand the true purpose and scope of the release in the *subsequent* bank transfer form. The parties' preceding contract was not conditional upon the execution by the pursuer of any formal discharge, nor did it envisage the execution of any further document to supersede that contract. Instead, all that was expressly envisaged was that the defenders would "arrange the refund" upon receipt of the pursuer's acceptance (defenders' offer dated 9 January 2019, final paragraph). Read in that context, the true nature and purpose of the bank transfer form becomes clear. It is an instrument that was largely administrative and executory in nature, intended to *implement* the parties' preceding contract. It was not intended to innovate upon it.

[71] In the sixth place, this interpretation (of the limited purpose and function of the bank transfer form) is reinforced by the wording of the accompanying email dated 14 January 2019. The email bears the subject-heading "Bank Transfer", which signifies its administrative purpose. The email then describes the document as a "bank transfer form", again underlining the limited executory function of the document. Thereafter, the email instructs the pursuer to complete, sign and return the form, so that the defenders can

"arrange the transfer of your refund". Nothing in the email suggests that the defenders are seeking to re-negotiate or amend the parties' preceding contract. Nothing in the email suggests that the "bank transfer form" was intended to supersede or innovate upon the parties' existing agreement. The manifest limited purpose of the "bank transfer form" was to implement the parties' agreement. Read in context, the release clause within the bank transfer form is properly construed as being co-extensive in scope with the *limited* discharge as previously agreed (per para [63], above). Any more extensive an interpretation of the release clause would be an unwarranted innovation upon the parties' preceding agreement.

[72] In the seventh place, this interpretation (of the limited administrative function of the bank transfer form) is consistent with the statutory context. Sections 56(4) and (5) of the 2015 Act require that a refund of the price, once agreed, must be given "without undue delay", and in any event within 14 days beginning with the day on which the trader agrees that the consumer is entitled to a refund. The trader must give the refund "using the same means of payment as the consumer used to pay for the service", unless the consumer expressly agrees otherwise (s 56(5), 2015 Act). The bank transfer form is readily referable to that statutory provision. It was an administrative tool by which the pursuer (as consumer) was afforded the opportunity to determine how the refund was to be given. The principal purpose of the bank transfer form is, therefore, as a mandate or authorisation to the defenders to pay the agreed refund into a nominated bank account as disclosed on the form. To that limited extent, it is contractual in nature, as a unilateral mandate or grant of authority to the defenders. But the remaining content of the form is superfluous, and certainly subordinate to that principal purpose.

[73] In the eighth place, I am fortified in this conclusion by the application of the *Gilbert-Ash* principle of construction. Clear words are necessary before a court will hold that

a contract has taken away valuable rights or remedies which one of the parties to it would otherwise have had at common law or under statute. Specifically, clear words will generally be needed before a court should conclude that an agreement excludes a party's liability for its own negligence *(Triple Point Technology Inc, supra).* No such "clear wording" appears in the release clause in the bank transfer form. It founders upon its own generality. It makes no express reference to the release of damages claims based on the defenders' own negligence. Read in the context of the original complaint, and the parties' preceding contract, and the executory function of the bank transfer form itself, the release clause therein falls to be construed as limited, in its scope, to claims for recovery, refund or reduction of the price, under statute or at common law. The defenders must bear the consequence of using wording in their form that was not sufficiently clear to discharge their own alleged liability in negligence for damages *a fortiori* for personal injury.

[74] In the ninth place, I am fortified in that conclusion by the statutory rule of construction that if a term in a consumer contract "could have different meanings", the meaning that is most favourable to the consumer is to prevail (s 69, 2015 Act). In this case, an evident difference of meanings arises as to the scope of the release clause within the bank transfer form (that is, whether, when read in context, it effects a general or limited release of claims). *Prima facie* the release is all-embracing and unqualified; but read in context, having regard to its "subject matter" and "true purpose", it bears a narrower interpretation, confined to all claims for recovery, refund and reduction (to nil) of the price of the failed treatment. (Even the reference in the release clause to "set-offs" is intelligible in this narrower context, because, but for the agreed compromise, the pursuer might well have been entitled to exercise a right of retention in response to a claim by the defenders for payment of the (small) outstanding balance of the price, and to set it off against his claim

of damages for recovery of the abortive costs: 2015 Act, sections 54(7)(a), (b) and (e)). Accordingly, the ambiguity must be resolved in favour of the pursuer as consumer. On a proper construction, read in context, and applying the statutory *contra proferentem* rule of construction, the release clause in the bank transfer form should be construed as so limited in its scope. It does not encompass or extinguish the defender's alleged liability in negligence for damages *a fortiori* for personal injury.

[75] In the tenth place, again, the wider statutory context supports this limited construction of the release clause in the bank transfer form. Section 54(6) of the 2015 Act expressly provides that the exercise by a consumer of *inter alia* the statutory right to a refund or "price reduction" (s 56, 2015 Act) does not prevent the exercise by the consumer of any other right or remedy that may otherwise be available to him, including the right to claim damages (s 54(6) and (7)(a)). This rule of law is part of the statutory legal context deemed to be known to both parties when the bank transfer form was signed. It therefore aids the construction of the document. Again, the consequence is that, absent clear wording, the mere acceptance of the refund by the pursuer, as a consumer, does not imply the release or surrender of other rights available to the consumer under statute or at common law, such as the right to claim damages for negligence.

[76] For these reasons, I conclude that, on a proper construction of the release clause in the bank transfer form, read in context, it is limited in scope to the release of claims by the pursuer against the defenders for the recovery, refund or reduction of the price of the failed dental treatment, under statute and at common law. It does not operate to discharge the defenders' alleged liability in negligence for damages *a fortiori* for personal injury.

[77] Parties were agreed that the proper construction of the release clause in the bank transfer form was the essential preliminary question. Therefore, in ordinary circumstances,

my conclusion on that issue (which is, after all, a question of law) may have been determinative of the dispute in favour of the pursuer. Unfortunately, that is not the result here, in part I suspect because of the blizzard of remedies that the pursuer has chosen to pursue, some (though, in fairness, not all) of which are predicated upon the erroneous assumption that the clause is effective as a general release.

[78] The upshot is this. At present, there is no declaratory crave or associated plea-in-law that corresponds directly to my adjudication on the proper construction of the clause (as effecting only a *limited* release).

[79] Only the fifth crave seems apt, in part at least. It alone seeks declarator that the deed does not have effect to discharge claims in negligence. But even that fifth crave is not wholly apposite because, as presently drafted, it is primarily directed at an adjudication upon the temporal scope of the discharge rather than its substantive scope. (This is confirmed by the wording of the pursuer's related ninth plea-in-law).

[80] Accordingly, pending further brief submissions, in the exercise of the wider powers available to me under commercial procedure (OCR 1993, rule 40.16), I shall meantime restrict this element of my interlocutor to a finding *quoad* the proper construction of the deed. Further procedure can be discussed at the case management conference to follow.

[81] Meantime, the other elements of the debate remain capable of formal adjudication.

Undue influence

[82] The pursuer seeks reduction of the bank transfer on the ground that it was procured by undue influence (crave 1, pursuer's plea-in-law 3).

[83] The second defender conceded that she held a position of trust and influence sufficient to attract the application of the relevant principles, but she submitted that there

was no averment that any *undue* influence had actually been exercised by her. There was said to be no averred "abuse" of the relationship of trust between the parties, and no averment of "deflection" or "diversion" of the pursuer from a proper course (note of arguments, paragraphs 22, 25 and 28). In my judgment, the second defender's criticism is not well founded.

[84] The leading case on undue influence as a vitiating factor is *Gray* v *Binny* (1879) 7 R 332. Lord Shand stated (at 347):

> "The circumstances which establish a case of undue influence are, in the first place, the existence of a relation between the granter and grantee of the deed which creates a dominant or ascendant influence, the fact that confidence and trust arose from that relation, the fact that a material and gratuitous benefit was given to the prejudice of the granter, and the circumstance that the granter entered into the transaction without the benefit of independent advice or assistance."

That test was recently reviewed and applied by Lord Brodie in *Wilson* v *Watkins* [2019] CSOH 44. He stated (at [24]):

> "In my opinion, should it be thought necessary to do so, a closer and more manageable re-statement of the elements identified by Lord Shand [in *Gray* v *Binny*] and therefore of what have to be averred and proved in the event of challenge to a deed on the ground of undue influence would be: (1) the existence of a relationship of a fiduciary character between granter and grantee; (2) the grant by the granter in favour of the grantee of a material and gratuitous or at least grossly disproportionate benefit at the granter's cost or otherwise to his prejudice; and (3) the granter having acted without independent advice or assistance of an appropriate sort."

In summary, while the essence of undue influence is indeed the abuse or misuse of a position of confidence and trust, that conclusion can drawn where the tri-partite test set out by Lord Shand (and re-stated by Lord Brodie) is satisfied. As Lord Brodie observes in *Wilson* (paragraph 24): "…It is a matter of abuse of trust, *as demonstrated by* the taking of a gratuitous benefit in the absence of appropriate independent advice."

[85] In the present case, the pursuer avers, and offers to prove, each of the three requisite component elements of Lord Shand's test: (i) the existence of a relationship of the necessary fiduciary character; (ii) the taking of a gratuitous benefit (namely, the gratuitous grant of a general release from liability in negligence); and (iii) the absence of independent legal advice. There is no obligation on the pursuer to aver some further, stand-alone "abuse of trust" or "diversion". That is the abuse of trust.

[86] The first and third elements are admitted by the second defender. Only the second element is in dispute (namely, whether a gratuitous or disproportionate benefit was conferred upon the defenders to the prejudice of the pursuer). That gratuitous benefit is said to be the grant of a *general* release for no adequate consideration (condescendence 11).

[87] In ordinary circumstances, I would have regarded that second element as a matter habile for proof. Cases involving undue influence (particularly where the issue in dispute concerns an assessment as to whether a benefit has been conferred on the dominant party, and whether that benefit is gratuitous or materially disproportionate) tend, by their nature, to be fact-sensitive, and ought not to be excluded at debate (*Honeyman's Executors* v *Sharp* 1978 SC 223; *Royal Bank of Scotland Plc* v *Etridge (No 2)* [2001] 3 WLR 1021; *Clydesdale Bank Plc* v *Black* 2002 SC 555, 559F-1 and 567E-I). (*Wilson* is unusual, perhaps, in having been dismissed at debate, but there the pleadings were plainly inadequate.) However, this is not an ordinary case.

[88] Here, if I am correct in my construction of the release clause in the bank transfer form, it follows, as a matter of law, that no *general* release (of negligence liability) was ever granted to the defenders. It follows, therefore, that no "gratuitous or materially disproportionate benefit" was ever conferred upon the defenders. If my construction is correct, the bank transfer form does no more than release the defenders, in exchange for

the refund, from claims for recovery, refund or reduction of the price of the failed treatment (to which *limited* discharge no exception is taken by anyone). Further enquiry at proof is unnecessary.

[89] For that reason, the pursuer's averments of undue influence are irrelevant. I shall sustain the second defender's preliminary pleas (pleas-in-law numbers 1 and 2), and dismiss crave 1, so far as founded upon undue influence.

[90] For completeness, I also draw attention to a technical defect in crave 1. As presently drafted, it seeks reduction of the bank transfer form *in its entirety*. This fails to recognise that the bank transfer form performs three discrete functions: (i) a release of claims, (ii) a mandate or authorisation to the defender to pay the refund into a nominated bank account, and (iii) an acknowledgement that the settlement is without admission of liability. Only the first of these is the subject of challenge. The second function of the form is unobjectionable. (I reserve judgment on the third.) In those circumstances, only a *partial* reduction could competently have been be sought in any event.

[91] That technical point aside, I should also record that, if I am wrong in my interpretation of the bank transfer form, I consider that the converse conclusion would have followed. To explain, if, contrary to my interpretation, the bank transfer form does indeed operate as a general release (*inter alia* of the defenders' liability in negligence), such a release would, as a matter of law, have represented a "gratuitous benefit". That is because, in that scenario, for no additional consideration or *quid pro quo,* the bank transfer form would have innovated upon the parties' preceding contract (as constituted by their offer and acceptance dated 9 and 10 January 2019) by granting a *general* discharge (*inter alia* of negligence liability) in place of the previous *limited* discharge, thereby conferring a "gratuitous benefit" upon the defenders (see my reasoning in paras [63] and [67]-[69], above). In that scenario, the second

defender's preliminary pleas, so far as directed at the pursuer's averments anent undue influence, would fall to have been repelled, and (subject to my comments on the technical drafting deficiency in crave 1), the bank transfer form would have been susceptible to partial reduction.

Essential error

[92] The pursuer avers that the "bank transfer form" was executed under essential error. The error is said to take two forms. First, there is said to be error as to the "nature" of the bank transfer form (Articles 13 and 15; plea-in-law 8). Second, there is said to be error as to the identity of the "grantee" or beneficiary of the form (Articles 13 and 14; plea-in-law 7). Both alleged errors are directed at supporting crave 1 (for reduction of the form) and crave 4 (for declarator that the form is void due to essential error).

[93] In addition, the pursuer's averments (in Article 13; plea-in-law 6) *quoad* the identity of the "grantee" of the release clause in the bank transfer form are directed at supporting a separate remedy of declarator in crave 3, though this crave appears to be founded mainly upon a construction of the document rather than upon alleged essential error.

[94] This all seems unnecessarily complicated.

[95] In my judgment, a simpler analysis is available. All the averments of essential error (and the related craves 1 and 4) are predicated upon the assumption that, on a proper construction, the bank transfer form effects a general release (*inter alia* of the defenders' negligence liability). In other words, the pursuer is averring that he was induced to sign the document under essential error as to its nature (as a general release) and under essential error as to the identity of the beneficiaries of that general release (specifically, that the second defender was to benefit from it). The averments in support of the declarator in

crave 3 are predicated upon the same basic assumption, namely that the bank transfer form operates as a general release (*inter alia* from negligence liability) subject to the refinement that the second defender was not intended to benefit from it.

[96] However, if I am correct in my construction of the bank transfer form, it follows, as a matter of law, that the bank transfer form does not operate as a general release at all. If I am correct in my construction, the bank transfer form does no more than release both defenders from claims for recovery, refund or reduction of the price of the failed dental treatment. No exception is taken by anyone to that limited discharge. That being so, no relevant vitiating "error" is averred, because the bank transfer form does not, in law, operate as a general discharge or release of the negligence liability of either defender. Since the issue is one of contractual construction, in an undisputed documentary context, further enquiry at proof is unnecessary.

[97] For that reason, I shall sustain the second defender's preliminary pleas (pleas-in-law numbers 1 and 2), so far as directed at the pursuer's averments anent essential error. It follows that both crave 1 (so far as founded upon essential error) and crave 4 fall to be dismissed.

[98] For completeness, I observe that a drafting defect also appears in crave 4. As presently worded, it seeks declarator that the bank transfer form *in its entirety* is "null and void". As explained above, this fails to recognise that the bank transfer form performs three discrete functions, at least one of which (namely, its function as a unilateral mandate and account nomination) is unchallenged and unobjectionable. In those circumstances, decree as fourth craved could not competently have been granted in any event.

[99] That technical drafting point aside, I should also record that, if I am wrong in my interpretation of the bank transfer form, and if the document does indeed operate as a

general release (*inter alia* of negligence liability), in my judgment the pursuer's averments of essential error *quoad* the "nature" of the document would have been relevant and sufficient for enquiry at proof. That is because, in that scenario, the pursuer avers that the bank transfer form was presented (and misrepresented) in the accompanying email as a mere administrative document, intended to implement the parties' pre-existing contract (Article 15). Accordingly, in that scenario, I would have concluded that the second defender's preliminary pleas (so far as directed at essential error *quoad* the nature of the document) should be repelled, and a proof allowed. In contrast with the averments of undue influence, proof would be necessary on these averments of essential error because the factual averments of actual error, inducement and causation remain in dispute.

[100] In contrast, the pursuer's averments of essential error *quoad* the identity of the "grantee" or beneficiary of the release are irrelevant either way. Reading the bank transfer form in context, the release therein (whether it is construed as being general or limited in nature) was plainly intended to enure for the benefit of both defenders. The text, and context, of the preceding written offer dated 9 January 2019, indicate that it was intended to "speak" for both defenders. The letter is signed by the second defender and runs throughout in the first person. But it is also printed on the first defender's headed notepaper, and was communicated by email from the first defender, with a subject heading that refers to the first defender.

[101] In my judgment, the proper construction, from the direct involvement of both defenders in the writing and communication of that offer, is that it was intended to resolve claims against both of them (for recovery, refund or reduction of the price) (*Kidd* v *Lime Rock Management LLP* 2021 SLT 1499, [31]; *Heaton* v *AXA Equity & Law Life Assurance Society*

plc [2002] 2 AC 329, 337). The subsequent bank transfer form must be read in that context as likewise enuring for the benefit of both defenders.

[102] Accordingly, I shall sustain the second defender's preliminary pleas to the extent of excluding from probation the pursuer's averments *quoad* (i) essential error as to the identity of the contracting parties and (ii) the alleged sole "grantee" or beneficiary of the release clause in the bank transfer form.

[103] It follows that both crave 1 (so far as founded upon essential error *quoad* the identity of the "grantee") and crave 3 fall to be dismissed.

Is the release limited in its temporal scope?

[104] In crave 5, the pursuer seeks declarator that, on a proper construction, the release clause in the bank transfer form has a limited temporal scope (specifically, that it does not operate to discharge claims by the pursuer relating to negligent treatment, advice or ineffective consent "prior to 31st January 2017"). The related averments appear in Article 16.

[105] It is correct that, read literally, the clause does indeed bear to tether the discharge to dental treatment received by the pursuer "between 31/01/17 and present". The pursuer avers that certain conduct (such as "defective consent" obtained, or treatment given) prior to 31 January 2017 would not be caught by the release.

[106] Firstly, as a matter of law, I have construed the scope of the release in a different manner. In my judgment, properly construed, whatever else it may cover, the release clause in the bank transfer form does not encompass *any* liability in negligence. The wording of the crave and the pursuer's related ninth plea-in-law number are simply not apt to be sustained because they are predicated upon an erroneous assumption as to the general nature of the release (that is, that it encompasses liability in negligence). On my construction, it would be

rather odd to pronounce a decree that the release does not cover any negligence claim pertaining to a certain period only (that is, pre-dating 31 January 2017). Properly construed, the release does not cover negligence liability at all.

[107] Secondly, read in context, I construe the bank transfer form as merely executory in nature, and co-extensive in effect (*quoad* its release clause) with the discharge in the parties' preceding contract. On that analysis, the release applies to claims for recovery, refund or reduction of the price of the dental treatment given by the second defender. It is a matter of admission on record that the dental treatment in question extended from 17 January 2017 to 17 March 2017 (Article and Answer 6). In other words, it was a *course* of dental treatment extending over a period of time. Therefore, the reference in the bank transfer form to a specific time-period (of "between 31/01/17 and present") is of no particular significance because, by process of contextual construction, the release should be read as being referable to that *course* of dental treatment (of which the stated time-period merely forms part).

[108] Thirdly, this conclusion is fortified by the specific wording of the release clause. It seeks to define the discharge as pertaining to claims arising out of "or connected with" dental treatment received on or after 31 January 2017. A certain latitude is introduced by use of the flexible term "or connected with". Even on a literal reading of the form, a "consent" obtained from (or treatment provided to) a patient prior to 31 January 2017 would be "connected with" treatment subsequently received after that date, if the consent and treatments are part of a single *course* of treatment extending over that period of time. To illustrate, a claim pertaining to the cost of, say, exploratory or preparatory dental treatment received prior to 31 January 2017 would still be covered by the literal wording of the form's release clause if, as a matter of fact, it is "connected with" substantive treatment subsequently received on or after 31 January 2017, because it is part of a single course of

treatment. True, in some circumstances, a proof might be required to establish whether, as a matter of fact, any such disputed "connection" exists between treatment received before, and treatment received after, 31 January 2017. But not so here - because, by reason of the admission on record, there is no dispute that we are dealing only with a single *course* of dental treatment traversing 31 January 2017.

[109] For each of these reasons, the second defender's preliminary pleas, so far as directed at the limited temporal scope of the release in the bank transfer form, are sustained; the pursuer's related ninth plea-in-law is repelled; and the pursuer's crave 5 (for declarator) falls to be dismissed.

The Consumer Right Act 2015: unfair and void terms

[110] The pursuer seeks declarator that the bank transfer form is unenforceable against the pursuer, so far as it purports to act as a discharge of all claims connected with the dental work, by virtue of sections 62 and 65 of the Consumer Rights Act 2015.

[111] In my judgment, the pursuer's averments *quoad* the application of section 65 of the 2015 Act are irrelevant; but the second defender's averments *quoad* the non-application of section 62 are irrelevant; with the result that decree of declarator as second craved falls to be granted, in part, so far as founded upon section 62 of the 2015 Act.

Competency?

[112] I pause to make two preliminary observations.

[113] Firstly, if I am correct in my construction of the release clause in the bank transfer form (with the result that, in law, the defenders' liability in negligence is not extinguished by the release), it might be thought that a declarator of unenforceability by virtue of the

2015 Act is neither competent nor necessary. That is not correct. A term may be "unfair" within the meaning of the 2015 Act, and challenged as unenforceable, not only where the term has the offending "effect", but also where it purports to do so. I base that conclusion on the Act's indicative list of unfair terms (Part 1, Schedule 2), all twenty of which define particular terms as being unfair if they have an offending "*object or* effect" (my emphasis). (Section 61(4) has the same effect in relation to a consumer contract "notice", which is said to be challengeable to the extent that it "purports" to exclude a trader's liability.) So, a term may be challengeable as "unfair" under the Act if it has the "object" of achieving an offending result even if, on a proper construction, it does not actually have that "effect". From the consumer's perspective, that conclusion makes sense because a consumer should not be obliged to pursue litigation to obtain an authoritative ruling on the true construction (and "effect") of an impugned clause when, either way, the clause may have the offending "object", and is being deployed in that way against him, rightly or wrongly. The statutory "fairness" assessment is different from the common law process of construction.

Disclaimer, exclusion or discharge: Are they different?

[114] Secondly, a subtle but important distinction requires to be drawn between (i) a disclaimer notice, (ii) an exclusion, exemption, or limitation of liability clause (or an indemnity clause, which is merely the obverse), and (iii) a discharge. Each of these contractual instruments performs a slightly different function (McBryd*e*, *The Law of Contract in Scotland*, (3rd Edition), 8-60). The purpose of a disclaimer notice is to negative the very existence of a delictual duty. A disclaimer notice is aimed at preventing a delictual duty of care from arising in the first place. In contrast, an exclusion (or exemption) clause generally purports to exclude a liability which may (or would) otherwise arise *at some future date* from

a *future* breach of a contractual or delictual obligation. (Likewise, a limitation of liability clause is aimed at limiting a liability which may or would otherwise arise at some future date between the parties.) In contrast, a discharge clause serves a subtly different function. It is designed to extinguish a *present* liability (that is, a liability that has already allegedly arisen) from an alleged breach of duty or event that has already occurred. The broad conceptual difference between an exclusion or limitation clause and a discharge clause is that the former is prospective in its intent (in the sense that it is directed at excluding or limiting a liability that has not yet arisen, pertaining to a breach or circumstance that has not yet occurred); whereas the latter is retrospective in its intent (in the sense that it is directed at extinguishing a liability that has already allegedly arisen, pertaining to a breach of duty or event that has already occurred).

[115] There can be some overlap. A general release clause may seek to eliminate both a *present* alleged liability pertaining to an act or omission that has already allegedly occurred, as well as a *future* liability pertaining to an act or omission that has not yet occurred. Such a wider form of settlement may be seen as hybrid in nature, a combination of a discharge clause and an exclusion clause, aimed at extinguishing and excluding both present and future alleged liabilities, respectively.

[116] The conceptual distinction is important when one comes to look at some of the "exclusion" terms to which the 2015 Act is directed (notably in section 65 and within the "grey list" in Part 1 of Schedule 2). To illustrate, paragraph 1 on the "grey list" refers to: "[a] term which has the object or effect of excluding or limiting the trader's liability in the event of death of or personal injury to the consumer resulting from an act or omission." In my judgment, this paragraph 1 is aimed at an "exclusion" clause. It applies to a term that purports to exclude a liability which may otherwise arise *at some future date* from a *future* act,

omission or circumstance. I base this interpretation upon (i) the use of the words "excluding or limiting" (rather than the word "discharging"); (ii) the use of the phrase "in the event of", with its connotation of futurity, looking ahead to a prospective occurrence; and (iii) the background context of the common law, which recognises the technical conceptual distinction between an exclusion (or limitation) clause and a discharge. The same logic applies to paragraph 2 on the "grey list".

[117] Some other terms on the list, though they have slightly different wording, retain the same prospective connotation of seeking to enable an outcome (favourable to the trader) upon the occurrence of some future event, such as the future cancellation of the contract (paragraphs 4 and 5); the future breach of the contract (paragraph 6); the future failure to terminate the contract (paragraph 9), and so on.

[118] The distinction is also significant in relation to section 65 of the 2015 Act. Section 65 creates a statutory bar on a term of a consumer contract or notice that seeks to "exclude or restrict liability for death or personal injury resulting from negligence". For the reasons explained above, on a proper interpretation, section 65 is also directed at a conventional "exclusion" (or limitation) clause. It is aimed at excluding a prospective liability in negligence, not at discharging a present liability. This interpretation is reinforced by section 66(2) which expressly removes from the scope of the section 65 prohibition a defined "discharge" given "in settlement of any claim the person *has*". (I emphasise Parliament's use of the present tense here.) The use of the word "discharge" in section 66(2) (and the description of its function, consistent with the common law, as being to effect "settlement" of any claim the person "*has*") is consistent with the conceptual distinction between these contractual instruments: an exclusion clause is directed at excluding a future alleged liability, a discharge clause is directed at extinguishing a present alleged liability. By using

the different terminology, I conclude that Parliament intended to respect that technical legal distinction in this context. (The same distinct language appears in section 66(3), which also removes certain other defined "discharge[s]" from the section 65 prohibition on prescribed "exclusion" terms.)

What is an "unfair term" (section 62, 2015 Act)?

[119] I turn now to consider the statutory controls that apply to unfair contract terms. These controls apply to contracts between a trader and a consumer (s 61, 2015 Act). There is no dispute that the pursuer is a consumer and the defenders are traders.

[120] An "unfair term" of a consumer contract is not binding on the consumer (section 62(1), 2015 Act). What is an "unfair term"? Section 62 of the 2015 Act gives the answer. It states:

> "(4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.
>
> (5) Whether a term is fair is to be determined:
>
> (a) taking into account the nature of the subject matter of the contract, and
> (b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends."

The "grey list" of indicative unfair terms

[121] Section 63 then introduces Part 1 of Schedule 2 to the 2015 Act. This contains an "indicative and non-exhaustive" list of terms that may be regarded as unfair. It is often referred to as the "grey list". The terms on the grey list are not automatically unfair but may be used to assist a court when considering the application of the section 62 fairness

assessment. Equally, terms not appearing on the "grey list" may still be found to be unfair by application of the section 62 fairness assessment.

The "safe harbour" exemption for traders

[122] Section 64 then provides an exemption (or "exclusion") from the section 62 "fairness" assessment. It is sometimes described as the "core exemption" or "safe harbour" for traders who are facing claims that a term is unfair. According to section 64, two categories of term are exempt from any assessment of fairness. A term of a consumer contract may not be assessed for fairness to the extent that:

> "...(a) it specifies the main subject matter of the contract, or
> (b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it."

Limits on the "safe harbour" exemption

[123] But there are three key limits on the "safe harbour" exemption. It can only be relied upon by the trader if the impugned term is both transparent and prominent (s 64(2)). In addition, the "safe harbour" exemption does not apply at all to a term appearing on the "grey list" (s 64(6)).

[124] Nor do the challenges end there for a trader, because it is recognised that exemptions from the "fairness" assessment must be "strictly interpreted" (*Director General of Fair Trading* v *First National Bank plc*, [2002] 1 AC 481, [12] and [34]; *The Office of Fair Trading* v *Abbey National plc & Others* [2010] 1 AC 696, [43]; *Kasler* v *OTP Jelalogbank Zrt* [2014] Bus LR 291, 42).

The correct order of resolution

[125] The section 64 exemption can appear labyrinthine. The correct order of resolution is to consider the "grey list" before the "safe harbour" provisions. The following sequence of questions (adopted, with gratitude, from the Competition and Markets Authority's published Guidance on unfair terms in the Consumer Rights Act 2015) might usefully be asked to determine whether the "safe harbour" exemption applies:

> Question 1: Does the term have the object or effect of a term on the "grey list"? If yes, the term is fully assessable for fairness. If no, go to Question 2.
>
> Question 2: Is the fairness assessment of the main subject matter of the contract? If yes, go to Question 4. If no, go to Question 3.
>
> Question 3: Is the fairness assessment of the appropriateness of the price in comparison with the services, goods or digital content supplied in exchange? If yes, go to Question 4. If no, the s 64 safe harbour exemption does not apply.
>
> Question 4: Is the term both transparent and prominent? If yes, the term benefits from the safe harbour exemption. If no, the term is fully assessable for fairness under section 62.

Does the "safe harbour" exemption apply here?

[126] Applying the foregoing order of resolution, I conclude that the release clause in the bank transfer form does not fall within the section 64 "safe harbour" exemption. The consequence is that the clause is subject to an assessment of its fairness under section 62 of the 2015 Act.

Is it a "grey list" term?

[127] By way of explanation, following the stepped process, the first question is this: does the release clause in the bank transfer form fall within any of the "indicative" unfair terms on the "grey list" (s 64(6), 2015 Act)? The answer is no.

[128] The pursuer submitted that the release clause fell within paragraphs 1, 2 and/or 20 of the grey list. I disagree.

[129] For the reasons explained above (paras [114] to [118]), on a proper interpretation paragraphs 1 and 2 of the grey list are directed at terms that seek to "exclude" a prospective (alleged) liability, arising from an act, omission or circumstance that may occur in the future. In contrast, on a plain reading, the release clause in this bank transfer form seeks to "discharge" present (alleged) liabilities, arising from acts, omissions or circumstances that have already occurred.

[130] As for paragraph 20, properly interpreted, it is even more narrow in its scope, though similarly prospective in its intent. It applies to terms that seek to "exclude or hinder" the taking of legal action or the exercise of a legal remedy. It does not go as far as to include terms that seek to "discharge" or extinguish a legal right of action or remedy. The narrower scope of this type of unfair term is supported by the three "particular" instances of the offending term, as listed in sub-paragraphs (a) to (c). That list falls to be construed *ejusdem generis*. All three of the listed particular instances are connected. They form part of a genus. They each comprise, in nature, *procedural* mechanisms (the mandatory diversion to arbitration; the restriction of evidence; the reversal of the onus of proof) that impede the future exercise of a substantive right of action or remedy. They do not comprise the wholesale discharge and extinction of an extant right of action or legal remedy.

[131] Of course, if I am wrong in that conclusion, then the section 64 "safe harbour" exemption does not apply at all, and the release clause is fully assessable for fairness.

Does it specify "the main subject matter" of the contract?

[132] If I am correct that the grey list does not apply, the second question is this: does the release clause in the bank transfer form specify "the main subject matter of the contract" (s 64(1)(a), 2015 Act)? Again, the answer is no.

[133] For the reasons set out above (see paras [70] to [75]), the principal "contract" between the parties was the agreement constituted by the preceding offer and acceptance. The subsequent bank transfer form was merely accessory to, and executory of, that principal contract. True, it is contractual in nature to the limited extent that it operates as a unilateral mandate or grant of authority to the defenders to pay the agreed refund to a nominated bank account, but, in that function, it is merely an adjunct to the preceding principal contract. On that analysis, the release clause within the bank transfer form does not specify "the main subject matter" of the (accessory) contract at all. The main subject matter of the bank transfer form is the grant of a mandate to the defenders to pay the agreed refund to a nominated bank account. The separate all-embracing "release" clause within the bank transfer form is superfluous (and certainly subordinate) to its main subject matter as a unilateral mandate and bank nomination, because the core terms of the parties' agreement (that is, the obligation to pay the refund, and the scope of the associated release) are matters defined elsewhere, in the parties' preceding contract.

[134] If I am correct in that conclusion, then the section 64 "safe harbour" exemption does not apply; the second defender's averments *quoad* the application of section 64 are irrelevant; and the release clause is fully assessable for fairness under section 62.

Is it "transparent and prominent"?

[135] However, if I am wrong in that conclusion, the third question is this: is the release clause on the bank transfer form "transparent and prominent" (s 64(2), 2015 Act)? Again, the answer is no.

[136] A term is "transparent" if it is expressed in plain and intelligible language (s 64(3)).

[137] The requirement of "prominence" focusses upon how the term was actually presented to the consumer, both in the contract itself and in the pre-contractual "sales process". A term is "prominent" if it is brought to the consumer's attention in such a way that an average consumer would be aware of it. For this purpose, an average consumer means a consumer who is reasonably well-informed, observant and circumspect (s 64(4) and (5)). The prominence requirement did not feature in the EU Directives from which the 2015 Act derives. It is an innovation inserted on the recommendation of the Law Commissions in their Joint Report dated March 2013. That said, it is not a novel concept. It derives from Lord Denning's "red hand rule" in ticket cases, that a party should take steps to bring particularly unusual or onerous terms to the other party's attention. Lord Denning stated (with some hyperbole perhaps) that certain clauses: "…would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient." The rule was stated by Lord Denning in *J Spurling* v *Bradshaw* [1956] 1 WLR 461 at 466, approved in *Interfoto Picture Library Ltd* v *Stiletto Visual Programmes Ltd* [1989] 1 QB 433, and applied in Scotland in *Montgomery Litho Ltd* v *Maxwell* 2000 SC 56.

[138] There can be overlap between "transparency" and "prominence". The essential structural difference is that the "prominence" requirement is only relevant if the trader seeks refuge within the "safe harbour" exemption (s 64(2)). So while all terms should be

transparent, not all terms need to be prominent. The essential substantive difference is that the "prominence" requirement extends beyond the four corners of the written contract to require a review of the presentation of the term in the preceding sales and advertising process.

[139] In my judgment, the release clause in the bank transfer form does not satisfy the requirement for prominence. The second defender points to the fact that the clause was there, in full view, to be read, and that it appeared right at the beginning of the document. But that is not sufficient. One must also look at the preceding "sales process". In this case, the term is not "prominent" because the bank transfer form (in which the purported general release appears) was "presented" to the pursuer in the guise of something materially different in nature and purpose from a general release. The parties had already concluded a settlement agreement. The deal was not conditional upon the execution of a formal discharge by the pursuer. Indeed, it did not envisage the execution of any further document to implement or supersede it. All that was expressly envisaged was that the defenders would "arrange the refund" upon receipt of the pursuer's acceptance (final paragraph, defenders' offer dated 9 January 2019). Against that background, the purported general release in the bank transfer form came out of the blue. Worse still, the bank transfer form was presented to the pursuer as nothing more than an administrative mechanism to implement a concluded deal. Its limited apparent purpose was reinforced by the wording of the accompanying email dated 14 January 2019: (i) it bears the subject-heading "Bank Transfer"; (ii) it describes the document as a "bank transfer form"; and (iii) it instructs the pursuer to complete, sign and return the form, so that the defenders can "arrange the transfer of your refund". All of this underlined the limited executory function of the document. Nothing in the email suggested that the bank transfer form was intended to

supersede or innovate upon the parties' existing contract. Nothing suggested that the defenders were seeking to re-negotiate or amend the parties' preceding agreement. Nothing in the email would have alerted the "average consumer" to the purported additional purpose of the form as effecting a general release (*inter alia* from the defenders' liability in negligence for personal injury).

[140] It is judicially recognised that the average consumer's "level of attention is likely to vary according to the category of goods or services in question" (*El Corte Inglés* v *Office for Harmonisation in the Internal Market* [2004] ECR II-965, 68). This is illustrated in cases involving, as here, connected or linked contracts forming part of a single transaction. In one such case, involving the sale of loans with a linked insurance contract, the Court of Justice of the European Union held that the average consumer "cannot be required…to have the same vigilance" as regards the ancillary (insurance) element of the transaction as he would if he had entered into it separately (*Jean-Claude Van Hove* v *CNP Assurances SA*, C-96/14, 23 April 2015, paragraph 48).

[141] Similar logic applies here. The principal contract had already been concluded several days earlier. The average consumer would have expected nothing more than payment of the agreed refund. Instead, a second contractual document was presented by the defenders. It was evidently linked to the principal contract; it was apparently intended to implement it; but, in fact, it goes further by purporting to innovate upon the deal by introducing a new general release clause. The average consumer cannot be expected to have the same vigilance (as with the principal contract) in perusing and understanding the terms of the linked, accessory contract. In that context, in order to make the general release clause "prominent", more required to be done by the defenders to draw the pursuer's attention to both its existence and its import. Most obviously, the defenders could and should have

expressly alerted the pursuer, in the accompanying email, to the existence and import of the all-embracing release clause in the form.

[142] Lastly, in my judgment, the release clause in the bank transfer form is also not "transparent". Clarity, legibility, and intelligibility of the language are not enough. Transparency also requires that terms should be drafted to ensure that consumers can make informed choices. A term should not only make grammatical sense to the average consumer but must put the consumer into the position of being able (per *Kasler, supra*): "to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it." It is of "fundamental importance" (*RWE Vertrieb AG* v *Verbraucherzentrale Nordrhein-Westfalen*, [2013] 3 CMLR 259, 44) for a consumer to have:

> "…information, before concluding a contract, on the terms of the contract and the consequences of concluding it…It is on the basis of that information in particular that he decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier."

In this case, the bank transfer form provides no such transparency. It founders upon its own generality. It fails to make clear to the pursuer the real-life practical scope and consequence of the discharge therein. By failing expressly to disclose in the release clause (or elsewhere) that it purports to discharge, not only the pursuer's simple right to a refund, but also, among other things, the defenders' liability in negligence for damages for personal injury, an informed choice could not be made by the average consumer of the real and practical consequences of signing it.

[143] Accordingly, the second defender's averments *quoad* the section 64 exemption are irrelevant. They fall to be excluded from probation. The release clause is then fully assessable for fairness under section 62.

Is this clause "unfair" (section 62, 2015 Act)?

[144] Returning to the section 62 fairness assessment, a term of a consumer contract is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the pursuer. Whether a term is fair is to be determined by taking into account the nature of the subject matter of the contract, and by reference to all the circumstances existing when the term was agreed, and to all of the other terms of the contract, or of any other contract on which it depends.

[145] Applying that assessment, I conclude that the release clause in the bank transfer form, insofar as it purports to operate as a general discharge (*inter alia* of the defenders' liability in negligence), is "unfair". To that extent, it is unenforceable against the pursuer.

[146] The imbalance caused by the term is self-evident. The parties had already concluded a contract (by means of the preceding offer and acceptance) under which, on a proper construction, the pursuer was entitled to receive the refund without having to give up any rights or claims against the defenders, other than claims for recovery, refund or reduction of the price. The contract did not oblige the pursuer to grant, or entitle the defenders to receive, a general release. However, the bank transfer form, which derives from and is accessory to that preceding contract, significantly upsets and unbalances those contractual rights and obligations. Under the bank transfer form, for no additional consideration or *quid pro quo*, the pursuer finds himself receiving the very same refund while purportedly granting to the defenders a much wider discharge (*inter alia* for liability in negligence). The defenders thereby gain the significant windfall of a general release of claims, at no extra cost; while the pursuer loses a valuable right of action, for no extra gain. A finding of unfairness does not require proof that a term has caused actual harm. The fairness assessment is concerned with rights and duties; its focus is on potential, not actual, outcomes. So there is

no need to quantify the actual financial value of the claim in negligence. It is enough that the pursuer's right of action has purportedly been extinguished by the term, for no additional consideration, thereby placing the pursuer in a less favourable legal position than he would otherwise have been in, and significantly unbalancing the parties' pre-existing rights and obligations, to the detriment of the consumer.

[147] The term is also contrary to the requirement of "good faith" for the reasons previously discussed. It is not "transparent". It is not "prominent". It appears in a document that was misleading as to its true nature and purpose. It was presented to the pursuer in the guise of an administrative form designed to procure a bank transfer of an agreed refund, not to innovate upon the scope of an agreed release. All of this offends against the general principle of "fair and open dealing" subsumed within the requirement of good faith (*Director General of Fair Trading* v *First National Bank plc, supra*, [17].

[148] Accordingly, in respect that the term is "unfair" under statute, decree as second craved falls to be granted, but in part only, to the extent that it is founded upon section 62 of the 2015 Act.

Bar on exclusion of negligence liability for personal injury (section 65, 2015 Act)

[149] Lastly, section 65 of the 2015 Act creates a statutory bar on any term of a consumer contract or notice that seeks to "exclude or restrict liability for death or personal injury resulting from negligence". A carve-out or exception appears in section 66(2), but it seems to be fairly narrow in its terms. It provides that the section 65 prohibition:

> "…does not affect the validity of any discharge or indemnity given by a person *in consideration of the receipt by that person of compensation* in settlement of any claim the person has" (my emphasis).

[150] The pursuer submitted that the release clause in the bank transfer form was void under section 65 of the 2015 Act because it purports to exclude the defenders' negligence liability for personal injury; and the section 66 carve-out does not apply because the pursuer has received merely a "refund" of the price, not "compensation".

[151] At first blush, there is a certain attraction in the pursuer's argument.

[152] However, if the pursuer is correct, it would mean that no discharge or release of any personal injury claim arising from negligence could ever validly be granted, unless "compensation" is paid to the claimant. That does not accord with common sense or common business practice.

[153] Many compromise settlements are concluded (to discharge death or personal injury claims arising from negligence) which do not involve payment of any "compensation" to the claimant. Parties often agree (for practical or economic reasons) to the discharge of such claims, without payment of any money to any party. The settlement may involve a simple "dropping of arms" by both parties. There is no "receipt…of compensation" by anyone (per s 66(2)). Or, as part of a compromise, a payment may be made by one party to another, but explicitly without admission of liability, such as, say, an *ex gratia* contribution to one party's legal fees. Such a payment is not naturally characterised as a payment of "compensation". Indeed, it contradicts the express terms of settlement. Or a discharge may be granted as part of a mutual release of counter-claims, or in exchange for some agreed act or omission by one party, or for the procuring of some other (non-financial) result. Or compensation might be received, not by the claimant, but by a third party such as a trust or charity, an arrangement that is also not envisaged by the literal wording of the section 66(2) carve-out. Or a discharge may be granted in exchange for an apology. On the

pursuer's analysis, all of these commonplace compromise settlements would be void because no "compensation" has been received by the claimant. That cannot be correct.

[154] In my judgment, on a proper interpretation, the statutory bar in section 65 is directed at an "exclusion" (or limitation) clause in its technical sense, being a term which purports to exclude or limit a *prospective* liability (in negligence for personal injury or death) which may otherwise arise at some *future* date from an act or omission that has not yet occurred. It is not directed at a "discharge" clause, being a term which purports to discharge a *present* liability attributable to an act or omission that has already occurred. This interpretation is supported by section 66(2), which expressly removes from the scope of the section 65 prohibition a defined "discharge" given "in settlement of any claim the person *has*" (my emphasis on the present tense). (Other specific "discharges" are also referred to in section 66.) I refer to my reasoning in paras [114] to [118], above.

[155] The words "exclusion", "exclude", "discharge" and the like, where they appear in sections 65 and 66, are not to be read literally, but are instead, in this particular context, intended to be given their technical legal meanings. That interpretation achieves consistency with the interpretation I have given to the grey list terms.

[156] However, I accept that, if I am correct in my interpretation, it might be argued that the carve-out of specific "discharges" in section 66 is strictly unnecessary. That may be so. I do not shy away from that conclusion. But that does not mean that the wording in section 66 is superfluous or meaningless. It serves the useful purpose of clarifying any doubt, by expressly recording that the section 65 bar does indeed "not affect" and "not apply to" those commonplace discharges (sections 66(2) and (3)). The reference to those specific discharges in section 66 does not prejudice the broader statutory intention that other

discharges, as that term is properly understood in its technical legal sense, are also not affected by the section 65 prohibition. It simply puts the matter beyond doubt.

[157] Returning, then, to the wording of the bank transfer form, on a proper construction, it purports to operate as a conventional discharge of *present* liabilities of the defenders, arising from specific acts or omissions that have already occurred (ie the failed course of dental treatment). Section 65 is not engaged at all. Accordingly, the pursuer's averments *quoad* the application of section 65 are irrelevant, and crave 2 falls to be dismissed, in part only, to the extent that it is founded on section 65.

Further procedure

[158] Given the relative complexity of these conclusions, I shall assign a case management conference to allow parties to consider the import of my interlocutor and suitable further procedure. Expenses are reserved meantime.