Editors Note

Permission for Withdrawing an Admission—A Threat to the Closure that Admissions are Meant to Provide

Admissions; Brain damage; Personal injury claims; Swimming pools; Withdrawal

Introduction

As a matter of general principle an admission made by a party to a dispute is legally binding only if it is supported by contract or estoppel. Otherwise, it may only be relied upon as evidence of the facts admitted. Special provision is, however, made by CPR r.14.1 which states that where a defendant admits the truth of the whole or part of the claimant's case, the claimant may enter judgment on the admission. It further provides that court permission is required to amend or withdraw an admission. Similar provision is now made for pre-action admission by CPR r.14.1A.

The rationale of the rule is straightforward: to enable a defendant who faces defeat or who for some other reason wishes to avoid contesting a particular case, to avoid the expense of litigation by making an early admission. But expense would be saved only if the claimant can feel sure that the admission is secure enough to allow him to cease investing effort and resources in preparing to prove the admitted case. A claimant who is not confident that the admission provides closure to the admitted case would be bound to continue to prepare for a contest.

The admission rule rationale does not require the admission to be irrevocable for all time. Indeed CPR Pt 14 confers on the court a jurisdiction to permit withdrawal of an admission. But the jurisdiction to permit withdrawal must not undermine the security that claimants may obtain from admissions. Otherwise admissions would not inspire sufficient confidence to deliver the advantage that the admission rule is intended to produce. It is argued that the recent decision in *Woodland v Stopford*[1] threatens to undermine the peace that claimants may obtain from admissions.

The effect of admission

Admissions during proceedings have been governed by CPR Pt 14. Provision for pre-action admissions was introduced with effect from April 6, 2007 in CPR r.14.1A,[2] to remedy the defect that emerged following the decision in *Sowerby v Charlton*,[3] where it was held that CPR Pt 14 applied only to admissions made after commencement of the proceedings. As a result of that ruling a claimant could not

[1] *Woodland v Stopford* [2011] EWCA Civ 266; [2011] Med. L.R. 237.
[2] Civil Procedure (Amendment No.3) Rules 2006 (SI 2006/3435).
[3] *Sowerby v Charlton* [2005] EWCA Civ 1610; [2006] 1 W.L.R. 568.

rely on an admission made by the defendant in response to a letter before claim and would have to press on with proceedings. The new rule puts pre-action admissions on broadly a similar basis as formal admissions during proceedings. A claimant is now able to obtain judgment on an admission made before commencement of proceedings, which can only be withdrawn by agreement between the parties or with court permission (CPR r.14.1A(4)).[4]

Court permission is required to amend or withdraw an admission made after commencement of proceedings (CPR r.14.1(5)). Although the rule does not spell it out, it must be permissible to withdraw an admission by agreement with all concerned parties. Where there are two parties or more, the consent of all the parties would be required because any other party may apply for judgment on an admission made under CPR r.14.1(2) (admission by notice in writing) (CPR r.14.3(1)). CPR r.14.1A makes provision for withdrawal of pre-action admission. A person may, by giving notice in writing, withdraw a pre-action admission before commencement of proceedings, if the person to whom the admission was made agrees (CPR r.14.1A(3)(a)). If the person to whom the admission was given does not accept the withdrawal, he would have to commence proceedings to engage the court's jurisdiction. After commencement of proceedings an admission may be withdrawn only if all parties to the proceedings consent or with the permission of the court (CPR r.14.1A(3)(b)). CPR r.14.1A(4) states that after commencement of proceedings any party may apply for judgment on a pre-action admission; but the party who made the pre-action admission may apply to withdraw it CPR r.14.1A(4)(b). Once judgment has been entered on an admission, it is final and it is too late to apply for permission to withdraw the admission.[5]

Pre-action admissions are governed by the CPR only if they fall within CPR rr.14.1A or 14.1B. That is to say: admissions in relation to: (1) personal injury claims; (2) clinical disputes; and (3) disease and illness claims (CPR r.14.1A). A pre-action admission made in cases outside these rules may be withdrawn without court permission.[6] It was held, as already noted, in *Sowerby v Charlton*[7] that an admission of liability before action could not be equated with an admission of "the truth of the whole or any part of another party's case", because a party's "case" was not formulated until the claim form or particulars of claim were prepared, and a person did not ordinarily become a party until legal proceedings had been commenced. This means that the party in receipt of a withdrawn pre-action admission outside CPR r.14.1A cannot obtain judgment on the admission.

However, such admission retains its evidential quality and may be relied upon as evidence of fact. A party may therefore adduce a withdrawn admission of liability as evidence in support of an application for summary judgment. But the opponent would then be free to undermine the probative force of the admission, eg by showing that it was given by mistake, or obtained by misrepresentation. For

[4] It should be noted though that CPR 14.1A applies only to pre-action admissions made in cases within the three pre-action protocols set out in 14 PD 1.1(2). These protocols relate to personal injury, clinical disputes, and disease and illness claims. Special provision is made in CPR 14.1B for admissions made in a cases to which the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (the RTA Protocol) applies. It was inserted by the Civil Procedure (Amendment) Rules 2010 with effect from 30 April 2010 to provide a regime for withdrawal of admissions during the structured negotiations dictated by the RTA protocol.

[5] *Kojima v HSBC Bank Plc* [2011] EWHC 611 (Ch); [2011] 3 All E.R. 359.

[6] *Sowerby* [2005] EWCA Civ 1610; [2006] 1 W.L.R. 568; *White v Greensand Homes Ltd* [2007] EWCA Civ 643; [2007] C.P. Rep. 43 at [29].

[7] *Sowerby* [2005] EWCA Civ 1610; [2006] 1 W.L.R. 568.

instance, a claimant may rely on a pre-action admission which is outside the CPR Pt 14 in an application to strike out the defence on one of the grounds set out in CPR r.3.4(2): (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim; or (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings.

The approach to such an application was considered in *Walley v Stoke on Trent City Council*,[8] where a pre-action admission of liability was made on behalf of a local authority by an incompetent employee of their loss adjusters. The Court of Appeal held that in order to establish abuse of process it would usually be necessary to show that the defendant had acted in bad faith. A claimant who advances the argument that a withdrawal would obstruct the just disposal of the proceedings would usually be required to show that he would suffer prejudice if he could not rely on the admission. Clearly the prejudice has to be something other than the loss of the benefit of the admission. Therefore, prejudice has to be some real disadvantage caused by the claimant's reliance on the admission which cannot be overcome once the admission is removed. The following were mentioned as examples of prejudice: the claimant agreed to the destruction of real evidence, or refrained from seeking expert inspection which is no longer possible, or witnesses became unavailable.[9] However, any effect that a withdrawal would have on a litigation funding arrangement would be unlikely to count in this regard.

Reliance and prejudice is central when a court entertains a striking out application under CPR r.3.4(2)(b) on the grounds that the statement of case is likely to obstruct the just disposal of the proceedings, as is illustrated by *White v Greensand Homes Ltd*.[10] The claimants sought damages for structural damage caused by the defendants' design of the foundations of their property. In response to a letter before action the defendants admitted that they were the authors of the designs and subsequently repeated the admission in their defence, but denied liability on other grounds. A few months later, the defendants applied for permission to amend the defence by withdrawing the admission that they had designed the foundations, having discovered that the design work had been carried out by a third party. The judge accepted that the defendants had an arguable case that the foundations had been designed by the third party and that its admission was the result of a mistake. The Court of Appeal agreed that the claimants suffered no prejudice by relying on the admission because they lost nothing by refraining to pursue the third party, who had been dissolved insolvent three years before the proceedings.

Permission to withdraw an admission under CPR Pt 14

Where a party applies for withdrawal of an admission made under CPR Pt 14, the court must, according to 14 para.7.2, have regard to all the circumstances of the case including the following:

[8] *Walley v Stoke on Trent City Council* [2006] EWCA Civ 1137; [2006] 4 All E.R. 1230; [2006] C.P. Rep. 48.
[9] *Walley* [2006] EWCA Civ 1137; [2006] 4 All E.R. 1230; [2006] C.P. Rep. 48 at [35].
[10] *White v Greensand Homes Ltd* [2007] EWCA Civ 643; [2007] C.P. Rep. 43.

> "(a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;
> (b) the conduct of the parties, including any conduct which led the party making the admission to do so;
> (c) the prejudice that may be caused to any person if the admission is withdrawn;
> (d) the prejudice that may be caused to any person if the application is refused;
> (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;
> (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the offer was made; and
> (g) the interests of the administration of justice."

Although the considerations listed in 14 para.7.2 were largely drawn from earlier decisions,[11] the approach adopted by the Court of Appeal to exercise of discretion is problematic. It held in *Woodland v Stopford*[12] that CPR PD 14 para.7.2 confers a wide discretion on the court to be exercised by reference to all the circumstances, including the factors mentioned in the practice direction. It noted that these factors were not listed in any hierarchical sense and held that it was not to be implied that any one factor had greater weight than another. A judge dealing with an application to withdraw an admission, the Court of Appeal explained, must have regard to each and every one of these factors, give each and every one of them due weight, take account of all the circumstances of the case and strike a balance with a view to achieving the overriding objective.

Telling a judge to pay attention to the seven listed factors, consider any other relevant factor and strike a balance provides no meaningful guidance. Indeed, the Court of Appeal seemed intent on ensuring that there was no guiding principle by stressing that cases will vary infinitely and that the weight to be given to the relevant factors will inevitably vary from case to case. Sometimes, it said, the lack of new evidence and the lack of explanation may be the important considerations; in others prejudice to one side or the other will provide a clear answer. Since the interests of justice must sway the balance the Court of Appeal felt that it would be wrong to circumscribe the manner of the exercise of this discretion. It thought that no other guidance was needed other than to say that the court must weigh each of the listed factors as well as all the other relevant circumstances and strike a balance with due regard to the overriding objective.

On this view, a court faced with a withdrawal application must go through the seven considerations listed in CPR PD 14 para.7.2 and any other factor it may find pertinent and then make what it may of this exercise. The exercise advocated by Court of Appeal seems to be in the nature of ticking off the relevant factors rather than a reasoning process. For a reasoning process would require more than just mentioning each factor; it would require some principle to guide decision making, some ordering of the importance of different factors, or some other system of

[11] *Braybrook v Basildon and Thurrock University NHS Trust* [2004] EWHC 3352 (QB) at [45]; approved by the Court of Appeal in *Sowerby* [2005] EWCA Civ 1610; [2006] 1 W.L.R. 568.
[12] *Woodland v Stopford* [2011] EWCA Civ 266; [2011] Med. L.R. 237.

moving from a statement of fact to a normative conclusion. Given the absence of any relative importance of the different factors, or a combination thereof, the court is effectively free to reach any decision it deems fit. Moreover, the Court of Appeal indicated in the *Woodland* case that an appellate court will not interfere with the judges' decision, as long as the lower court took the trouble of indicating that it paid attention to all the relevant factors. This is, it is suggested, a recipe for unpredictability which can only be resolved by court decision, often at more than one level.

The unfortunate experience with a similarly drafted CPR r.3.9, mercifully to be amended with effect from April 1, 2013, shows that this kind of open-ended approach to the exercise of discretion is bound to have two undesirable consequences.[13] First, permission for withdrawal is going to be relatively easily available, which means that a party in receipt of an admission can never safely rely on it when making pre-trial preparations. Secondly, given that there is no guiding principle to the exercise of discretion outcomes are unpredictable and satellite litigation is bound to ensue.

The decision in *Woodland* illustrates the opaqueness of the real reasons for the outcome and therefore the unpredictability of withdrawal applications. The claimant, a 10-year-old girl, was severely injured during a swimming lesson in 2000. Acting through her father, she blamed the defendants who supervised the lesson and sent a letter before action in 2001 to the defendants' solicitors, who in turn denied liability. After an inconclusive initial report, the Health and Safety Executive commissioned a second investigation into the accident which produced a report in 2002. For some reason the claim became dormant and was resurrected only in 2007 when this report was sent to the defendants' claims handlers. The claim handlers admitted liability and an interim payment followed. The defendants then changed solicitors who first indicated that they would not contest the admission but in 2009 gave notice of withdrawal of the admission. The claimant commenced proceedings and the defendant applied for permission to withdraw the admission in 2010, roughly a decade after the incident. No new evidence had emerged since the admission had been given and no explanation was given for the withdrawal of the admission, other than that the defendants' new solicitors wished to reconsider the matter.

The judge addressed the factors listed in CPR PD 14 para.7.2 and other relevant aspects and concluded:[14]

> "I have a balancing exercise to perform … There are factors in favour of both sides. Looking at the circumstances, in my view the interests of justice lead me to conclude that the balance, albeit by no great margin, comes down in favour of the defendant."

To the extent that it possible to discern what factors in particular led to this conclusion, it seems that the following impressed the judge: it could not be said that there was no viable defence; it was not in the interests of the administration of justice to impose on the defendants a state of affairs where there is good evidence that this might result in an injustice; the value of the claim was in excess of £2

[13] See discussion in Ch.11.
[14] *Woodland v Stopford* [2011] EWCA Civ 266; [2011] Med. L.R. 237 at [23].

million and therefore anxious scrutiny needed to be given to the risk of unjustly saddling a defendant with such liability; it was not in the interests of justice that there should be satellite litigation against the first firm of solicitors in respect of the admission.

Absent from the judge's ruling and from the Court of Appeal's discussion was any reference to the rationale for the permission requirement and the role it should play in the exercise of the jurisdiction. As noted earlier, an admission is binding if it forms part of a contract or if it creates an estoppel. When the admission is in a contract, the court has no discretion to relieve the admitting party of its obligation. Where an admission gives rise to estoppel, discretion must be exercised in accordance with established estoppel principles. The whole purpose of CPR Pt 14 is to enable a claimant to obtain judgment on an admission without having to establish contract or estoppel. This is done for one particular purpose: to allow the party in receipt of an admission to proceed safe in the assumption that the litigation is effectively over in respect of the case, or part of the case, that has been admitted, so as to avoid any further effort and expense in preparation for a contest on the admitted case. If an admission did not provide such security, the recipient of the admission would be unable to rely on it, would have to continue preparation for proving the case, and no savings would be achieved; thereby defeating the purpose of the admission provision. In other words, the primary purpose of CPR Pt 14, bringing closure or finality to the admitted case, would be thwarted.

The CPR admission rationale does not entail that an admission must be wholly irreversible. But it does require that the grounds for withdrawing permission should be consistent with the rationale and not undermine it. It would be consistent with the rationale to permit withdrawal where the admission was flawed in the first place. For example, it would be unjust to hold a party to an unintended admission, or to one obtained by misrepresentation of facts,[15] or to an admission given by mistake.[16] An obvious example of mistake is where a party made an admission on the basis of reasonable knowledge of certain facts which are falsified by subsequently emerging evidence. Notably, the emergence of new facts provides justification for undoing other procedural consequences intended to be final. Thus, the general rule is that on appeal a party may not rely on facts which had not been pleaded at the trial. But a party may adduce fresh evidence where he had been unaware of certain facts at the time and could not have discovered them by exercising due diligence.[17] Similarly, an offer to settle under CPR Pt 36 must be open for at least 21 days (CPR r.36.3(5)), but court permission may be obtained for withdrawing the offer within this period where new evidence has emerged.[18] Common to both these instances is a need for certainty which must not be disturbed except where matters were overtaken by unforeseen developments.

The factors identified by the judge and the Court of Appeal in *Woodland*[19] do not give sufficient weight to the need for certainty which underpins the CPR Pts 14 and 14A admissions, but rather undermine it. The judge considered that the fact that the defendant had a viable defence argued in favour of permitting

[15] *Flaviis v Pauley (t/a Banjax Bike Hire)* Unreported October 29, 2002.
[16] *Hamilton v Hertfordshire CC* [2003] EWHC 3018 (QB); [2004] C.P. Rep. 22.
[17] See Ch.24, Appeal.
[18] See discussion in Ch.26, Offers to Settle.
[19] *Woodland v Stopford* [2011] EWCA Civ 266; [2011] Med. L.R. 237

withdrawal. Yet it is precisely where there is an arguable defence that a claimant should be able to rely on an admission, because where there is no real defence the claimant may obtain summary judgment. The judge, and seemingly the Court of Appeal, gave weight to the consideration that refusing withdrawal permission could result in a judgment which is at odds with the facts. Yet, if an admission could be undone wherever the admitting party is able to show a good prospect of success, the other party would feel bound to continue investigating the issue in case it occurred to the admitting party that he could succeed on the issue after all. A claimant would at least have to be ready to contest a withdrawal application founded on a reasonable prospect of success. It should be noted that, by contrast, a prospect of success is not sufficient for raising fresh points on appeal or for withdrawing a CPR Pt 36 offer.

As we have seen, two other considerations weighed with the judge. One was the size of the potential recovery. It is not clear why it should have carried much weight when the admission was in effect made on behalf of insurers who were perfectly able to meet the award. A further factor considered significant by the judge was that if the admission stood, litigation was likely to follow against the claim handlers who made the admissions. It is not self-evident why this should count in favour of withdrawal when such an action might have forced the claim handlers to internalise the costs of the trouble their admission caused, if it turned out to be negligent. Again, claimants would be unable to rely on admissions made by the defendant's agents if they could be undone whenever the defendant became dissatisfied with the agent's action.

Even if precedence were given, as it is suggested it should, to the need to show a good reason for the withdrawal, the other factors mentioned in CPR PD 14 para.7.2 would not become redundant. The conduct of the parties (CPR PD 14 para.7.2(b)) would become relevant where, for instance, the admission was induced by the other party's misrepresentation. Prejudice that would be caused by the withdrawal (CPR PD 14 para.7.2(c)) might justify refusal of permission even though the admission was made by mistake, as where in reliance on the admission the party had foregone opportunities to preserve evidence,[20] or failed to sue the correct party.[21] Similarly, withdrawal may be refused despite good reasons and fresh evidence, if the withdrawal is made near a trial which has been prepared on the basis of the admission (14 para.7.2(f) and (g)).

Conclusion

The exercise of the jurisdiction to permit withdrawal of admissions must not undermine the purpose of the CPR Pt 14 procedure. The aim of CPR Pt 14 admissions is to enable the claimant to proceed safe in the knowledge that the admission brings litigation over the admitted case to an end, unless the defendant can demonstrate that the admission was flawed in one of the ways described above.

The approach advocated here is reflected in a number of decisions on the subject. In *American Reliable Insurance Co v Willis*[22] David Steele J. considered proof of good reason for the withdrawal and the emergence of fresh evidence to be threshold

[20] *Sollitt v DJ Broady Ltd* [2000] C.P.L.R. 259 CA.
[21] *Sollitt* [2000] C.P.L.R. 259 CA.
[22] *American Reliable Insurance Co v Willis Ltd* [2008] EWHC 2677 (Comm).

requirements. In *Gunn v Taygroup Ltd*[23] the principal reason for the permission to withdraw was the fact that the defendants admitted a claim which was quantified at £637,000 only to be faced with a claim of £3.4 million. The admission initially made in that case could be said to have been fundamentally different from the one to which the claimant sought to hold the defendant.

These decisions and others in similar vein suggest that the starting point should be to ask whether a good reason has been given for freeing the applicant from an admission freely given. To show good reason, it is suggested, the applicant must persuade the court that the admission could no longer be upheld because it was unintended, or made in ignorance of facts which could not be ascertained at the time, or induced by misrepresentation, or some other similar reason. Only such an approach to withdrawal applications can ensure that the exercise of the jurisdiction is predictable and compatible with its rationale.

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[23] *Gunn v Taygroup Ltd* [2010] EWHC 1665 (TCC).