11 March 2015

PRESS SUMMARY

Carlyle (Appellant) v Royal Bank of Scotland Plc (Respondent) [2015] UKSC 13
On appeal from: [2013] CSIH 75

JUSTICES: Lord Neuberger (President), Lord Kerr, Lord Clarke, Lord Reed, Lord Hodge

BACKGROUND TO THE APPEAL

The appellant, Mr Carlyle, is a property developer. In 2007 he purchased a plot of land for development at Gleneagles, Perthshire from the Gleneagles Hotel. He had to complete the construction of a new house on the plot by 31 March 2011, before the Ryder Cup was due to be staged at Gleneagles golf course. The purchase was subject to a buy-back clause entitling the vendor to re-purchase the plot for the original price if the construction was not completed on time **[9]**.

Mr Carlyle funded the purchase by taking a loan from the respondent, The Royal Bank of Scotland Plc ("the bank"). On 26 March 2007 Mr Carlyle met with representatives of the bank to discuss the proposed loan. The buy-back clause was discussed and Mr Carlyle made it clear that he would need to borrow money to build the house as well as to purchase the plot **[9]**. In subsequent telephone calls he reiterated that the bank should not lend him the purchase money unless it was also committed to providing him with development funding **[10]**. On 14 June 2007 the bank's representative told him by telephone that his proposal was "all approved" and Mr Carlyle accordingly paid a deposit to the vendor to secure the purchase **[11]**.

In August 2008 the bank informed Mr Carlyle that it would not provide funding for construction and called in the loan. On 14 August 2008 the bank raised an action against Mr Carlyle for the payment of £1,449,660 plus interest. Mr Carlyle defended the action and counter-claimed for his loss of profit on the development **[3]**.

The central issue in the case was whether, on an objective assessment of what the parties said to each other, the bank intended to enter into a legally binding promise to lend Mr Carlyle money for not only the purchase but also the development of the plot **[1]**.

On 10 May 2010 the Lord Ordinary declared the bank was in breach of a collateral warranty to make development funding of £700,000 available to Mr Carlyle **[5]**. He held that the telephone conversation of 14 June 2007, set in the context of the previous discussions, represented a commitment by the bank both to advance the purchase price and to provide a facility for the build cost **[13]**.

The bank appealed. On 12 September 2013 the Second Division of the Inner House allowed the bank's reclaiming motion **[6]**, holding that: (i) in the conversation of 14 June 2007 the bank had simply informed Mr Carlyle of an internal decision to approve funding in principle; (ii) the bank was not under any legal obligation until there was a written loan agreement; and (iii) the alleged promise was legally ineffective because essential terms, including the maximum draw down, had not been agreed **[18]**. Mr Carlyle appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows the appeal, sets aside the interlocutor of the Second Division and remits the case to a commercial judge in the Court of Session to proceed accordingly **[38]**. Lord Hodge, with whom Lord Neuberger, Lord Kerr, Lord Clarke and Lord Reed agree, gives the judgment.

REASONS FOR THE JUDGMENT

Lord Hodge notes the limited power of an appellate court to reverse the findings of fact of the judge who has heard the evidence **[2]**. He comments that had he been deciding the matter at first instance, and if the findings of fact record all the material evidence, he might have shared the view of the Second Division that the bank had not entered into a legally binding obligation to provide the development funding **[20]**. However, when deciding that the trial judge has gone "plainly wrong", the appeal court must be satisfied that the judge could not reasonably have reached the decision under appeal **[21]**. The rationale for this is both that the judge who has heard the evidence will have a deeper insight in reaching conclusions of fact and the different role assigned to the appellate court **[22]**. The Second Division disagreed with the Lord Ordinary on questions of fact without facing up to the restricted role of the appellate function on such questions **[23]**.

The Lord Ordinary had a reasonable evidential basis for finding on an objective analysis that the bank made a legally binding promise in the telephone call of 14 June 2007 to provide development funding. He might have interpreted the evidence differently and concluded that there was no binding commitment, but he did not have to **[25]**. The fact that parties envisage that their agreement will be set out in a formal contract in the future does not, by itself, prevent that agreement from taking legal effect **[25]**. Although Mr Carlyle and the bank knew that the 14 June 2007 commitment would be superseded by more detailed loan agreements, this did not prevent it from having effect as a legally binding promise **[26]**. The fact that a previous loan transaction between Mr Carlyle and the bank had been conducted differently was not relevant, because in the earlier transaction there had been no buy-back clause **[30]**.

It was open to the Lord Ordinary to reach the conclusion he did despite the relatively ill-defined nature of the obligation to provide the development funding **[29]**. The parties had proceeded on the basis that Mr Carlyle would need up to £700,000 for the development of the plot **[27]**. They were aware of the rates of interest applied to other loans, and the time constraints on the development of the plot **[29]**. Once the Lord Ordinary was satisfied that the bank had the intention to make a legally binding promise, he was entitled and indeed required to look for ways to give effect to that promise **[29]**.

The pleading of a "collateral warranty" became a distraction in this case. It was not used as a term of art. Either "promise" or "unilateral undertaking" would be a suitable description for the independent legal obligation under consideration **[33]**. In English contract law, the doctrine of consideration gives rise to the concept of a "collateral contract", in which one party's promise or representation is given in exchange for the other party entering into the envisaged (separate) contract. In Scots law a unilateral undertaking that is intended to have legal effect, such as a promise, is binding without consideration passing from the recipient of that promise. The promise may be, but does not need to be, collateral to another contract. The issue is simply whether a legally binding obligation has been undertaken **[35]**.

References in square brackets are to paragraphs in the judgment