OUTER HOUSE, COURT OF SESSION

[2023] CSOH 84

PD515/22

OPINION OF LORD MALCOLM

In the cause

JAMES MILLER

Pursuer

against

J.W. WHEATLEY AND SON LTD AND ANOTHER

Defenders

Pursuer: B Fitzpatrick; Digby Brown LLP
Defenders: J Gardiner; Kennedys Scotland

28 November 2023

Introduction

[1] James Miller raised an action for the payment of damages arising out of a workplace accident against three parties. The action was abandoned against the first defender, namely Algo Blairgowrie Ltd (Algo). Subsequently and after a proof decree was sought against only the third defender, a partnership named JW Wheatley and Son (Wheatley). (The other defender is JW Wheatley and Son Ltd.) Much of the relevant background is not in dispute.

The background circumstances

[2] Algo was constructing a building for the greenkeeper's maintenance equipment and associated facilities at Dunbarnie Golf Links, Upper Largo, Fife. It sub-contracted the electrical works to Wheatley which in turn sub-contracted part of those works, namely the installation of solar panels on the roof, to MMS Building Services Ltd (MMS). Mr Miller is a solar panel engineer and the sole director of MMS. He was directly responsible for the sub-contract and for fitting the panels. He submitted a risk assessment and method statement in respect of their installation to Algo. It identified adverse weather as a hazard.

[3] On 21 February 2020 Mr Miller attended at the site with an employee, namely Mr Owen Cook, to fit panels to the roof. No-one from Wheatley was present. Access to the roof was gained using equipment belonging to Algo. Because of adverse weather the metal roof was wet. As a result Mr Miller slipped and fell. He sustained a fracture to the left femur and required surgery. (The parties have agreed the amount of damages to be paid if Wheatley is found solely liable for the accident at £38,500.)

The written pleadings

[4] In the written pleadings for Mr Miller it is claimed that one of the Wheatley partners, namely David Wheatley, pressured him to complete the work as soon as possible. Wheatley failed to carry out a risk assessment into the solar panel work. If it had, the obvious risk of slipping when the roof was wet and appropriate mitigation measures, such as stopping work, would have been identified. Reference is made to various workplace and health and safety regulations relating to risk assessment, management, working at height, and safe place of work. Wheatley is said to have failed in its duty of reasonable care toward

Mr Miller. On the hypothesis that Algo instructed Wheatley that the site was to be closed, there was fault and negligence in that this instruction was not followed.

[5] Wheatley aver that MMS was a specialist sub-contractor not under Wheatley's control. There was no deadline for the work. The risk of working on the wet roof would have been obvious to Mr Miller. It was identified as a hazard in the risk assessment provided by him to Algo. He was solely responsible for the accident. Wheatley denies liability, failing which there was substantial contributory negligence.

James Miller's evidence

[6] Mr Miller confirmed that MMS were asked by David Wheatley to carry out the solar panel work. It had been made clear that the site was on a tight timescale and that Mr Wheatley wanted to get the work finished. Mr Miller felt under pressure to make progress. Some preparatory work was done on the roof on 20 February 2020. Early in the morning of the 21st, which was a Friday, Mr Miller telephoned David Wheatley from the site and told him there was light drizzle. David Wheatley did not dissuade him from going on the roof to fix the panels. He said that they needed to get the job finished. Mr Miller appreciated that to go onto the metal roof was hazardous. It was slippy and felt unsafe. However he decided to do the job. When asked why, Mr Miller said that it was because Mr Wheatley wanted it finished. Having fixed some panels, in order to obtain something from the van he went down the sloping roof at an angle. He slipped and fell. He takes it that the slip was caused by the wetness. While he did not fall off the roof, he had broken his hip.

[7] When completing the risk assessment Mr Miller used a template. In hindsight he recognises that he should have reviewed its terms. Rather than "low", the risk of working

on the roof should have been categorised as "medium", perhaps increasing to "high" when there was rain.

[8] In cross-examination Mr Miller accepted that if he thought it unsafe he should not have done the work, however they wanted it completed. He was aware of pressure from both Algo and Wheatley. He stressed that during the telephone call that morning David Wheatley did not tell him to stop the job. He accepted that he could have decided not to go on the roof and that it was his decision to do so. He denied that the rain was more severe than drizzle. The conditions were not windy otherwise he would have stopped work. There were Algo workers but no Wheatley employees on the site that day.

[9] In re-examination Mr Miller stated that if he had been told that Algo had closed the site he would not have gone onto the roof.

Barbara Miller's evidence

[10] Mrs Miller assists with administration for MMS such as drafting invoices and certificates for completed works. Her husband deals with contract documents. She had spoken to David Wheatley on the phone and there were emails concerning the golf links work. For several days before the accident Mr Miller was stressed and feeling under pressure. Mr Wheatley kept asking him to get the work finished.

The evidence of Owen Cook

[11] Mr Cook is a retired HGV driver. He was employed as a labourer by MMS for the solar panel work. On the Friday the weather was "dampish". They were later in arriving and, having been to see the site agent, Mr Miller said they would wait in the van till the weather cleared and it was safe to go on the roof. There were two people working in the

building who were nothing to do with them, and there were others on golf course duties. He heard but did not see the fall. He knew that Mr Miller had slipped. It had been chilly the night before but it was a fine day. When asked about precipitation Mr Cook said that one has to wait till the roof was totally dry - one cannot take any chances. It was drying out.

[12] The "boss man" wanted the job finished and asked Mr Cook whether he could attend the following day. If it was fine with Mr Miller it was fine with him. There would be two electricians and two workers. The following day, which was a Friday, the boss man, Mr Cook and the others had the job finished. Mr Cook was surprised when told that the accident occurred on a Friday. Mr Cook would not normally work on a Saturday unless he had to. The person on the roof was a Mr Wheatley. He was the "boss man".

[13] In cross-examination Mr Cook stated that the night before the accident and in the early morning there had been heavy rain. When asked if there were strong winds, he replied - yes, normal winds.

The evidence of James Latto

[14] Mr Latto is a construction site manager employed by Algo. That February he was responsible for the Dunbarnie Links site and one other. On the Thursday the weather was becoming stormy. Adverse weather was coming. He decided that no one should go on the roof on the Friday. Over the telephone he told David Wheatley not to instruct people to work that Friday. He told Algo employees that there was to be only internal work. He expected other workers to be told this. On the Friday he was in Perth. The weather was bad. He was shocked that someone had gone on the roof. Along with others David Wheatley finished the solar panel installation the following week. He could not see why there would be time pressure to finish it.

[15] In cross-examination Mr Latto confirmed that before the accident Mr Miller gave him the MMS risk assessment for the solar panel work. As site manager it was his, not David Wheatley's job to ensure the site was closed. During re-examination in a couple of leading questions Mr Latto was asked if he expected David Wheatley to comply with the no external working instruction and communicate it to workers who might be on the roof. He replied in the affirmative.

David Wheatley's evidence

[16] David Wheatley was the only witness led for the defence. He was the partner running the business from day to day. It lacked accreditation to fit solar panels. Wheatley sub-contracted that work to MMS. He saw the MMS risk assessment before the accident. It was up to MMS to decide how the work would be done and carry out its own risk assessment. There was no fixed date for the installation of the panels. The job was not time sensitive. He did not put any pressure on Mr Miller to finish the work.

[17] Mr Wheatley did not recall a phone call from Mr Latto concerning the anticipated adverse weather on the Friday. He did not tell Mr Miller that no work was to be done that day. Mr Wheatley was in his office in Alyth. No Wheatley employees were on site. He had no idea as to the weather at the golf links until he attended after the accident. When asked about a phone call early in the morning from Mr Miller, Mr Wheatley said that he did not recall it. He did not hear from Mr Miller and did not know where he was until told of the accident. It was Mr Miller's choice to install the panels on the Friday. It was his decision.

[18] In cross-examination Mr Wheatley said that some time later Mr Latto got in touch and told him that he did speak to him on the Thursday about closing the site on the Friday. Having received a letter from Algo's solicitor Mr Wheatley replied by letter dated

11 February 2022 stating that Mr Latto did communicate with him and Mr Miller saying that the site would be closed due to the expected poor weather. He wrote this in haste thinking it was the right thing to do. However he does not recall the conversation. He was referred to the admission in Wheatley's pleadings. It was the main contractor's job to control what happens on the site.

[19] When pressed as to the call from Mr Miller early on the Friday and shown a record of his mobile calls at the time which appeared to confirm it, Mr Wheatley was not saying that it did not happen, just that he does not recall it. He had not checked his mobile phone. He had removed Mr Miller from it. He denied that the work was completed on the Saturday. Having looked at photographs on his phone, he could say that the panel work was completed on 27 February. He worked on it alongside Mr Cook.

The submissions for James Miller

[20] There was no dispute as to the immediate circumstances of the accident. David Wheatley as Mr Miller's superior in the chain should have passed on the site agent's instruction not to work on the roof on the Friday. The main submission was that the relationship between Wheatley and Mr Miller was akin to employer/employee. MMS was not an independent contractor. Mr Miller could be categorised as a "worker" for Wheatley. Not all workers will be employees. Recent case law has blurred the distinction between employees and independent contractors. While there was no pay slip it was necessary to look at the underlying situation. Mr Miller was there to get the solar panel aspect of the Wheatley work completed. Reference was made to *Uber BV* v *Aslam* [2021] ICR 657, *Makepeace* v *Evans Brothers (Reading)* [2001] ICR 241, *Pimlico Plumbers Ltd* v *Smith* [2018] ICR 1511, and *Victoria Rose and others* v *WNL Investments Ltd* [2023] CSOH 49.

[21] On the issue of Wheatley's alleged control over Mr Miller's operations reliance was placed on the following factors. Mr Miller did not supply equipment allowing access to the roof. It did not matter that it was provided by Algo. While Mr Miller picked Mr Cook as his labourer, after the accident he remained involved working with David Wheatley. The work was done on the Saturday outside Mr Cook's normal working hours, something which was an extraordinary instruction showing control over someone not your employee. Mr Cook called him the boss man. Mr Cook wrongly thought the accident happened on the Thursday. He said that the work was completed the day after the accident, which must have been the Saturday.

[22] Much of the submission focussed on various passages in the judgment In *Uber*, particularly at paragraphs 91/92, 98, and 126. Counsel clarified that it was not asserted that liability flowed from the various regulations cited; however, the policy underpinning the decision in *Uber* was to ensure that vulnerable groups were protected. Common law protection equivalent to the contents of the regulations should be afforded to both employees and statutory "workers", see section 230(3) of the Employment Rights Act 1996. The common law and statutory duties were coterminous, *Kennedy* v *Cordia* paragraphs 110/111. Reference was made to section 69 of the Enterprise and Regulatory Reform Act 2013, the Management Regulations 1999, *Allison* v *London Underground* [2008] ICR 719 at paragraphs 57/58, *Makepeace* at paragraphs 12/13, and to various passages in *Victoria Rose*.

[23] On a realistic view of matters the relationship was of the employer/employee type, triggering a duty of reasonable care. This included telling Mr Miller not to go on sloping metal roofs in wet weather. An employer owes a duty to protect his employees from their own stupidity. Both Mr Wheatley and Mr Latto said there was no urgency to complete the

work. Simply on the neighbourhood principle Mr Wheatley should have told Mr Miller that the site agent had decided there should be no external work that day. Had he done so, Mr Miller said he would not have gone on the roof. Wheatley should have carried out a risk assessment of the solar panel installation operation. There had been no engagement with the Work at Height Regulations 2005. The roof was clearly an unsafe place of work unless suitable precautions were taken.

[24] It was accepted that there was also a duty on Mr Miller to take care for his own safety, but it was not a matter of 100% liability upon him. There was nothing special about independent contractors such that others did not owe them a duty of care, especially in the context of a construction site. The drive is towards co-operation and improved standards of health and safety. It appeared that Mr Wheatley took the view that he need not tell Mr Miller anything and that it was up to him to look after himself. He was more blameworthy than Mr Miller for the severe injury caused by the accident.

The submissions for Wheatley

[25] Mr Miller worked for and was the face of MMS, who were classic independent contractors hired to carry out a discrete piece of specialist work. The factors relied on to support the proposition that the relationship between Wheatley and Mr Miller was akin to employer/employee were unconvincing. Mr Cook only helped to complete the work because Mr Miller allowed it. It was of no significance whether this happened on the Saturday or later the following week, however Mr Cook insisted it was not done on the Saturday. MMS brought the solar panels to the site. It mattered not that it used Algo equipment to gain access to the roof. Even if Mr Miller's evidence of the work being on a tight timescale and needing to get finished is accepted, it is not evidence of control of MMS

by Wheatley. If Wheatley did control MMS, David Wheatley could have ordered Mr Miller to go on the roof that day. The most Mr Miller said was that he did not dissuade him.

[26] None of the authorities relied on assist Mr Miller. The transportation service provided by Uber drivers was "very tightly defined and controlled by Uber", paragraph 101. Their remuneration was fixed by Uber, paragraph 94. The present case was wholly different. Furthermore Mr Miller need not rely on section 230(3) of the 1996 Act for his employment rights - he can look to MMS.

[27] *Makepeace* was not authority for the proposition that even if Mr Miller was an independent contractor, Wheatley might still owe duties to him under the neighbourhood principle. It turned on the particular combination of factors set out at paragraph 14 of Holman J's judgment. Here there are no circumstances pointing to a duty of care for the safety of Mr Miller. Mr Wheatley did not direct Mr Miller to work on the roof.

[28] There is no factual or legal basis for a duty on Wheatley to risk assess the solar panel operation. MMS was responsible for how the work was done and for managing the risks. On any view there was no obligation on Wheatley to carry out another risk assessment. The accident was not caused by any gap in the risk assessment. It stated that adverse weather conditions should be taken into account when working at height. The safety risk that morning was apparent and had been identified by Mr Miller yet he chose to begin the work. On his own evidence he decided against the obvious mitigation, namely delaying until it was safe to install the panels.

[29] As to the case based on the site closure, Algo were in charge of the site. Any criticism should be directed to them. In the absence of record for it, the court should not entertain the argument that Mr Wheatley should have passed on the detail of a telephone call from Mr Latto. In any event Wheatley was not in control of when MMS did the work.

MMS in the shape of Mr Miller was responsible for managing the work and the risks. He was an experienced solar panel installer. He had risk assessed the work. Mr Wheatley did not disobey Mr Latto by instructing roof work that day. Mr Miller was on site and had all the information he needed to make his own decision. The problem was that he ignored his own risk assessment and, on his own admission knowing it was unsafe to do so, began the work.

[30] If liability is established, contributory negligence should be at the top of the range.

Analysis

[31] In certain circumstances it can be difficult to decide whether a claimant was an employee to whom a duty of care was owed or an independent contractor. This is not such a case. MMS were specialist independent contractors hired by Wheatley under a contract for services to perform the solar panel aspect of the electrical work they had agreed to provide for Algo, the main contractors in the construction project. Mr Miller was employed by MMS, not Wheatley. It was MMS, not Mr Miller, that supplied services to Wheatley. Nonetheless it was submitted that there were particular factors in play which supported the proposition that he was Wheatley's "worker" in terms of section 230(3)(b) of the 1996 Act. Just as each Uber driver worked for Uber under a worker's contract and so could look to Uber to satisfy certain employment rights, it was contended that Mr Miller was entitled to expect that Wheatley would comply with the provisions of certain regulations and exercise reasonable care for his safety when he was installing the panels.

[32] The difficulty with the submission is that there is no comparison between the circumstances of the present case and the position of Uber and the Uber drivers. There are three parts to the definition of a worker's contract under section 230(3)(b). First there must

be a contract whereby an individual undertakes to perform work or services for the other party; secondly an undertaking to do this personally; and finally a requirement that the other party is not a client or customer of any profession or business undertaking carried on by the individual. Mr Miller did not undertake "to do or perform personally any work or services for" Wheatley. MMS agreed to install the panels. Mr Miller was working for MMS - not for himself, and not for Wheatley. It was apparent that each Uber driver was personally providing services as part of Uber's business undertaking, and hence could claim the benefits under the Act. It cannot be said that Mr Miller was providing his services as part of Wheatley's business. And even if Mr Miller had been self-employed, the argument would fall foul of the statutory requirement that Wheatley was not a client or customer of a business undertaking carried on by Mr Miller.

[33] Wheatley enjoyed none of the elements of control or direction in respect of Mr Miller's work which might create something akin to employment or common law duties of care. In agreement with the submissions for Wheatley I consider that none of the factors relied on by Mr Miller's counsel for a common law case are persuasive. Standing the evidence on the point from Mr Latto and Mr Wheatley, and the absence of any explanation as to why there was a tight deadline, I consider that Mr Miller exaggerated any pressure he might have felt under to complete the work. In any event a customer's desire for progress is not the same as the exercise of control and direction. Likewise it is of no moment that Mr Miller used Algo equipment to gain access to the roof. And it matters not that Mr Cook, an MMS employee was allowed to assist with completion of the work, even if that happened on a Saturday outside his normal working hours. That said the weight of the evidence was against it being done on the Saturday, a proposition which depended entirely on Mr Cook's

mistaken recollection that the accident happened on a Thursday. No-one spoke to the work being done on a Saturday.

[34] As to the events on the day of the accident I accept the evidence that there was an early morning call from Mr Miller to Mr Wheatley. As with the telephone call from Mr Latto, ultimately Mr Wheatley did not deny that this happened. However Mr Wheatley did not attempt to exercise control over Mr Miller. The most that Mr Miller said was that Mr Wheatley did not dissuade him nor tell him not to go on the roof. That is not surprising. He was not employing Mr Miller and was not in charge of the site. It was not Mr Wheatley's place to issue instructions to Mr Miller. If he had Mr Miller would have been entitled to say - I am my own boss. I am on the site and no one there is trying to stop me. I can assess the weather conditions and the state of the roof. I can decide whether I do or do not want to carry out the work. If Mr Cook is to be believed, and I see no reason not to, they waited in the van for some time for the weather to clear until the person in charge, namely Mr Miller, decided that it was alright to set foot on the roof. In short, and as Mr Miller accepted, it was his decision to work on the roof.

[35] I accept that the previous evening there was a telephone conversation between Mr Latto and Mr Wheatley in which the latter was told of the anticipated bad weather and the intention to close the site at least regarding external working. However, and no matter what Mr Latto's expectations might have been, Mr Wheatley breached no legal duty by not mentioning that to Mr Miller. Nor was he under a duty to issue a similar instruction to Mr Miller. He had no right or power to do so. He was not in charge of either the site or Mr Miller. Unlike Mr Miller he was unaware of the actual conditions at the site. If Mr Miller found the site open it was up to him what he did.

[36] In submissions Mr Miller's counsel made nothing of the suggested pressure to finish the job. On the contrary mention was made of the evidence from both Mr Latto and Mr Wheatley that there was no timescale. This conflict in the evidence is not critical. Even if Mr Wheatley was keen that the work was progressed quickly and made that apparent to Mr Miller, it remained for Mr Miller to decide whether to work that day. Just as Mr Wheatley had no power to issue orders, Mr Miller was his own free agent as to whether he did or did not succumb to any pressure, real or perceived.

[37] Mr Miller was aware that to walk on the sloping metal roof when it was wet was hazardous, yet of his own volition he chose to do so. That was not because of any element of direction or control by Wheatley sufficient to create the legal relationship on which the case is based. None of the duties imposed by a contract of employment, nor anything akin to such, lay on Mr Wheatley. No circumstances imposed a neighbourhood principle duty on Mr Wheatley to take care for an independent contractor.

[38] Taking Mr Miller's case at its highest on the evidence, it fails. Throughout he was an employee of MMS who were classic independent contractors. There was no underlying reality or particular features which created a responsibility resting on Wheatley for Mr Miller's safety nor a liability for the accident. Mr Miller was not a subordinate and vulnerable person requiring the statutory protection of section 230(3)(b) of the 1996 Act to obtain rights against Wheatley. Having regard to the whole circumstances, in my view he was solely responsible for the accident.

[39] If this is wrong and Wheatley were in breach of a duty owed to Mr Miller, I consider that the lion's share of the blame for the accident lies with his own decision to work on the roof despite his view that it was unsafe to do so. On this hypothesis I would assess Mr Miller's contributory negligence at 75%. However the overall result is that the action

fails and Wheatley and the other remaining defender are absolved of any liability in damages.