OUTER HOUSE, COURT OF SESSION

[2025] CSOH 55

CA119/24

OPINION OF LORD RICHARDSON

In the cause

NADEEM SARWAR

Pursuer

against

(FIRST) PHLO TECHNOLOGIES LIMITED
(SECOND) ADAM RODERICK HUNTER
(THIRD) AIDAN MACMILLAN
(FOURTH) PAUL MUNN
(FIFTH) ALISTAIR MURRAY

Defenders

Pursuer: McIlvride KC; BTO Solicitors LLP
Defenders: Roxburgh; Addleshaw Goddard LLP

26 June 2025

Introduction

[1] This case concerns a dispute about the control and leadership of the first defender. The first defender is a company which operates in the online pharmacy sector.

[2] Prior to 30 August 2024, the pursuer was the chief executive of the first defender. The second defender was its chief commercial officer.

[3] On 30 August 2024, at a board meeting of the first defender, attended by, among others, the third defender, the board sought to terminate the pursuer's service agreement by summarily dismissing him and, as a result, to treat the pursuer as a Bad Leaver in terms of the first defender's articles of association. Thereafter, the board sought to remove the pursuer as a director of the first defender.

[4] In the present proceedings, the pursuer challenges the validity of what was done on 30 August 2024. In particular, the pursuer seeks, among other things, declarator that the first defender's termination of his service agreement was null and void.

[5] In turn, the defenders challenge the relevancy of the pursuer's pleadings on a number of grounds. I heard the case at debate. The pursuer, for his part, submitted that his averments were relevant for proof and that a proof before answer on all issues ought to be allowed.

The disputed agreements

[6] The parties are in dispute as to the documents which regulate the pursuer's relationship with the first defender.

The pursuer's position

[7] So far as the pursuer is concerned, this relationship is governed by:

(1) the first defender's articles of association adopted on 29 March 2024;

(2) a shareholders' agreement between the first defender and its members, including the pursuer, also dated 29 March 2024;

(3) a service agreement between the pursuer and the first defender dated 6 March 2020;

(4) a non-executive director's agreement between the pursuer and the first defender dated 23 March 2020; and

(5) a consultancy agreement between the pursuer and the first defender dated 23 June 2018.

[8] In summary, in reliance on the provisions of items (3), (4) and (5), the pursuer contends that the first defender's termination of his service agreement was invalid. Furthermore, even if the termination was valid, the pursuer would remain a non-executive director pursuant to (4) and a consultant pursuant to (5). If correct, the effect of the pursuer's argument would be, in short, that the pursuer would not fall to be treated as a Bad Leaver in terms of the first defender's articles of association.

The defenders' position

[9] The defenders agree that items (1) and (2) regulate the pursuer's relationship with the first defender. The defenders' position is that that relationship is also regulated by a service agreement dated 13 February 2018. The defenders dispute the authenticity of items (3), (4) and (5) (the "disputed agreements"). The defenders also contend that the pursuer has either waived his rights in respect of the disputed agreements or is personally barred from relying on them.

[10] It was the defenders' arguments in respect of waiver and personal bar which were the subject of the debate before me.

The subscription agreements

[11] The arguments advanced by the defenders take as their starting point a series of three subscription agreements concluded by the first defender from 2022 to 2024 with

investors. These agreements were dated, respectively, 23 December 2022, 27 March 2023 and 29 March 2024. It is apparent from the pleadings that there is no dispute between the parties either that the subscription agreements were concluded or as to their terms (Article 3 and Answers 3.8, 3.19 and 3.20).

[12] On each occasion, the pursuer was also a party to the subscription agreements being designated as "Founder". On each occasion, the pursuer executed the subscription agreements both on his own behalf and on behalf of the first defender in his capacity as a director. All of the subscription agreements post-date the disputed agreements. Each of the subscription agreements contained warranties which were made by the pursuer and the first defender to the investors. In each case, these warranties were made subject to disclosures which were made in an accompanying disclosure letter.

December 2022 subscription agreement

[13] In the case of the December 2022 subscription agreement, the pursuer and first defender warranted, among other things, first, that there were no agreements between them other than the subscription agreement itself (Warranty 12.3). Secondly, the pursuer and the first defender warranted that full details of all contracts of services and other arrangements between the first defender and its officers were set out in or annexed to the accompanying disclosure letter dated 23 December 2022 (Warranty 13.1). In respect of these warranties, the disclosure letter referred to the "Founder's service agreement" (Warranty 12.3) and to a "tailored service agreement" (Warranty 13.1) and referred to "Disclosure Document 38". The defenders aver that this document was the pursuer's service agreement dated 13 February 2018. This fact is not admitted by the pursuer. However, the pursuer does

admit that he sent an email to his agents dated 22 December 2022 which included the following remark:

> "I took no salary at all prior to 2018. My service agreement was signed in early 2018 and I was contracted to £150K which was agreed with investors at the time."

March 2023 subscription agreement

[14] In the case of the March 2023 subscription agreement, the warranties granted by the pursuer and the first defender in the December 2022 agreement were simply deemed to have been repeated, subject to the disclosure letter. The March 2023 subscription agreement also appended an additional disclosure letter. For present purposes, the additional disclosure letter was in materially the same terms as the disclosure letter dated 23 December 2022.

March 2024 subscription agreement

[15] The March 2024 subscription agreement followed a similar approach with warranties being made subject to a disclosure letter. However, the warranties granted by the pursuer and first defender were in slightly different terms. They warranted, among other things, that:

> "There are no agreements between the Founder and the Company other than this agreement, the Founder's contract of employment and the Shareholders' Agreement (in each case, as Disclosed)." (Warranty 12.3)

No further reference was made in relation to this Warranty in the accompanying disclosure letter. The pursuer and first defender also warranted:

> "Each employee, worker and consultant of the Company is engaged on materially the same terms as the Company's relevant template agreement for such employee's, worker's or consultant's respective employment classification and country of residence, copies of which are Disclosed." (Warranty 13.2)

In respect of this warranty, the disclosure letter stated that the pursuer:

> "…has a tailored service agreement which is provided as Disclosure Document 23." (paragraph 13.2)

[16] Warranty 13.6 of the March 2024 subscription agreement provided:

> "The engagement of each of the Company's employees, workers and consultants may be terminated by not more than 12 weeks' notice in the UK or not more than the applicable statutory minimum notice period elsewhere given at any time without liability for any payment, compensation or damages. …"

[17] As with the earlier disclosure agreements, the defenders aver that Disclosure Document 23 was the pursuer's service agreement dated 13 February 2018 but this is not admitted by the pursuer.

Reference to the disputed agreements

[18] As noted above (at [11]), the pursuer admits that the subscription agreements were entered into and does not dispute their terms. Furthermore, there would appear to be no disagreement that the disputed agreements were neither referred to nor disclosed in terms of any of the subscription agreements.

[19] In relation to the March 2024 subscription agreement, the pursuer avers:

> "As at 29 March 2024 the Pursuer's whole time and attention was devoted to ensuring the economic survival of the First Defender pending the receipt of the funds to be provided by the Investors. Without those funds the First Defender would have had insufficient working capital to continue trading. In those circumstances [the pursuer] did not properly read the warranties granted in the Subscription Letter [dated 29 March 2024]. Nor did he notice that the Disclosure letter failed to refer to the Service Agreement, the NED Agreement or the Consultancy Agreement [the disputed agreements]. No inquiries were made of him regarding those matters by the solicitors acting for him and the first defender in the transaction, [Addleshaw Goddard]. In consequence the pursuer was unaware that the existence and terms of the Service Agreement, the NED Agreement and the Consultancy Agreement had not been disclosed to the Investors. He could not have discovered that the correct Service Agreement had not been disclosed in any event. The appendix to the Disclosure Letter identified a service agreement between the Pursuer and the First Defender as document number 23. The disclosure documents were made available

> online in a data room set up by Addleshaw Goddard. However, in the data room document 23 was stated to be "redacted" and could not be accessed. Nevertheless, the investors were aware or ought reasonably to have been aware that there was a Service Agreement subsequent to the 2018 Service Agreement. Clause 1 of the Shareholders' Agreement entered into between the same parties on the same date as the Subscribers' Agreement made reference to the subsequent Service Agreement, albeit it was incorrectly described as having been dated 18 September 2023."
> (Article 3)

[20] In respect of the subscription agreements dated 23 December 2022 and 27 March 2023, the pursuer avers:

> "The references to the Pursuer's service agreement with the First Defender in the 2022 and 2023 Disclosure Letters did not identify the date of the service agreements. The pursuer did not see any copy service agreements which may have been exhibited to other parties."
> (Article 3)

Waiver

The defenders' argument

[21] The defenders submit, that, even on the pursuer's own averments, the pursuer has waived any right he had arising out of the disputed agreements based on the warranties given by the pursuer in each of the three subscription agreements. The defenders submit that in granting the warranties contained in the subscription agreements, the pursuer had acted so as to waive, by implication, any rights he may have had arising out of the disputed agreements. Thereafter, the first defender had conducted its affairs on the strength of that position by itself entering in the subscription agreements.

[22] The defenders submitted that the well-recognised requirements for implied waiver were fulfilled (see *Armia Ltd* v *Daejan Developments Ltd* 1979 SC (HL) 56 at pages 69 and 71 per Lord Fraser and Lord Keith respectively). Waiver usually involved the abandonment of a right. Determining whether a right had been waived was a question of fact to be determined objectively. The party relying on the waiver did not need to have suffered

prejudice by reliance on the waiver. However, that party must have conducted their affairs on the basis of the waiver and the party waiving a right must have been aware of its existence (McBryde, *The Law of Contract in Scotland* (3rd edition) paragraph 25.15). Counsel for the defenders also drew attention to the summary of the law contained in the opinion of Lord Hodge in *Mactaggart & Mickel Homes Ltd* v *Hunter* [2010] CSOH 130 at paragraph 82:

> "In this case Mr and Mrs Hunter assert an implied waiver. In *Armia Ltd* Lord Keith of Kinkel (at p.72) observed that such waiver was:
>
> 'a creature difficult to describe but easy to recognise when one sees it, subject to the proviso that it is on occasion difficult to distinguish it from variation of a contract.'
>
> In my view an implied waiver arises from a person's actions or inactivity seen in their factual context, from which the law deems that he, in the knowledge that he has a right, has voluntarily abandoned that right. It deals with a particular type of inconsistent conduct, by preventing a person who has objectively created the impression that he will not enforce a right from thereafter attempting to enforce it. In 'Personal Bar' (2006) Reid and Blackie state (at paragraph 3.10):
>
> 'Waiver is regarded as a matter of fact: the conduct in question is viewed objectively to ascertain whether it is consistent with a continuing intention to exercise the right.'
>
> As waiver seeks to prevent unfairness arising from inconsistent conduct, the court, in the context of implied waiver, usually looks to see if the person asserting waiver has acted in some way in reliance on a belief induced by the conduct of the other party: Armia Ltd and Presslie."

[23] In relation to *Lousada & Co Ltd* v *JE Lesser (Properties) Ltd* 1990 SC 178 which was relied upon the pursuer (see below at [30]), counsel submitted that the observations of Lord Justice Clerk Ross (at page 189) had to be seen in context. In that case, which was dealt with without hearing evidence, the question was whether the pursuer's pleadings were sufficient to instruct a case of waiver. His Lordship was not seeking to innovate on the law as stated in *Armia.* As to *James Howden & Co Ltd* v *Taylor Woodrow Property Co Ltd* 1998 SC 853, also relied upon by the pursuer (see below at [31]), it was notable that the observations of both Lord Kirkwood and Lord Marnoch appeared to be questioning the

extent to which acting in reliance was required to constitute waiver. Furthermore, again these observations required to be seen in the context of the facts of that case.

[24] Applying the law to the present case, counsel for the defenders submitted that the court could conclude on the basis of the pursuer's pleadings that he had waived his rights arising out of the disputed agreements. First, there was no question that the pursuer was, on his own averments, aware of the disputed agreements. Second, it was clear that the pursuer had, in giving the warranties in terms of the three subscription agreement, made representations which were entirely inconsistent with the continued currency of the disputed agreements (see above at [13] to [15]).

[25] Third, it was apparent from the terms of the three subscription agreements that the pursuer had caused the first defender to enter into these agreements. The pursuer made averments as to the background to the subscription agreements. In respect of the March 2024 subscription agreement, the pursuer averred that:

> "As at 29 March 2024 the Pursuer's whole time and attention was devoted to ensuring the economic survival of the First Defender pending the receipt of the funds to be provided by the Investors. Without those funds the First Defender would have had insufficient working capital to continue trading."
> (Article 3)

[26] Counsel submitted that these averments were sufficient to satisfy the requirement that the first defender had conducted its affairs in reliance on the representations made by the pursuer. It was not necessary for the party relying on the waiver to demonstrate that it knew that the representation made was, in fact, a waiver. It was sufficient, in the words of Lord Hodge in *Mactaggart & Mickel Homes* if the party "asserting waiver has acted in some way in reliance on a belief induced by the conduct of the other party."

[27] For completeness, the defenders also advanced an argument relating to the attribution of the knowledge of the pursuer to the first defender. The defenders anticipated

that the pursuer would seek to argue that because he was aware of the disputed agreements in some way that knowledge ought to be attributed to the first defender. Counsel submitted that the pursuer's knowledge ought not to be attributed to the first defender thereby undermining the defenders' waiver argument.

[28] This aspect of the defenders' argument was based on the summary of the law given by Lady Hale in *Singularis Holdings Ltd (in liquidation)* v *Daiwa Capital Markets Europe Ltd* [2019] UKSC 50 (at paragraphs 26 to 34). In brief, counsel's argument, based on *Singularis,* was that the question of attribution depended upon the context and purpose of the attribution. In particular, the answer would not necessarily be the same in questions as between the company and its agents as it would be in questions between the company and third parties. Against this background, counsel submitted that the knowledge of the pursuer in respect of the disputed agreements ought not to be attributed to the first defender because to do so would run contrary to the principle that attribution ought not to enable a director to benefit from his or her own wrong (*Bilta (UK) Ltd (in liquidation)* v *Nazir* [2015] UKSC 23 at paragraphs 7, 38, 180 to 183 and 202 to 209).

[29] However, in the event, the pursuer made no such argument and, as such, there is no need to consider the defenders' anticipated response to it any further.

The pursuer's response

[30] Senior counsel submitted that there was clear binding authority that in order to establish a case of waiver, a party asserting implied waiver had to establish that they had acted in reliance upon a belief induced by the conduct of the party said to have waived its rights. This proposition could be taken from the judgment of Lord Justice Clerk Ross in *Lousada* (at page 189).

[31] The nature of the required belief was explained in *Howden.* Senior counsel founded, in particular, on the following passage from the judgment of Lord Kirkwood (with whom Lord Allanbridge had concurred):

> "…the next question which arises is whether, on the assumption that Taylor Woodrow waived their right to resile for the period of three months, that waiver became effective. In this connection it was agreed that it was not necessary for Howden to establish that they had suffered prejudice, and that it would be sufficient if Howden had established that they had conducted their affairs on the basis that the waiver had been made. … However that may be, on the assumption that evidence of actings in reliance was necessary it is, in my opinion, clear that Howden could not have conducted their affairs in reliance on Taylor Woodrow's waiver unless they believed that the right to resile had, in fact, been waived." (at page 868 B to F)

[32] Senior counsel placed particular emphasis on the final sentence of this passage: Howden, who were asserting waiver, had to demonstrate that they had acted on the belief that Taylor Woodrow had waived the right in question.

[33] On this basis, in the present case, in order for the defenders to be successful, they required to satisfy the court that the first defender had a particular belief and that the first defender had acted on that belief. As this was a debate, the defenders required to achieve this solely on the basis of the pursuer's averments and admissions. Accordingly, senior counsel submitted that it was not possible for the defenders to succeed. There was no basis in the pursuer's pleadings for the court to draw any conclusion as to what the first defender actually believed at the time the various subscription agreements had been entered into. In particular, there was no basis for the court to conclude that, at that point, the first defender had relied upon its belief that the pursuer was waiving reliance upon the disputed agreements.

[34] Secondly, senior counsel drew attention to two aspects of the pursuer's pleadings.

[35] First, he highlighted that, in relation to the March 2024 subscription agreement, the pursuer disputed the defenders' position in respect of "document 23" in Article 3 of

condescendence (see above at [19]). In the same way, the pursuer made no admission as to the identity of the service agreement disclosed under the 2022 and 2023 Disclosure Letters. It was not necessary for the pursuer to make positive averments about this issue. The pursuer had made averments to explain why he could not confirm the identity of "document 23".

[36] Second, senior counsel drew attention to the fact that the pursuer made averments in respect of Warranty 13.14 in the March 2024 disclosure letter:

> "Moreover, the Disclosure Letter disclosed in relation to warranty number 13.14 regarding employees' pension entitlements that "The Company makes a 10% contribution to Nadeem Sarwar's personal pension." Clause 9.1 of the Service Agreement provides that the First Defender will contribute 10% of Pursuer's salary annually to the Pursuer's chosen pension scheme. There was no equivalent provision in the previous, 2018, Service Agreement."
> Article 3

The pursuer made equivalent averments about Warranty 13.9 in the March 2022 and March 2023 Disclosure Letters.

[37] Senior counsel submitted that, taken together, these averments provided a basis for the pursuer's contention that a reasonable reader of the March 2024 subscription agreement ought to have been aware that there was a service agreement between the pursuer and the first defender which post-dated the 2018 service agreement. On this basis, senior counsel submitted that it could not be said that the sole conclusion open to the court, following proof of the pursuer's averments, was that the pursuer by his actions must be taken to have unequivocally abandoned his rights arising from the disputed agreements.

Personal Bar

The defenders' argument

[38] In the alternative, the defenders submit, on the basis of the same circumstances relied upon in support of the waiver argument, that the pursuer is personally barred from relying on the disputed agreements. Counsel was careful to emphasise that the personal bar was the alternative position for the defenders but submitted that, however the pursuer's representations were analysed, the outcome ought to be the same.

[39] The warranties granted by the pursuer in the subscription agreements gave rise to a justifiable belief on the part of the first defender that it was entitled to give the same warranties. On this basis, the requirements of personal bar were established: the pursuer had and knew of his rights under the disputed agreements; the pursuer had acted inconsistently with those rights by granting the warranties; the pursuer now sought to assert his rights in terms of the disputed agreement; and, finally, were the pursuer to be entitled to exercise his rights, this would cause prejudice to the first defender by putting it in breach of the warranties it had granted in the subscription agreements (*Gatty* v *Maclaine* 1921 SC (HL) 1 at page 7; *William Grant & Sons Ltd* v *Glen Catrine Bonded Warehouse Ltd* 2001 SC 901 at page 923G; and *Gloag and Henderson* (15th edition) at paragraphs 3.05 to 3.07). The representation was to be judged objectively. If it could be concluded that a reasonable person would regard the representation as one which he or she was intended to believe and act upon, he or she would be justified in acting on it as being the state of facts for all purposes (*Ben Cleuch Estates Ltd* v *Scottish Enterprise* 2008 SC 252 at paragraphs 85 to 89).

The pursuer's response

[40] The pursuer submitted that the defenders' personal bar arguments were unsound.

[41] First, the pursuer submitted that, in order to be successful, the defenders would require to prove that the first defender had been induced to enter into the subscription agreement on the basis of a belief, induced by the pursuer, that the disputed agreements did not exist. Senior counsel submitted that if the defenders' position was rather that the pursuer did not intend to rely on the disputed agreements, then that required to be the subject of a plea of waiver rather than personal bar.

[42] In any event, the court could not be satisfied of the requirements necessary for a plea of personal bar on the basis of the pursuer's averments and admissions. Apart from anything else, the first defender was itself a party to the disputed agreements. The pursuer offered to prove that the first defender had resolved to enter into these agreements at a board meeting at which the pursuer himself did not vote.

Decision

The waiver argument

[43] The parties both took the case of *Armia* as their starting point for any consideration of waiver. From that starting point, the parties were also agreed that in order to establish an implied waiver, it was necessary to establish both (1) that the party said to have waived its rights had, knowingly, acted in such a way as to permanently abandon its rights; and (2) the party relying on the waiver had conducted its affairs on that basis. I consider that parties' agreed position is broadly correct insofar as it is to be understood to be an attempt to distil into two limbs the slightly fuller summary of the previous authorities given by Lord Hodge in *Mactaggart & Mickel Homes* at paragraph 82 (see [22] above).

[44] From this starting point, the defenders' position is straightforward: both limbs of the test are satisfied by the granting by both the pursuer and the first defender of the warranties

contained in the three subscription agreements which are a matter of admission in the pleadings (see [11] to [17]).

[45] It seems to me that there is considerable force in the position of the defenders. It follows from the pursuer's admitted granting of the subscription agreements that on three occasions he granted warranties which were entirely inconsistent with any continued reliance by him on the disputed agreements. Put simply, on each occasion, the pursuer denied the existence of those agreements. It is also noteworthy that, on the pursuer's own averments, the pursuer granted the last of the warranties (contained in the March 2024 subscription agreement) in critical financial circumstances for the first defender.

[46] In this regard, I do not consider that any remaining uncertainty, so far as the pursuer is concerned, as to precisely which documents were disclosed under the December 2022, March 2023 and March 2024 subscription agreements is of any significance given the pursuer's admission in respect of the March 2024 subscription agreement and its associated disclosure letter that:

> "Nor did he notice that the Disclosure letter failed to refer to the Service Agreement, the NED Agreement or the Consultancy Agreement [the disputed agreements]. … In consequence the pursuer was unaware that the existence and terms of the Service Agreement, the NED Agreement and the Consultancy Agreement had not been disclosed to the Investors."

Read fairly and in context (see [14] above), this averment, taken together with the absence of any positive averment by the pursuer that any of the disputed agreements were in fact disclosed to the investors, make it apparent that, so far as the pursuer is concerned, whatever documents were referred to and disclosed under the subscription agreements, they did not include the disputed agreements. Accordingly, so far as the disputed agreements are concerned, there is nothing which undermines or impacts upon the general

denial in relation to the disputed agreements made by the pursuer contained in each of the subscription agreements.

[47] As to the second limb, the defenders' position is, in short, that the granting by the first defender of the three subscription agreements constitutes it conducting its affairs in reliance on the pursuer's waiver. Again, there is considerable force in the defenders' argument. On the pursuer's pleadings, the pursuer himself signed each of the subscription agreements on behalf of the first defender granting warranties which are inconsistent with any continued reliance by him on the disputed agreements.

[48] In response to the defenders' position, the pursuer puts forward two arguments challenging each of the limbs of the test.

[49] First, the pursuer submits that the defenders cannot succeed at debate in respect of the second limb. This is because, so argues the pursuer, the defenders cannot satisfy the court, on the basis of the pursuer's averments and admissions, that the defenders have conducted their affairs in reliance upon a belief, induced by the pursuer, that the pursuer had, in fact, waived his rights arising from the disputed agreements. In essence, the pursuer's short point is that the pursuer makes no averments as to the beliefs held by the first defender and so the defenders cannot succeed at debate.

[50] The pursuer's second argument is that, based on his pleadings (see [35] to [37]), the court could not be satisfied that the only conclusion open to it was that the pursuer had unequivocally abandon his rights arising from the disputed agreements.

[51] I consider that both of the pursuer's arguments are misconceived.

[52] In respect of the first, the pursuer's argument depends upon establishing, as a matter of law, that it is necessary for the first defender not merely to have conducted its affairs in reliance on the pursuer's conduct but in the specific belief that the pursuer had waived his

rights under the disputed agreements. The pursuer submits that this proposition is vouched by the judgment of Lord Kirkwood in *Howden* and, in particular, the passage at page 868 E to F where his Lordship stated:

> "However that may be, on the assumption that evidence of actings in reliance was necessary it is, in my opinion, clear that Howden could not have conducted their affairs in reliance on Taylor Woodrow's waiver unless they believed that the right to resile had, in fact, been waived." (Emphasis added)

Senior counsel for the pursuer sought to argue that this part of Lord Kirkwood's opinion represented binding authority on me as to the nature of the conduct and in particular the belief required of a party seeking to rely on an implied waiver.

[53] I do not consider that the passage from Lord Kirkwood bears the weight which the pursuer requires to place upon it.

[54] First, I consider that it is important to see the passage in context. *Howden* concerned an argument by Howden that Taylor Woodrow had waived its right to resile from a contract between the parties. The contract between the parties included a clause, clause 14, which provided for the fulfilment of certain essential conditions. If the conditions of clause 14 were not fulfilled by a particular date – the final possession date – either party was entitled to resile from the contract. In the event, those conditions were not fulfilled. However, the parties met and orally agreed that they would not resile from the contract for a period of three months. During the three month period, Taylor Woodrow then served notice that it intended to resile. It was on this basis that Howden sought to argue that Taylor Woodrow had waived its right to resile. Essentially, Howden contended that it had conducted its affairs on the basis of Taylor Woodrow's waiver and sought to rely upon its actings at a meeting shortly before the final possession date.

[55] It was against this factual background that Lord Kirkwood made reference to it being necessary for Howden, in order to have acted in reliance on Taylor Woodrow's implied waiver, to have believed that Taylor Woodrow had, in fact, waived its right to resile. The critical factual point was that Howden was fully aware that, in terms of clause 14, following the final possession date, Taylor Woodrow would have the right to resile. Accordingly, unless and until it believed that Taylor Woodrow had actually waived that right, Howden could not have been acting in reliance. The factual evidence did not support Howden's position. As Lord Kirkwood points out, immediately after the passage founded on by the pursuer, the Lord Ordinary had found that the individual conducting negotiations for Howden, Mr Maclachlan, believed that Taylor Woodrow would have been entitled to resile.

[56] Accordingly, I consider that the statement of Lord Kirkwood relied upon by the pursuer relates to the particular factual circumstances of the case before him rather than being of general application. I am reinforced in reaching this conclusion by a number of further considerations.

[57] First, in order for the pursuer's argument to be correct, one would have to reach the view that Lord Kirkwood was seeking to innovate upon the pre-existing law. However there is no indication in Lord Kirkwood's opinion that he sought to do so. Immediately before the passage relied upon by the pursuer, his Lordship says:

> "There is certainly authority in *Armia* and *Lousada*, which is binding on us, for the proposition that Howden must show that they conducted their affairs on the basis of Taylor Woodrow's waiver of their right to resile for the period of three months." (868 B to D)

Neither *Armia* nor *Lousada* provide any support for the pursuer's argument that a party seeking to rely upon an implied waiver must specifically believe that the other party has waived his or her rights.

[58] Accordingly, there is simply no basis for considering that his Lordship was seeking to develop or further specify the proposition his Lordship refers to, derived from *Armia* and *Lousada*, in the way contended for by the pursuer. Rather it appears that his Lordship is simply applying the proposition to the particular facts of the case before him. There is similarly no indication of any intention to develop the law in the opinions of Lord Marnoch or Lord Allanbridge.

[59] Second, I have difficulty reconciling the pursuer's gloss of Lord Kirkwood's opinion with the clear statement of Lord Keith in *Armia* that:

> "…the question of whether or not there has been waiver of a right is a question of fact, to be <u>determined objectively</u> upon a consideration of all of the relevant evidence." (page 72) (Emphasis added)

The need for an objective approach to questions of implied waiver was also highlighted by Lord Hodge in *Mactaggart & Mickel Homes* at paragraph 82 (see [22] above). I consider that were the pursuer to be correct that a party relying on an implied waiver required to demonstrate it held a particular belief – namely that the other party had waived or abandoned its rights – the test would cease to be objective in any meaningful sense.

[60] Senior counsel for the pursuer argued that Lord Justice Clerk Ross' opinion in *Lousada* was authority for the need for a party seeking to rely on an implied waiver to demonstrate a belief induced by the conduct of the party said to have waived its rights. He relied on the following passage:

> "In my opinion senior counsel for the defenders was well-founded in making these submissions, and it is necessary to consider whether it can properly be inferred from these averments that the defenders were abandoning their right, and whether the pursuers had acted in reliance upon a belief induced by the conduct of the defenders." (page 189)

[61] I do not consider that this passage assists the pursuer's argument. The passage is entirely consistent with the application of an objective test. The critical word in the above

passage is "inferred". The Lord Justice Clerk is emphasising that it must be possible to infer from the averments detailing the actions of the pursuer, the party seeking to rely on the implied waiver, that it had acted in reliance on a belief induced by the conduct of the defenders, the party alleged to have impliedly waived their rights. Unlike the test proposed by the pursuer in this case, I do not read the Lord Justice Clerk in *Lousada* as requiring an inquiry as to the specific nature of the subjective beliefs held by the party seeking to rely on the implied waiver.

[62] For these reasons, I reject the pursuer's first argument. I consider that the pursuer's second argument can be dealt with more briefly.

[63] I have explained above (at [46]) why I do not consider that the absence of an admission by the pursuer as to the identity of "document 23" or, for that matter, the documents disclosed in terms of the 2022 and 2023 disclosure letters, assists the pursuer. In short, the pursuer's pled position appears to be that, although he is not aware what was referred to or disclosed under the three subscription agreements, it was not any of the disputed agreements. Accordingly, I do not consider that this issue in any way undermines the defenders' argument that the granting by the pursuer of the warranties contained in the three subscription agreements was conduct consistent with the voluntary abandonment by him of any rights he had arising from the disputed agreements.

[64] The final element of the pursuer's second argument concerns the averments he makes in relation to the disclosures made in respect of the pursuer's pension arrangements (see [36] and [37]). These averments, it is contended, undermine the conclusion of the defenders' argument that by granting the warranties contained in the three subscription agreements, the pursuer unequivocally abandoned his rights arising from the disputed agreements.

[65] I am entirely unpersuaded by this part of the pursuer's argument. I struggle to understand on what basis it can possibly be suggested that the reference to the pursuer's pension arrangements in each of the three disclosure letters in any way undermines or even relates to the unequivocal denial of the existence of the disputed agreements which arises from the warranties given together with the pursuer's own admission that the existence and terms of the disputed agreements had not been referred to or disclosed.

The personal bar argument

[66] My conclusion in respect of the waiver issue is sufficient to dispose of the matters which were argued before me. However, in deference to the arguments on personal bar which I heard and lest matters go further, my views are as follows.

[67] The defenders' position in respect of personal bar was, essentially, to present it as an alternative legal characterisation of the same basic facts: the pursuer by granting the warranties contained in the subscription agreements had justified the first defender in believing that the pursuer did not intend to rely on any rights arising from the disputed agreements; the first defender had acted to its prejudice by granting similar warranties; and now in the present action, the pursuer was seeking to rely on the disputed agreements. Accordingly, the well-known three-part formulation of Lord Chancellor Birkenhead in *Gatty* v *Maclaine* was fulfilled (at page 7).

[68] As I understood it, the pursuer's only response to this argument was predicated on the basis that, in order to be successful, the defenders would require to demonstrate that the pursuer had justified the defenders in believing that the disputed agreements did not exist. In other words, so the pursuer argued, the defenders could not rely on personal bar in order to contend that the first defender had been induced to believe simply that the pursuer would

not insist on his rights arising from the disputed agreements. Such an argument by the defenders "would more accurately be characterised as one of waiver" (pursuer's note of argument at paragraph 11).

[69] The pursuer advanced no authority to support this argument and I am unpersuaded by it. I can see no reason, as a matter of principle, why, to use Lord Chancellor Birkenhead's formulation, the "state of facts" which the pursuer has induced the first defender to believe should be restricted to whether the disputed agreements exist as opposed to encompassing the fact that the pursuer would not rely on any rights arising from the disputed agreements. Based on the authorities, I do not consider that a clear line can be drawn between the factual situations which can be characterised as waiver, particularly implied waiver, and those which can be characterised as personal bar. In many cases, as is in the present, arguments of implied waiver and personal bar are pled as overlapping alternatives. In this regard, it is notable that in *Armia*, Lord Keith moves from referring to "waiver" to "personal bar" in the same passage (at page 72). Further, it seems to me that the facts of *Gatty* could be analysed both as personal bar or implied waiver. On this basis, I respectfully agree with the observations of the learned authors of *Personal Bar,* Reid and Blackie, who say, at paragraph 3-16:

> "In the absence of a clear-cut distinction, there is no sound basis for subjecting cases said to involve implied waiver to a legal framework which is different from that applicable generally to personal bar generally. This does not mean that all cases must be assessed in the same way, but rather that they must be approached taking into account much more specific differences in fact patterns than those indicated by the elusive and indeterminate distinction between waiver and other forms of personal bar."

[70] Accordingly, having rejected the pursuer's argument on personal bar, I would have upheld the defenders' argument based on personal bar were it to have proved necessary to do so.

Disposal

[71] In light of my conclusions in respect of the defenders' arguments concerning waiver, I am minded to sustain the defenders' second plea in law to exclude the pursuer's averments in respect of the disputed agreements from probation.

[72] The parties were agreed that, in that eventuality, the case should be put out by order in order to consider further procedure. This was because it became apparent during the hearing of the debate that the parties were not agreed as to what the consequences would be of such a finding for the remainder of the pursuer's case. On that basis, I will put the case out by order in order to hear submissions on that point and, in particular, to identify which of the pursuer's averments fall to be excluded from probation.