SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2026] CSIH 48
A42/24

Lord Justice Clerk
Lady Wise
Lord Clark

OPINION OF THE COURT

delivered by LORD CLARK

in the reclaiming motion

in the cause

KAREN LAMB

Pursuer and Reclaimer

against

(FIRST) THOMAS ROSS BENNETT, (SECOND) GEORGE EWAN MOFFAT and (THIRD) KENNETH JAMES HAWARD SOPER as the partners of the firm of Campbell Boath, Solicitors and as individuals

Defenders and Respondents

Appellant: Party
Respondent: A McKenzie KC; DAC Beachcroft Claims Scotland LLP

19 November 2026

Introduction

[1] In 2012, Karen Lamb purchased a ground floor shop at 108 Seagate, Dundee. At that time the building in which the shop was situated was under development, with three upper floors being added for residential flats. The firm of solicitors which had acted on her behalf in relation to the purchase was Campbell Boath (CB). After having bought the property,

Ms Lamb became aware that problems had arisen with the development works and as a result she could not use the shop for her business. She raised an action against the firm's partners, alleging that one of them, Mr Soper, had been in breach of his duty of care to her by failing to advise her properly about potential problems. She sought damages in the sum of £2,000,000 for loss of profits and £60,000 for inconvenience, together with interest.

[2] The Lord Ordinary (first instance judge) refused the claim, holding that Ms Lamb had not established any breach of duty. The Lord Ordinary also held that even if there had been a breach of duty, causation was not established, loss of profits would not have been awarded, and any award for inconvenience would not have exceeded £5,000. In this reclaiming motion (appeal) Ms Lamb (the reclaimer) seeks to challenge the decision of the Lord Ordinary. The respondents are the firm's three partners.

Background

[3] When Mr Soper was instructed by the reclaimer, he was told of her intentions. She wanted to convert the shop into a beautician's salon, offering a variety of services. She told him that work on the residential flats was being undertaken and that the ongoing work also affected the shop area. She also said that the work would have to be completed before the shop could be occupied.

[4] On behalf of the reclaimer, Mr Soper made a formal offer to the seller's solicitors on 31 July 2012 to purchase the shop at a price of £250,000. In response, the seller's solicitors issued a qualified acceptance dated 10 August 2012, in which various conditions in the offer were deleted or qualified. One of the deleted conditions was clause 17, which included a requirement that all necessary certificates of completion were to be exhibited prior to the date of settlement. Mr Soper prepared a draft response to the qualified acceptance, which

would have required certain matters relative to completion to be confirmed. However, after discussions between him and the reclaimer, the response was not sent. On 31 August 2012, Mr Soper accepted the qualifications and the missives were concluded. Mr Soper was aware that, prior to settlement of the reclaimer's purchase, there would be no completion certificate issued for the shop itself, and no completion certificate would be issued for the larger development.

[5] Mr Soper was also instructed by a bank which was to offer funding to the reclaimer. He advised the bank on 28 August 2012 that there would be no completion certificate prior to settlement but that an undertaking would be received from the seller's agents to provide this within the timescale of four to six weeks after the settlement. However, no undertaking was then sought by him.

[6] After settlement of the shop purchase, it became clear that there were various problems with the building works. On 28 January 2013, a completion certificate was submitted to Dundee City Council by the architects for the development and that was accepted by the Council. The completion certificate was in relation to a building warrant which had authorised removal of the roof and the addition of three floors to provide a new stairwell, nine flats and domestic storage. However, even after the completion certificate was issued, the reclaimer was not able to operate her beautician's business from the shop. Extensive remedial works were required and, in that regard, a further building warrant was issued on 3 June 2014, with a further completion certificate for those works issued on 8 May 2015.

The Lord Ordinary's decision

[7] The Lord Ordinary noted that the reclaimer's case proceeded on the basis of what was averred in the summons and the terms of a report given by their legal expert, Mr Donald Reid. The Lord Ordinary observed (at paragraph [72]):

> "It is not disputed that Kenneth Soper had a duty to (a) insist upon retention in the missives of clause 17.3 or else (b) if accepting deletion of the clause to ensure protection of the pursuer against its deletion by some other means unless (c) he received clear and informed instructions from the pursuer not to insist upon any such protection. The principal dispute relates to what advice, if any, Mr Soper gave to the pursuer following receipt of the qualified acceptance dated 10 August 2012 and what instructions, if any, he received from the pursuer."

[8] The key issues in the case were identified by the Lord Ordinary in the following terms: whether Mr Soper advised the reclaimer of the terms of the qualified acceptance, the absence of a completion certificate, the associated risks, and alternative protections; and whether, nonetheless, the reclaimer instructed Mr Soper to proceed to conclude the missives.

[9] Having considered all of the evidence, the Lord Ordinary found that the reclaimer's case failed in relation to breach of duty, causation, scope of duty, loss and quantum. In reaching that decision, the Lord Ordinary's findings turned largely on her assessment of the reliability of the evidence given by the reclaimer and Mr Soper.

[10] The Lord Ordinary decided that, while the reclaimer had not intended to mislead the court, her evidence was unreliable. She had little recollection of her interactions with Mr Soper throughout the purchase transaction. At the proof, the respondents submitted that it was not the case that the reclaimer positively advanced a competing account of what Mr Soper, in his evidence, said he had told her. That submission was accepted as correct by the Lord Ordinary.

[11] Mr Soper's recollection was that he had gone through the terms of the qualified acceptance with Ms Lamb and that his annotations on that document were in response to

her instructions. He had told her that there was no completion certificate, and so there was no certification from the local authority that the property met the terms and conditions of the building warrant, and that the local authority could potentially take enforcement action. The reclaimer was warned about the risk of concluding missives without a completion certificate. It was not Mr Soper's intention to accept a position of not obtaining protection. When asked what he had explained to the reclaimer about the deletion of clause 17 in the offer and her position if there was no undertaking, he said that he told her they would not know that the upstairs floors and pillars were constructed in accordance with the building regulations. Mr Soper's evidence was that, notwithstanding that explanation, the reclaimer was content to proceed to settle the transaction in reliance on the architect's letter, the structural engineer's report, a re-inspection report by D M Hall and the local authority inspections.

[12] The Lord Ordinary found Mr Soper's evidence to be credible and reliable, and supported by various other facts. The Lord Ordinary therefore accepted his evidence and was satisfied that he had received clear and informed instructions from the reclaimer not to insist upon protection.

[13] In any event, the Lord Ordinary held that, even if Mr Soper had breached the duty of care owed to his client, on the question of causation the reclaimer had failed to prove that, had the respondents fulfilled that duty, she would not have proceeded with the transaction. In relation to loss, no part of the reclaimer's alleged loss arose from the risk that was averred. There was no evidence that costs were incurred because of the lack of a completion certificate. Any losses suffered by the reclaimer through completing the purchase arose from risks against which, objectively, it was no part of the respondents' duty to protect her. As a consequence, the losses claimed by the reclaimer did not fall within the scope of the

respondents' duties. The reclaimer's case on quantum would almost entirely have been rejected.

Submissions

Reclaimer

[14] The appeal form lodged by the reclaimer set out nine grounds of appeal, stating alleged errors by the Lord Ordinary. These were: an error in characterisation of the subject matter of the action as relating primarily to the absence or delay of a completion certificate; a failure to have regard to material evidence by not properly assessing and giving effect to evidence demonstrating that, at the date of settlement, the subjects had not been constructed in accordance with the approved building warrant and the warrant required formal amendment; an error in failing properly to apply the standard of care required of a reasonably competent solicitor; a failure to properly identify and assess the subjects as a subdivided commercial unit forming part of a larger mixed-use development; a failure to assess whether the reclaimer was advised of the true nature and extent of the risk at the date of settlement; a failure to address a material inconsistency between the respondents' alleged advice and the respondents' conduct; an error of law in the application of the legal test; a failure to provide adequate reasons for rejecting material aspects of the reclaimer's case; and an error of law in the approach to quantum.

[15] However, in her Note of Argument the reclaimer focussed on one key matter, with two other points that would follow on if that first contention succeeded. The principal argument was that the Lord Ordinary erred in her assessment of the risk against which the respondents undertook to protect the reclaimer. Having erred in that manner, the two consequential points were that the Lord Ordinary's reasoning was inadequate, insofar as it

failed to address relevant evidence contained within the productions, and that the Lord Ordinary had also erred in her assessment of causation, since she proceeded upon an unduly narrow characterisation of the risk. Once the risk was correctly characterised, the Lord Ordinary's conclusions on performance, causation and recoverable loss could not safely stand without reconsideration.

[16] The reclaimer's oral submissions developed these points and also touched on some of the grounds of appeal. Reference was made to what was noted by the Lord Ordinary (in paragraph [17](c)(iv) in her Opinion) as having been put forward by the expert witness led for the reclaimer, Mr Reid:

> "… the pursuer was vulnerable to the adverse effects which might ensue if a completion certificate were not issued quickly or at all or only if additional works and costs were undertaken in which costs the pursuer might be obliged to participate."

The Lord Ordinary was said to have committed an error of law by not addressing this point. The issue was whether the reclaimer was not protected when the wider development works affecting the shop remained unresolved.

[17] The Lord Ordinary referred to the risk of there being a delay in the local authority accepting the completion certificate, or not doing so at all, causing the statutory prohibition of not being able to use and occupy the premises. The Lord Ordinary had failed to address in that paragraph what had been said by Mr Reid (noted at paragraph [17](c)(iv)) about the adverse effects, if additional works and costs were undertaken. The Lord Ordinary did not test the complete risk and failed properly to identify and assess the subjects as a subdivided commercial unit forming part of a larger mixed-use development. The Lord Ordinary's reasoning proceeded upon an oversimplified basis.

[18] Mr Soper should have put the true position before both decision makers (the reclaimer and the bank). While the Lord Ordinary observed that the reclaimer had not proved that she would have refused to purchase the shop, the Opinion did not state that the reclaimer would have settled if the risk had been fully explained to her. There was a need for disclosure to her of the further works. The court would have to identify the loss that was caused by proper protection not being obtained. The Lord Ordinary should have had regard to the full breach. Reference was made to *Manchester Building Society* v *Grant Thornton UK LLP* [2021] UKSC 20, [2022] AC 783 at paragraph 5, and *Meadows* v *Khan* [2021 UKSC 21, [2022] AC 852 at paragraph 36, which require comparison between the identified risk and the proved loss. At paragraph [87] the Lord Ordinary materially understated the risk requiring protection. The reclaiming motion should be allowed and damages awarded.

Respondents

[19] The duty of care that was an issue at the proof was stated by Mr Reid. It was that the reclaimer should either have got a completion certificate or an undertaking that it would be provided soon. In relation to the last sentence noted by the Lord Ordinary (at paragraph [17](c)(iv)) about adverse effect, the reason why the Lord Ordinary mentioned it there but not later was because that was not a factual situation which actually occurred. The dispute was whether the reclaimer had been advised appropriately about the risks. That was the basis of the questioning at the proof and the reclaimer had been entitled to lead whatever evidence she wanted. There was no attack on the Lord Ordinary's factual findings.

[20] Mr Reid's contention was really all about the lack of a completion certificate, rather than not complying with the approved building warrant. The reclaimer's position in this

reclaiming motion about the wider matters now alleged was not part of the dispute before the Lord Ordinary.

[21] On breach of duty, that was decided on the facts. In relation to causation, the Lord Ordinary found that the evidence did not support a finding that the reclaimer would not have proceeded with the transaction. Even if Mr Soper had not fulfilled the duty of care averred the reclaimer would in any event have continued with the transaction. The alleged breach of duty by failing to update the bank was not relied upon by the reclaimer.

[22] As to the scope of the duty, if the problem was all about the absence of a completion certificate and concluding the purchase without it, the question that arose was whether the fact that it came five months later made any difference. On the evidence before the Lord Ordinary, and the facts found, it made no difference at all. The reclaimer was not in a position to commence trading within the five-month period when the completion certificate was outstanding. As a result, the temporary absence of the completion certificate caused no delay and no loss to the reclaimer.

[23] What did occur was that it was discovered that the work of developing the subjects under the building warrant of March 2012 had not been done very well, and that came to light in January 2013. Those problems with the work then took three years to be resolved. That is what caused the reclaimer to not be able to trade from the premises.

[24] On the matter of loss, there was no evidence that the development which needed to be done to sustain the level of profit could have been achieved within the period stated by the reclaimer.

Analysis and decision

Breach of duty

[25] As noted, the primary submission for the reclaimer was that, when considering the risk against which the respondents had a duty to protect the reclaimer, the Lord Ordinary erred in law by identifying that risk too narrowly. In considering this central issue, it is necessary to have regard to the reclaimer's pleadings. The reclaimer averred that an ordinarily competent solicitor would have considered whether completion certificates could be obtained, whether effective undertakings to get them could be obtained and, if neither could be obtained, would have "considered how the pursuer might be protected from the consequences of non-completion or delay by the developer" and would have advised her about the risk she was taking.

[26] The reclaimer's averments also said that, for further specification of her case on breach of duty, reference was made to the report by Mr Reid, which was incorporated into the pleadings. Mr Reid stated:

> "Averred duty 1: CB had a duty (a) to insist upon retention in the missives of Clause 17.3 or else (b) if accepting deletion of it to ensure protection of their client against its deletion by some other means unless (c) they received clear and informed instructions from their client not to insist upon any such protection."

Mr Reid's report, which formed part of his evidence, then explained in detail his opinion about these matters. He accepted that the firm Campbell Boath (CB) should have been allowed to accept the sellers' solicitors' deletion of the clause but then should have obtained an undertaking personally from those solicitors to produce the completion certificate within six weeks of settlement for the required protection of the reclaimer. As CB had not sought the required undertaking from the sellers' solicitors and allowed the transaction to settle without it, there had been a failure to do what any solicitor of ordinary skill acting with

ordinary care would have done. If CB had covered the deletion of clause 17.3 by procuring some other adequate protection for their client, then that would have been a sufficiently competent alternative performance. Mr Reid then listed the risks which he considered should have been explained to the reclaimer if she was to conclude the missives *de plano*. He noted the conflicting positions, with the reclaimer saying that she was not advised of these risks and Mr Soper saying that she was so advised, and he acknowledged that the assessment of that evidential dispute was outside his remit. He did not comment on the instructions to purchase having been given by the reclaimer, but it can be inferred that his point was that even if she did give instructions, that could only be relied upon by the respondents if they had advised her of the risks.

[27] In support of the reclaimer's central issue about the characterisation of the risk against which the respondents had a duty to protect her, the reclaimer submitted that:

> "The protected risk pleaded was therefore the risk of the pursuer committing herself to the transaction without protection against uncertified, incomplete, non-compliant or otherwise unresolved development works affecting the subjects. It was not confined to the timing or existence of a single completion certificate."

[28] The reclaimer's averments did not suggest that the risk to be protected against involved "uncertified, incomplete, non-compliant or otherwise unresolved development works affecting the subjects". These are not consequences of a breach of what the reclaimer averred to be the duty owed by the respondents, which was protection from non-completion or delay. Rather, they are potential issues which could arise from how the development works had actually been carried out, notwithstanding there having been a completion certificate issued. The reclaimer simply did not have any averments that Mr Soper had to identify this much wider range of risks. The averments, and indeed the evidence led at the proof, did not suggest that the exercise of reasonable skill and care by the respondents

would have resulted in them being aware, at the date of conclusion of the missives, that the subjects had not been constructed in accordance with the approved building warrant, or that the approved building warrant required formal amendment.

[29] The Lord Ordinary found that, on the evidence of Mr Reid, the risk which the respondents ought to have guarded against was the risk of there being a delay in the local authority accepting a completion certificate or not doing so at all, which would result in a statutory prohibition on using or occupying the premises. He did not contend that there was a need for advice about, or protection against, the risk of the development works not being done properly whether or not a completion certificate was issued.

[30] On the point raised by Mr Reid about the adverse effects on the reclaimer (noted in paragraph [16] above), the facts established at the proof, properly assessed by the Lord Ordinary, established that the reclaimer was told about the consequences of the completion certificate being "not issued quickly", i.e. that occupation of the premises would generally not be permitted. As already noted, Mr Soper had also told the reclaimer that, without a completion certificate, they would not know that the upstairs floors and pillars were constructed in accordance with the building regulations. She was equally aware of the effect of a completion certificate not being issued "at all", although of course that did not arise here. Moreover, there was a completion certificate issued at the end of January 2013, some five months after the conclusion of the purchase. When that certificate was issued, the works had still not been done properly, with additional remedial works required and a separate completion certificate needed. Accordingly, this was not a situation in which a completion certificate could have been issued "only if additional works and costs were undertaken".

[31] There was no duty on the respondents to identify any further risks that could arise even if a completion certificate was issued. A completion certificate confirms that a building has been constructed, demolished or converted in accordance with the relevant building warrant and complies with building regulations, but it is certainly not a guarantee against "uncertified, incomplete, non-compliant or otherwise unresolved development works affecting the subjects". The Lord Ordinary heard Mr Reid's evidence that a notice of acceptance of a completion certificate is not a guarantee of the quality of workmanship, as was stated in the warning given by the Council in the notice.

[32] The Lord Ordinary properly determined the question of breach of duty, taking the correct legal approach and considering the pleadings and all of the evidence. The reclaimer's contention that the Lord Ordinary erred in law by identifying the risk too narrowly is without substance. For the reasons explained, the reclaimer's necessary starting point in this reclaiming motion cannot succeed.

Other matters

[33] It is not necessary to deal with the other grounds of appeal in any detail, since they can only arise if breach of duty has been established. However, even if the breach of duty averred had been established, the Lord Ordinary would still have rejected the reclaimer's position that, if Mr Soper had explained the risk, she would not have proceeded to purchase the subjects. The Lord Ordinary also held that, on the evidence, and contrary to the reclaimer's position, no part of her loss arose from the risk averred in the pleadings. These findings were made on the basis of the facts identified and assessed by the Lord Ordinary, which wholly undermined the reclaimer's case on causation.

[34] It is also clear from the evidence that the reclaimer was not in a position to commence trading between 31 August 2012 and 30 January 2013, when the completion certificate was outstanding. The Lord Ordinary found that there was no evidence of the reclaimer incurring any costs during that five-month period, or subsequently, which were attributable to the lack of a completion certificate. The reclaimer required planning permission for change of use of the subjects and also a building warrant to allow the conversion of the subjects to be operated by her as a beauty salon. Planning permission was granted by the Council on 26 October 2012. A building warrant application for the fit-out works was not obtained, as the reclaimer accepted, until 17 December 2012. She could not start refurbishment of the shop until the building warrant had been granted and her business plan anticipated that refurbishment would take approximately three months, meaning that trading would not have commenced prior to about mid-March 2013. We agree that the temporary absence of the completion certificate caused no real problems to the reclaimer. The failures in relation to the development works took a considerable time to be resolved and that is what caused the reclaimer's inability to trade from the premises.

[35] Even if the allegation of breach of duty averred by the reclaimer, and the contention that had there been no such breach the reclaimer would not have entered into the transaction, had both succeeded, that would not have provided a sufficient basis to find the respondents liable for all of the consequences and all foreseeable loss. A party who is in breach of duty is liable for damages in respect of losses of a kind which fall within the scope of that duty (*Manchester Building Society* v *Grant Thornton UK LLP* [2021] UKSC 20, [2022] AC 783; *Meadows* v *Khan* [2021] UKSC 21, [2022] AC 852; *Hughes-Holland* v *BPE Solicitors* [2017] UKSC 21, [2018] AC 699). As has been explained, the alleged breach in this case would not have given rise to the losses claimed, which fell outside the scope of the duty.

[36] There would also have been other difficulties with the reclaimer's arguments on loss of profits and earnings. While the reclaimer's position was that the premises would have been fitted out within a three-month period, at a cost of £70,000 or so, the Lord Ordinary was satisfied, on the evidence, that the fit-out period would have taken longer than three months and the costs would have been much greater, almost £200,000.

[37] On all of these other matters, we again rely on the unchallenged factual findings of the Lord Ordinary.

[38] In her oral submissions the reclaimer also referred to the loan given to her by the bank. It is correct that Mr Reid had given his view that Mr Soper's failure to update the bank meant that he was, in that regard, in breach of duty to the bank and also to the reclaimer. However, that alleged breach of duty was expressly departed from in the submissions made on behalf of the reclaimer at the end of the proof, and so it no longer arises for consideration.

Conclusion

[39] We are satisfied that the Lord Ordinary's decision, made after a careful assessment of all of the evidence, involved no error of law and cannot be interfered with. The reclaimer's arguments on breach of duty, and the corresponding arguments on causation, loss and quantum, cannot succeed.

Disposal

[40] The reclaiming motion is refused. All questions of expenses are reserved.