



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 88

A47/24

OPINION OF LORD HARROWER

in the cause

KIRKWOOD HOMES LIMITED

Pursuer

against

ROBERT CAMERON

Defender

Pursuer: Findlay KC, Garrity; Ledingham Chalmers LLP

Defender: MacColl KC; Morton Fraser MacRoberts LLP

11 September 2026

Introduction

[1] The pursuer is a developer of residential property. The defender is the owner of Conveth Mains, a large farm north of Laurencekirk, in the county of Kincardineshire. On 1 December 2008, the parties entered into an options agreement in respect of 328.22 acres of land at Conveth farm (“the option area”). In terms of the agreement, the pursuer could take an option or options over any part of the option area during a 10-year period beginning with the conclusion of the missives constituting the agreement. However, in 2016, having applied for planning permission in respect of part of the option area (“the site”), it undertook to restrict its rights under the agreement such that they could only be exercised on one

occasion and then only in respect of an area of land that comprised at least the site or such other area as the parties might agree. On 28 November 2018, by written notice issued to the defender, the pursuer sought to exercise its option rights over an area of land that was smaller than the site. Initially, the parties were in discussion regarding the valuation of the land to which the notice related. However, in March 2019, the defender advised the pursuer that, in the absence of any agreement allowing the pursuer to call for the sale of any area of land smaller than the site, he would be treating the notice as being not in conformity with the undertaking and therefore invalid. As a result, the pursuer wrote to the defender, holding him to be in repudiatory breach of contract. Having accepted the repudiation, the pursuer now sues the defender in damages. The option period having expired, it claims to have lost the opportunity to realise the development potential of the land, and seeks to recover from the defender over £5 million. The matter came before me on the procedure roll for discussion of the parties' preliminary pleas. The principal issue in dispute was the validity of the pursuer's notice.

Background

[2] The parties' agreement was constituted by missives comprising an offer dated 26 November 2008 by Ledingham Chalmers LLP on behalf of the pursuer and a *de plano* acceptance dated 1 December 2008 by Messrs McLean & Stewart on behalf of the defender. In terms of the missives, the defender conferred upon the pursuer options to purchase individual areas of land within Conveth Mains for residential development purposes, but only after the pursuer had obtained planning permission in detail and other relevant development consents. The option area was shown on a plan annexed to the offer and was comprised of several individual areas. The pursuers' options were to call for the sale of all

or any of the areas of land shown on the plan or any part or parts thereof. The pursuer paid to the defender £84,000 upon conclusion of the missives in respect of the first 5 years of the option period, and a further £5,000 per annum for each year thereafter. The 10-year option period was expressed to be capable of being extended in blocks of 5 years by agreement in writing between the parties reached at any time during the option period or any extension thereof.

[3] In 2014, the pursuer submitted to the relevant planning authority, Aberdeenshire Council, an application for planning consent in respect of the site and the development thereon of 310 dwellings and associated infrastructure. In January 2016, the council confirmed that it was minded to grant planning permission, subject to the parties entering into a planning agreement in terms of section 75 of the Town and Country Planning (Scotland) Act 1997. The missives obliged the defender, upon reasonable request by the pursuer, to enter into a planning agreement with the council. On 12 December 2016, the pursuer having made a request to the defender to enter into the planning agreement, the pursuer undertook to the defender that any option to be exercised by the pursuer in terms of the missives would be exercised once only and in respect of an area comprising not less than the whole of the site or such other area as might be agreed between the parties. The planning agreement having been entered into, full planning permission was granted on 23 December 2016.

[4] By letter dated 28 November 2018, shortly before the expiry of the option period, the pursuer wrote to the defender purporting to exercise its right of option over part of the option area, being a different and lesser area than the site. Over the course of the next 3 months, parties entered into correspondence over the valuation of the site. The missives permitted either party, in the absence of agreement, to refer the question of valuation to

three reputable member firms of the Royal Institute of Chartered Surveyors, to be chosen by the parties, failing which, by the chairman of the Scottish branch of the institute. On 20 February 2019, the parties having been unable to reach agreement, the defender decided to ask the institute to choose appropriate surveyors to determine the relevant valuation. However, on 13 March 2019, the defender wrote to the pursuer advising that it considered the pursuer's notice to be invalid and that it would no longer be proceeding with the dispute resolution procedure. As already stated, the pursuer took this to be a repudiation of the missives and on 13 June 2019, the pursuer's agents wrote to the defender accepting that repudiation.

Submissions

[5] The defender submitted that the pursuer had only been entitled to exercise an option under the agreement in respect of an area comprising at least the site or such other area as might be agreed by the parties. There had been no dispute that the area in respect of which the pursuer purported to exercise an option was not in respect of the whole site. Nor had it been disputed that there was no agreement between the parties permitting the pursuer to exercise its option rights in respect of any other area. In those circumstances, the pursuer's purported notice had been invalid and of no effect. It had not given rise to any obligation on the part of the defender to sell any area of land to the pursuer. Therefore, the pursuer's assertion that the defender had been in breach of contract was irrelevant and the action fell to be dismissed. In article 6 of condescendence, the pursuer had sought to advance a case of waiver on the basis of the correspondence that had taken place between the parties following the service of the purported option notice. However, waiver operated as a shield not a sword and could not be used to constitute a contractual obligation. The same was true

also for personal bar insofar as that might have been relied upon by the pursuer.

Accordingly, the pursuer's averments anent waiver were also irrelevant in law.

[6] The pursuer submitted that the defender's argument was fatally flawed. It had been premised on the proposition that the validity of the options notice was determined by the undertaking. In fact, the validity of the notice had to be determined by the missives (*HOE International Limited v Andersen* 2017 SC 313, at paragraphs 16 and 17). It had not been averred, nor could it be, that the missives had been varied by the undertaking. Moreover, parties had been in agreement that the undertaking should be analysed as a promise made by the pursuer. A promise was a unilateral expression of the will of one party, not requiring acceptance in order for it to be binding. It was therefore distinguishable from a contract which, in order to be binding, required the mutual consent of the parties (*Macfarlane v Johnston & Ors* (1864) 2 M 1210, at 1213; *Stair*, I, x, 3). The undertaking, being a unilateral promise, was not capable of varying a bilateral contract. In the course of the debate, senior counsel for the pursuer conceded that the undertaking might give rise to a question of personal bar, but in any such question it would be necessary also to consider the defender's representations, and the pursuer's reliance thereon, averred to have taken place following upon the serving of the notice. As with the pursuer's averments of waiver, these would involve issues of fact that could only be resolved at a proof before answer.

Decision

[7] Parties were in agreement that the undertaking did not vary the missives. However, in his pleadings, the defender averred that the "practical effect" of the undertaking was to vary the missives, or at least the pursuer's rights under the missives, and I have come to the conclusion that this analysis is correct.

[8] It was not in dispute that the undertaking constituted a promise binding the pursuer. But in my view, and contrary to the position apparently being adopted by the pursuer, the effect of such a promise was to restrict the manner in which the pursuer might validly or effectively exercise its option under the missives. Put differently, it extinguished whatever rights the pursuer had under the missives to exercise its option in any manner other than as set out in the undertaking.

[9] Moreover, there was never any question of the missives being required to be varied in order to bring this situation about. It was in the nature of the options granted by the defender to the pursuer that they could be exercised unilaterally by the pursuer, at any time or even at different times within the option period, and in respect of all or part of the option area. As such, they could also be unilaterally restricted or extinguished by the pursuer without the need for the parties to enter into any variation of the missives. Nevertheless, as the defender averred, the “practical effect” of any such unilateral exercise of the pursuer’s powers would be to vary the pursuer’s rights under the missives, since it would restrict the manner in which the pursuer’s options could be exercised or it might even extinguish them altogether. While, therefore, I accept that a unilateral promise cannot vary a bilateral contract, in my view, the argument is beside the point.

[10] Nor, it seems to me, does the case of *HOE International Ltd, op cit*, provide much assistance in this context. The issue is not merely one of whether the option notice complied with the manner and form requirements of the missives. In my view, the undertaking should be understood as having curtailed the option rights of the pursuer, rather than how these rights might be exercised by way of notice.

[11] It follows also, in my opinion, that the pursuer’s rights, to the extent that they had been extinguished by the undertaking, could not be revived by the operation of waiver or

personal bar. For the reasons submitted by the defender, personal bar and waiver operate as a shield rather than a sword (*Shaw v James Scott Builders & Co* [2010] CSOH 68, at paragraph 64; *Advice Centre for Mortgages Limited v McNicoll* 2006 SLT 591, at paragraph 17). The pursuer having extinguished whatever right it had under the missives to exercise the option in a manner other than as set out in the undertaking, the only way such a right could be recreated was by way of a fresh grant from the defender. No such grant was ever extended to the pursuer.

Disposal

[12] In the result, I shall sustain the first plea-in-law for the defender and dismiss the action, reserving any question of expenses.

[13] Had I not dismissed the action, I would have sustained the pursuer's third plea-in-law, inviting me to exclude certain of the defender's averments from probation, to the following extent only. The averments alleged by the pursuer to be irrelevant included those in answer 5 of condescendence, on page 21 of the closed record, beginning with the words, "The Undertaking constituted a promise..." and ending with the words, "... in respect of a different area." In summary, they simply set out the defender's analysis of the contractual position, with which I have broadly expressed my agreement in this opinion. Accordingly, if I were wrong in the analysis presented here, then I would agree that these averments fall to be excluded from probation. However, the other averments identified by the pursuer in its note of argument as being irrelevant, all fall to be classed as narrative, in my opinion, and would not have required to be excluded from probation.