FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2026] CSIH 20
CA119/24

Lord President
Lord Clark
Lord Ericht

OPINION OF THE COURT

delivered by LORD ERICHT

in the reclaiming motion

by

NADEEM SARWAR

Pursuer and Reclaimer

against

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

Defenders and Respondents

Pursuer and Reclaimer: Bowen KC; BTO Solicitors LLP
Respondents and Defenders: Dean of Faculty (Dunlop KC), Roxburgh; Addleshaw Goddard LLP

22 April 2026

Introduction

[1] The founder of an online pharmaceutical company brought a commercial action against the company and four of its directors seeking declarator that a purported termination of his service agreement on the ground of gross misconduct was null and void and also seeking various interdicts flowing from that declarator. He pled that the company had entered into various agreements with him, including the service agreement. In

response, the company and the four directors argued that as a result of warranties given by the founder and the company to investors, the founder had waived these agreements and was personally barred from relying on them. After legal debate, and without hearing any evidence, the commercial judge dismissed the action. The central issue in this reclaiming motion (appeal) is whether the commercial judge was entitled to dismiss the action at debate without hearing any evidence.

Background

[2] The pursuer and reclaimer (the "Founder") was founder, director and majority shareholder of the first respondent (the "Company"). The second to fifth respondents are directors of the Company.

[3] The Founder and the Company entered into a service agreement dated 13 February 2018 (the "2018 Service Agreement"). There is a factual dispute between the Founder and the respondents as to whether or not the Founder and the Company entered into a further service agreement dated 6 March 2020 (the "2020 Service Agreement"), a Consultancy Agreement dated 23 June 2018 (the "Consultancy Agreement") and a Non-Executive Director's Agreement dated 23 March 2020 (the "NED Agreement"). As the action proceeded by way of debate, the Founder's averments fall to be treated as *pro veritate* and this appeal falls to be dealt with on the basis that the 2020 Service Agreement, the Consultancy Agreement and the NED Agreement were entered into. Indeed, the respondents' argument as to waiver and personal bar is dependent upon the existence of these agreements, otherwise there would be nothing for the Founder to waive or be personally barred from enforcing.

[4] The Founder avers that on 30 August 2024 the respondents purported to terminate the 2020 Service Agreement by summarily dismissing him. He seeks declarator that the Company's purported termination of the 2020 Service Agreement was not conform to the termination provisions therein and is null and void and of no force and effect. He also seeks to interdict the respondents from taking certain actions in respect of the Founder's shares, and from terminating the Consultancy Agreement and the NED Agreement.

Funding rounds

[5] Prior to August 2024 the Company had conducted various funding rounds.

[6] In the March 2024 funding round, the Company obtained further funding from Par Fund Management Limited. A subscription agreement (the "2024 Subscription Agreement") was entered into on 29 March 2024 between

(1) Par Equity Ventures 1 LP, Par Nominees Limited, KCP Nominees Ltd, KCP Nominees (2) Limited, Mark R Bamforth as trustee of the Thairm Bio Nominee Trust D and Scottish Enterprise (the "Investors"),

(2) Par Fund Management Limited,

(3) the Founder, and

(4) the Company.

[7] In terms of the 2024 Subscription Agreement, the Founder and the Company jointly and severally granted certain warranties in favour of the Investors.

[8] The respondents plead the following pleas-in-law:

> "6. The Pursuer having waived the right to enforce the [the 2020 Service Agreement, the Consultancy Agreement and the NED Agreement], as a result of the warranties given in the Subscription Agreement, decree of absolvitor should be granted.

> 7. The Pursuer by giving the warranties in the Subscription Agreement having represented to the [Company] that the 2018 Agreement was the only agreement governing the relationship between the parties and the [Company] having relied upon these representations to its detriment in that it gave identical warranties under the Subscription Agreement, the Pursuer is personally barred from seeking to rely upon the terms of the [the 2020 Service Agreement, the Consultancy Agreement and the NED Agreement] and decree of absolvitor should be granted."

[9] "Subscription Agreement" is a defined term in the respondents' answers (answer 3.8) and refers only to the 2024 Subscription Agreement. Although the commercial judge makes additional reference to subscription agreements for the December 2022 and March 2023 subscription rounds, the Dean of Faculty confirmed to us that he was content to take his stand solely on the 2024 Subscription Agreement.

[10] Clause 5.1 of the 2024 Subscription Agreement states:

> "**5 Warranties**
>
> 5.1 Each of the Warrantors jointly and severally warrants to the Investors that each and every Warranty set out in Part 5 of the Schedule is true, accurate and not misleading at the Execution Date subject only to:
>
> 5.1.1 the matters Disclosed; and
>
> 5.1.2 any exceptions expressly provided for under this agreement."

"Warrantors" is defined as the Company and the Founder (Clause 1).

[11] Clause 6 included the following limitations on the warranties:

> **"6 Limitations on Warranty Claims**
> …
> 6.2 No Claim may be made against the Warrantors unless written notice of such Claim is served on the Warrantors, giving reasonable details of the Claim, within the 18 month period after Initial Completion.
>
> 6.3 The aggregate liability of the Company in respect of all and any Claims shall be limited … to an amount equal to the aggregate amount subscribed for the New Shares by the Investors pursuant to this agreement together with the proper and reasonable costs of recovery in respect of any Claim incurred by or on behalf of the Investors.

> 6.4 The aggregate liability of the Founder in respect of all and any Claims (including any proper and reasonable costs of recovery in respect of any Claim) shall be limited … to an amount equal to 1.5x his gross annual salary from time to time."

[12] Warranty 12.2 states:

> "There are no existing contracts or arrangements to which the Company is a party and in which any of its directors or Shareholders and/or any person connected with any of them is interested (other than the Shareholders Agreement, such directors' contracts of employment and the Share Option Plan (in each case, as Disclosed))."
>
> In the Disclosure Letter there was no disclosure of the 2020 Service Agreement, the Consultancy Agreement or the NED Agreement against Warranty 12.2

[13] Warranty 13.2 states:

> "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."

The Disclosure Letter discloses against Warranty 13.2:

> "Nadeem Sarwar has a tailored service agreement which is provided as Disclosure Document 23."

The respondents aver that Document 23 was the 2018 Service Agreement. That averment is not admitted by the Founder. A data room was set up for disclosure. The Founder avers that in the data room Document 23 was stated to be "redacted" and could not be accessed. He also avers that he was unaware that the existence and terms of the 2020 Service Agreement, the Consultancy Agreement and the NED Agreement had not been disclosed to the defenders.

[14] Warranty 13.14 states:

> "Save for defined contribution pension schemes for its employees, to which the Company contributes the minimum employer contributions required by law, the Company does not contribute to or participate in any pension scheme, nor has the Company incurred, will it incur or could it incur any liability or responsibility for or in relation to the provision of any pensions, allowances, lump sums gratuities or other like benefits on redundancy, retirement, withdrawal from service or on death or during periods of sickness or disablement or accident for or in respect of any

> director, former director, employee or former employee of the Company or any person who has at any time agreed to provide services to the Company or any dependents of any such persons and no proposals or announcements have been made about the introduction, continuance, variation of, or payment of any contribution towards the same."

The Disclosure Letter discloses against Warranty 13.14:

> "The Company makes a 10% contribution to Nadeem Sarwar's personal pension."

The Commercial Judge's Opinion

[15] The commercial judge upheld the respondents' arguments on waiver and personal bar and dismissed the action.

Waiver

[16] Parties were agreed that in order to establish 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. The commercial judge agreed with the respondents that both limbs were satisfied by the granting by both the Founder and the Company of the warranties contained in the three subscription agreements. It followed from the granting of the subscription agreements that on three occasions the Founder granted warranties which were entirely inconsistent with any continued reliance on the 2020 Service Agreement, the Consultancy Agreement and the NED Agreement. On a fair reading of the Founder's averments that he was unaware that the 2020 Service Agreement, the Consultancy Agreement and the NED Agreement had been disclosed, whatever documents were disclosed under the subscription agreements, they did not include the 2020 Service Agreement, the Consultancy Agreement and the NED Agreement. The commercial judge

rejected the Founder's argument that the respondents could not succeed as he had made no averments as to the Company's beliefs: the statement by Lord Kirkwood in *James Howden* v *Taylor Woodrow* 1998 SC 853 at p 868E to F did not bear the weight that the Founder required to place on it and was not of general application. The test was an objective one (*Armia* v *Daejan* 979 SC (HL) 56 per Lord Keith at p72, *Mactaggart & Mickel Homes Limited* v *Hunter* [2010] CSOH 130 at para [82]).

[17] The commercial judge found at para [63] that the Founder'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 2020 Service Agreement, the Consultancy Agreement and the NED Agreement: that did not undermine the respondents' argument that the granting by the Founder of the warranties was conduct consistent with his voluntary abandonment of any rights he enjoyed under the disputed agreements. Nor did the commercial judge find that the respondents' argument was undermined by the Founder's averments on the pension disclosure: he struggled to understand on what basis it could possibly be suggested that the reference to the pension arrangements even related to the unequivocal denial of the existence of the 2020 Service Agreement, the Consultancy Agreement and the NED Agreement which arose from the warranties.

Personal Bar

[18] The commercial judge was of the view that his conclusion on waiver was sufficient to dispose of matters. He would have upheld the respondents' argument on personal bar. He would have rejected the Founder's argument that the respondents could not rely on personal bar in order to contend that the Company had been induced to believe simply that the Founder would not insist on his rights: he would have done so on the basis that that

argument was unsupported by authority and contrary to principle (Birkenhead LC in *Gatty* v *Maclaine* 1921 SC (HL) 1 at p7; Reid and Blackie *Personal Bar*, First Edition, para 3-16).

Submissions for the Founder

[19] Senior Counsel for the Founder submitted that the commercial judge was not entitled to determine the question of waiver and personal bar at debate without hearing evidence. The Founder's pleadings, read as a whole, did not support the conclusion that his conduct constituted an unequivocal abandonment of his rights. While it was accepted that waiver was to be determined objectively, the respondents had failed to aver any facts or circumstances to support the requirement that the respondents must have conducted their affairs in reliance on a belief induced by the Founder's conduct (*Lousada & Co* v *Lesser (Properties)* 1990 SC 178 at page 189). The commercial judge also erred in dismissing the significance of the Founder's averments relative to the Founder's pension, which demonstrated that the Founder's conduct was not an unequivocal abandonment of his rights. The Founder also averred that a Shareholders' Agreement entered into as part of the 2024 funding round made reference to a subsequent service agreement. The Company could not plead waiver based on the Investors' reliance.

Submissions for the Respondents

[20] The Dean of Faculty for the respondents submitted that to allow the Founder to rely upon the 2020 Service Agreement, the Consultancy Agreement and the NED Agreement would place the Company in breach of the warranties which it granted and would allow the Founder to benefit from his own breach of the warranties. Whether or not there had been a waiver was a matter of fact, to be determined objectively (*Armia* per Lord Keith p 72, *Presslie*

v *Cochrane McGregor Group Ltd* 1996 SC 289 at p291). The statement of Lord Kirkwood in *Howden* v *Taylor Woodrow* was taken out of context. The commercial judge was correct in his conclusions. Waiver was abandonment of a right for all time which resulted in the right being extinguished, and accordingly waiver resulting from reliance on the warranties by the Investors would mean the 2020 Service Agreement, the Consultancy Agreement and the NED Agreement were unenforceable against any party, including the Company. The commercial judge's reasoning on personal bar was unimpeachable and plainly correct.

Decision

[21] Cases such as this one, in which a party asserts an implied waiver, are by their nature fact sensitive. As Lord Hodge explained in *Mactaggart & Mickel Homes Limited* v *Hunter* [2010] CSOH 130 at paragraph [82]:

> "In [*Armia v Daejan* 1979 SC (HL) 56] Lord Keith of Kinkel (at p.72) observed that [an implied] 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 v Cochrane McGregor Group Ltd* 1996 SC 289]." (emphasis added)

[22] Because of the need to consider the actions in their factual context, it will normally be necessary for a court to hear evidence before it can come to a conclusion as to whether waiver has been established.

[23] Having said that, in certain rare cases it may be possible to dismiss a claim on the basis of waiver on the pleadings alone without hearing evidence. That can happen only if the defender succeeds in showing that even if the pursuer succeeds in proving all that he avers, still his case must fail (*Jamieson* v *Jamieson* 1952 SC (HL) 44 Lord Reid at p63).

[24] This is not such an exceptional case. Both because of the nature of the contractual provisions on which the respondents rely, and because of the averments made by the Founder, the question of whether the Founder has waived his rights can only be decided after proof.

The nature of the warranties

[25] The action which the respondents say constitutes an unequivocal abandonment by the Founder of his rights for all time is the granting of the warranties given under the 2024 Subscription Agreement. The commercial judge accepts that the warranties "were entirely inconsistent with any continued reliance by [the Founder] on the [the 2020 Service Agreement, the Consultancy Agreement and the NED Agreement]" (eg paras [45], [63])

[26] However, when the contractual provisions relating to the warranties are examined in detail it cannot be said that the granting of the warranties must necessarily constitute an unequivocal abandonment by the Founder of his rights against the respondents for all time so that his case must fail.

[27] The relevant warranties, which are set out above, were not given by the Founder to the respondents or to the Company. They were given by the Founder and the Company to

third parties, the Investors in the Company. That gives rise to an issue as to whether the granting of a warranty by two warrantors to a third party can constitute an abandonment of rights as between the two co-warrantors. But there is also a prior question as to whether, by their nature, the warranties constitute an unequivocal abandonment of rights for all time.

[28] Where an investor invests in shares in a limited company, it is standard practice for warranties to be granted in favour of the investor. These warranties are generally given by the company, but are often, as in the current case, also granted by a shareholder or director. The purpose of the warranties is to allocate risk as between the investor on the one hand and the company/shareholder/director on the other. Where a warranty is given the company/shareholder/director take the risk. Where a warranty is not given, or is disclosed against or is subject to a limitation, the investor takes the risk.

[29] The warranties in the 2024 Subscription Agreement were subject to limitation. In accordance with normal practice in the allocation of risk, the warranties were limited by capping the maximum amount payable in respect of breach of warranty and by imposing a time limit for the making of any claim. No claim could be brought unless notice was given within 18 months. The Company's liability was limited to the amount subscribed for the shares. The Founder's liability was limited to 1.5 times his gross salary.

[30] In a question between a warrantor and an investor in respect of an undisclosed contract with such limitations, it is difficult to see how a warranty to the investor could be categorised as a waiver. The warrantor has not unequivocally abandoned for all time the right under the undisclosed contract. The warrantor has merely allocated the risk in respect of the undisclosed contract coming to light. If the undisclosed contract comes to light within the 18 month claim period, then the contract is still valid but the investor is entitled to damages, which are capped at a maximum amount. If the undisclosed contract comes to

light after the 18 month claim period, then the contract is still valid and the investor is not entitled to damages. It is even more difficult to see how in a question between a warrantor and a co-warrantor, by allocating risk between the co-warrantors and the investor a warrantor unequivocally abandons for all time a right against a co-warrantor. That could involve the warrantor abandoning a right against the co-warrantor that it had not, for the reasons just given, abandoned against the grantee of the warranty. Having said that, these are matters which are best considered in the context of an understanding of the full facts and circumstances after evidence is led.

Founder's averment as to disclosure of pension entitlement

[31] The effect of disclosure against any particular warranty is not limited to that particular warranty: the Disclosure Letter states that disclosures "are made against all the Warranties to which they reasonably relate"

[32] The Founder avers:

> "… 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 [2020] 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." (art 3)

[33] The respondents claim that by non-disclosure against a warranty the Founder has voluntarily abandoned his rights under the Service Agreement. The Founder on the other hand offers to prove that a right under the 2020 Service Agreement was in fact disclosed. It cannot be said that even if the Founder proves that averment his case is bound to fail. It is a relevant averment of a factual matter which, if proved, could go towards establishing that there was no abandonment and therefore no waiver. The test in *Jamieson* is accordingly not

met. The significance of this issue requires to be considered as part of the full factual context after evidence is led.

Reliance by the respondent on a belief induced by the Founder

[34] Before the commercial judge, the Founder submitted that the respondents could not succeed at debate as they could not satisfy the court, on the basis of the Founder's averments and admissions, that they had conducted their affairs in reliance upon a belief, induced by the Founder, that the Founder had waived his rights (para [49]). His argument was founded on the following statement by Lord Kirkwood in *James Howden v Taylor Woodrow* 1998 SC 853 at p868 B to F:

> "… 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." (emphasis added)

[35] The commercial judge rejected the Founder's argument. He held that it was not necessary for the Company to have conducted its affairs in the specific belief that the Founder had waived his rights (paras [50] to [53]) and that the statement by Lord Kirkwood related to the facts of the case before him rather than being of general application (para [56]).

[36] Lord Kirkwood's statement proceeds on an assumption that reliance was necessary. However, that assumption is not necessarily correct in all factual circumstances. Any requirement for the respondents to have acted in reliance on the warranty arises out of fairness. Fairness usually, but not always, requires reliance. As Lord Hodge said in *Mactaggart* at paragraph [82]:

> "**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*." (emphasis added)

[37] The nature of the requirement for fairness varies according to context (Reid and Blackie *Personal Bar* (2nd ed) para 3.14). The current context is the novel one of waiver as between two co-warrantors. The question of what fairness requires in that context, and in particular whether fairness requires reliance which is based on a belief, is a matter best left until the court has an understanding of the full factual context after evidence is led. In the meantime, we express no view on the statement by Lord Kirkwood.

[38] For these reasons, the respondent's plea of waiver should not be determined until after evidence is led. The same applies to their plea of personal bar: personal bar is fact sensitive and the categorisation as between waiver and personal bar depends very much on the factual circumstances of the particular case (Reid and Blackie *Personal Bar* (First Edition) at para 3-16, quoted in para [69] of the commercial judge's opinion).

Order

[39] After the reclaiming motion was marked, the Inner House allowed the Founder to amend his pleadings to introduce an alternative case that the decision to dismiss the Founder was null and void as the board meeting which purported to ratify the dismissal was inquorate.

[40] We shall allow the reclaiming motion, recall the commercial judge's interlocutors of 16 July 2025 and allow a proof before answer on the amended pleadings, repel the respondents' second plea in law, and reserve parties' other pleas-in-law. We shall remit the case to the commercial judge to proceed as accords.