SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2025] SC EDI 78

EDI-A625-24

JUDGMENT OF SHERIFF O'CARROLL

in the cause

COMINO PROPERTIES LTD

Pursuer

against

DHKK LTD

Defender

Pursuer: McEwan, solicitor, Lindsays
Defender: Mitchell, advocate, instructed by DAC Beachcroft Scotland LLP

Edinburgh, 16 October 2025

The Sheriff, having resumed consideration of the cause, Sustains the defender's first preliminary plea-in-law; Dismisses the action; Finds the pursuer liable to the defender in the expenses of the action as taxed; Allows the defender to lodge an account of expenses and remits same when lodged to the Auditor for taxation and report.

NOTE:

Introduction

[1] In this action the pursuer seeks payments from the defender of £70,000 and £74,718 and expenses. The action arises from the purchase in 2022 of residential property in Edinburgh ("the property") by the pursuer from a third-party seller. The seller made available a home report as required by Part 3 of the Housing (Scotland) Act 2006 ("the 2006

Act") and associated secondary legislation. The home report must include a survey report (section 99 of the 2006 Act) as prescribed by regulation 4 and schedule 1 to the Housing (Scotland) Act 2006 (Prescribed Documents) Regulations 2008, SSI 2008/76. The prescribed survey report (sometimes informally referred to as the single survey), which must be prepared by a chartered surveyor, must contain information *inter alia* about the condition of the property and its value. The defender, a chartered surveyor's company, was instructed by the seller to provide a prescribed survey report ("the survey") and did so.

[2] After the sale was completed, the pursuer began renovations during which, it is averred structural problems were discovered. A structural engineer inspected and reported serious structural defects requiring repair. Repairs cost £70,000. While repairs were being carried out, the pursuer lost profit of about £74,000. The pursuer founds a right to damages said to have been created by Article 3 of the Housing (Scotland) Act 2006 (Consequential Provisions) Order 2008 (SI 2008/1889) ("the 2008 Order") where a prescribed survey has not been "prepared with reasonable skill and care". The parties stated in debate there are no reported decisions concerning alleged negligence in the preparation of a prescribed survey report (as opposed to other types of surveys).

[3] The defender seeks dismissal on the basis that the pursuer has failed to plead a relevant case against the standards applicable to claims for professional negligence. Further, the pursuer does not produce an expert report to support its case of professional negligence. Further, the pursuer's pleadings lack specification and are irrelevant.

[4] Following a helpful preliminary discussion between the bench and the parties' representatives at the commencement of the debate, which identified and narrowed the central issues, the defender did not proceed with an additional argument to the effect that the pursuer's claim for pure economic loss was irrelevant.

Parties' submissions at debate

[5] In his thorough and carefully considered submissions, counsel for the defender submitted in summary as follows. The requirement in Article 3 of the 2008 Order that the prescribed survey report "has been prepared with reasonable skill and care" should be understood as an implicit reference to the common law standard. Therefore, one must read into that requirement the usual and well-developed law as regards professional negligence and the legal tests for professional negligence. Only a surveyor registered with or authorised to practice by the Royal Institution of Chartered Surveyors may prepare a prescribed survey: Article 5 of the 2008 Order. Thus, the standard of reasonable care and skill is that which is to be expected of a chartered surveyor and not any other professional.

[6] The standard is not further explained or defined by the legislation. However, other legislation uses the same term which has been interpreted by the courts as incorporating the usual common law standard. For example, section 13 of the Supply of Goods and Services Act 1982 uses that phrase, without further explication, as an implied term in relation to contracts for services. That can only be a reference to the similarly expressed common law standard. In the case of the supply of professional services, the degree of care and skill required of a professional is that which is to be expected of a member of the profession (in the appropriate speciality if the professional be a specialist) of ordinary competence and experience: see Chitty on Contracts at paragraph 17-047 and extensive case law referred to in the footnote thereto. In *Abramova* v *Oxford Institute of Legal Practice* [2011] EWHC 613 (QB), a case relating to allegedly deficient professional legal education, a claim brought in reliance on section 13 of the 1982 Act, the court held that the statutorily implied duty is for practical purposes the same as if the case were brought in negligence: so that a claimant relying on that implied term must establish a breach of duty which satisfies the test in *Bolam* v *Friern*

Hospital Management Committee [1957] 2 All ER 118, 122. That is, a medical professional is not guilty of negligence if the professional has acted in accordance with a practice accepted as proper by a responsible body of medical persons skilled in that particular art and is not negligent, if acting in accordance with such a practice, merely because there is a body of opinion which takes a different view. That test is differently expressed, but to similar effect in the key Scottish case of *Hunter* v *Hanley* 1955 SC 200, 206, which held that to establish professional negligence the pursuer must aver and prove a usual and normal practice, that the defender has departed from that practice and crucially, no "professional man" of ordinary skill acting with ordinary care would have adopted the defender's practice. That rule, though expressed in relation to medical professionals, applies to all professionals exercising professional skills including chartered surveyors.

[7] Thus, the fact that the pursuer founds its case on Article 3 of the 2008 Order does not enable it to elide the usual common law standard for professional negligence.

[8] Turning to the pursuer's pleadings, there are no averments relating to the usual and normal practice of chartered surveyors when carrying out a prescribed survey for a home report, nor to a failure by the defender to adopt such a practice, nor to the defender having adopted a practice which no chartered surveyor of ordinary skill and experience would have adopted if acting with ordinary care. The pursuer avers that a structural engineer observed the building and saw that the structure of the building was defective in various ways. That is irrelevant. That averment does not go any way to establishing relevant test at common law which is brought in by Article 3. Reference was also made to *Hart and Hart* v *Large and Ors* [2020] EWHC 985 (TCC) at paragraphs [122] to [125]. The pleadings are therefore fundamentally irrelevant and the action falls to be dismissed.

[9] As regards the claim for damages, Article 3 of the 2008 Order provides that the buyer of a house who has obtained a copy of the prescribed survey report and has suffered material loss as a result of the report not having been prepared with reasonable skill and care has a right to damages against the surveyor. Material loss (Article 3(3) of the 2008 Order) occurs where the market value of the house on the date of the report is materially lower than the value given in the prescribed survey report and the buyer has paid more than the market value. Therefore, the pursuer must as a minimum aver and prove what the market value of the house was on the date of the report. This the pursuer fails to do. Thus, the pursuer's claim to damages founding on Article 3 must fail.

[10] Even if it were possible to deduce from averments relating to the cost of damage that there has been a material reduction in value as a result of the alleged defects, the clear implication of the language used in Article 3 is that the measure of loss is the difference between the value given in the prescribed survey report and the true market value on the date of the valuation as assessed as if the valuation had been done without negligence. That reflects the usual way in which the common law and the courts deal with proven cases of negligent surveys by surveyors where the measure of loss is the difference between the price paid for the property and the value of the property if it had been correctly valued taking account of the defects. See *Stewart* v *Brechin & Co* 1959 SC 306, 309 where the court held that damages in such a case are not to be assessed by reference to the expenditure of the pursuer. See also *Martin and Martin* v *Bell Ingram* 1986 SC 208 which held that the cost of repairs is not the measure of damages but may be used as a cross-check only.

[11] In the present case, the pursuer makes no averments in relation to the difference in market value and the valuation brought out in the allegedly negligent survey report. The closest the pursuer comes is to aver the cost of repair. But that may only be used as a cross-

check, not a measure of loss. In addition, the pursuer claims consequential losses, being loss of rental profit. That is not a good head of claim in such cases. Therefore, all averments as regards damages are irrelevant.

[12] Furthermore, the pursuer has not lodged an expert report in relation to the alleged negligence. The pursuer ought to have done and not to do so may amount to an abuse of process. See *Todds Murray WS* v *Arakin Ltd* 2010 CSOH 90, in which a counterclaim alleging professional negligence was dismissed, despite relevant averments having been made. See also *JD* v *Lothian Health Board* 2018 SCLR 1, in which the Court's dismissal of the action, partially on the basis that no expert report had been lodged, was sustained on appeal.

[13] I should say that a further challenge to the relevancy of the pleadings was mounted by the pursuer based on absence of averments that the pursuer had actually obtained the home report in question and when and how that was done. The pursuer offered to amend to deal with that deficiency. Had that been the only difficulty with the pleadings, I should have allowed such a motion, the defender not offering any objection in principle. However, given the ultimate disposal, it is unnecessary to deal further with that issue. Likewise, it is unnecessary to deal with additional arguments made by the defender concerning lack of specification in relation to what the defender ought to have done in performance of its duties to the pursuer or to aver what the counterfactual scenario would have been such that loss would have been avoided.

[14] *Reply.* In reply, the agent for the pursuer, in interesting and helpful submissions, submitted as follows. The pursuer's pleadings are relevant. The pursuer's case is founded on Article 3 of the 2008 Order. Therefore, there is no need to prove the existence of a duty of care. The pursuer pleads each of the elements required by Article 3. The defender admits preparing a prescribed survey report which was obtained by the pursuer. It is averred that

the prescribed survey was prepared without reasonable skill and care. The agent candidly accepted that in the more usual case, where for example a claim for damages is made against a surveyor for an allegedly negligent survey report, the pursuer requires to make the usual averments as regards the standard of professional negligence as explained in the well-known case of *Hunter* v *Hanley,* which he accepted was broadly equivalent to the *Bolam* test. He accepted equally candidly that there were no such averments on record and that no expert report supporting any such case has been lodged or would be were the matter to go to proof.

[15] However, not all cases alleging professional negligence require such averments and reports as a matter of relevance, it was submitted. If the impugned actions or inactions of the defender are obviously negligent or involve an oversight or neglect which was not the product of professional judgement, the court would be entitled to find negligence established on ordinary principles, on suitable evidence being advanced, without also requiring evidence from a suitably qualified professional concerning the usual tests for professional negligence. So, to take extreme examples, a claim alleging that a surveyor had surveyed the wrong property, that a surveyor failed to notice the property had no roof or that a doctor had amputated the wrong leg, would not necessarily require such evidence to bring home a claim of negligence. Equally, where on the facts, the professional was not exercising a professional judgement or providing advice based the professional's specialist skill, knowledge and experience but was merely carrying out an incidental function, *Hunter* v *Hanley* principles do not apply. Instead, the ordinary principles of common law negligence apply.

[16] That submission was illustrated by reference to two cases. In *Hyde and Associates Ltd* v *JD Williams and Co Ltd* [2001] PNLR 8, an architect was sued in respect of the advice he

gave to his client with regard to the installation of a heating system which after installation produced discolouration of the client's goods. At first instance, the court held that the architects had been in breach of duty for failure to investigate further the potential for that hearing system to produce discolouration prior to advising their clients. The Court of Appeal held that there were three situations where the *Bolam* test did not apply being: (1) where expert opinion supporting the practice is not capable of logical support; (2) where the evidence did not constitute evidence of the school of thought and (3) where the act or omission in question did not require the exercise of any special professional skill. The Court held that the judge had been correct in considering that the case fell into that last category and that on ordinary principles of tort, the architects were negligent. In *Cockburn* v *Cockburn's Judicial Factors* 2024 SLT 1089, a case alleging professional negligence by a judicial factor, the Court held, on the facts, proof of negligence by the judicial factor did not require pleadings or evidence in accordance with *Hunter* v *Hanley*. *Obiter,* the Court held that in cases of alleged professional negligence, not all cases required specialist reports.

[17] In the present case, the pursuer offers to prove various structural defects which were obvious from street level. This is not a case of the exercise of professional judgement such as whether to classify a defect as falling within any particular category. Nor is it the exercise of a judgement as to what advice to give in the survey report. Rather, the pursuer avers that the defects could be seen clearly from street level and were seen by the structural engineer instructed by the defenders without any special examination: they were obvious. Because the structural engineer saw significant structural defects, the defender also ought to have seen and reported on the same defects since they were each carrying out a similar exercise. The pursuer's case is not based on *Hunter* v *Hanley* type liability. Rather, the defects being obvious, the failure by the surveyor to notice and report on those defects was not an error of

professional judgement but amounted to plain negligence on ordinary common law principles.

[18] As regards the requirement in Article 3(2)(c) of the 2008 Order that the prescribed survey report has been prepared with reasonable skill and care, it was accepted that while the use of that phrase effectively incorporates the common law standard, that law includes the exceptions to the *Hunter* v *Hanley* test.

[19] Finally, as regards damages, Article 3 of the 2008 Order does not require averment of the exact market value of the property because the court can infer the true valuation from the evidence concerning cost of repairs. Furthermore, the legislation does not specify the measure of damages. Rather, it acts as a gate which once opened, allows the pursuer to claim damages arising from the breach on an unrestricted basis. While the pursuer was unable to identify any negligent survey case in which the damages awarded exceeded the difference between the price paid and true valuation, had Parliament wanted to limit damages in that way it could have done so but chose not to do so.

Analysis and decision

[20] I begin with analysis of the pursuer's case founded on Article 3 of the 2008 Order. That reads as follows:

> 3.— (1) If the buyer of a house has–
>
> (a) obtained a copy of a prescribed survey report under section 99(1) of the 2006 Act in respect of that house; and
>
> (b) suffered material loss as a result of the report not meeting any of the requirements in paragraph (2),
>
> the buyer has a right to damages against the person who prepared the report.

(2) The requirements are that the prescribed survey report–

(a) is based on an inspection of the house;

(b) has been prepared in a fair and unbiased way;

(c) has been prepared with reasonable skill and care.

(3) For the purposes of this article, material loss has been suffered when–

(a) the market value of the house on the date of the prescribed survey report is materially lower than the value given in the prescribed survey report; and

(b) the buyer has paid more than the market value of the house

[21] The reason for the Order is reasonably obvious. The Scottish Parliament made a radical change to the practice of residential house sales in the 2006 Act by requiring the seller of residential property to provide a Home Report, having three components including a survey report on the property prepared by a chartered surveyor, reporting as to condition and value, and to make that report available to genuine potential purchasers: section 99 of the 2006 Act and associated secondary legislation. The purpose of Article 3 is to provide the legal basis on which a buyer might obtain damages against a surveyor where the survey report, instructed by or on behalf of the seller and obtained from the seller (or the seller's agent) by the buyer, was improperly prepared causing material loss to the buyer (the 2006 Act being silent on this matter). The provisions of Article 3 ensure that the existence of a duty of care to the purchaser (who will not have instructed the survey) and the standard of care are made plain. The article also specifies requirements a prescribed survey report must satisfy, breach of any of which may open the door to a claim for damages if material loss results from breach. Those requirements include that the report has been prepared with "reasonable skill and care".

[22] The meaning of that phrase is not further defined or explained. The parties agree that the expression must be a reference to the common law duties incumbent on such a professional performing the professional's duties and that therefore the meaning of that expression can only be understood by reference to the ordinary common law principles applicable to such a situation. I accept that the use of this term by Parliament (since the Order deals with consumer protection, a reserved matter, the Scottish Parliament had no legislative competence), identical to the term used in other Westminster legislation (such as section 13 of the Supply of Goods and Services Act 1982 implying that that term into contracts for the supply of a service) is intended to refer to the common law relating to negligence. So, in *Abramova* v *Oxford Institute of Legal Practice* [2011] EWHC613 (QB), where the claimant sought damages resulting from allegedly negligent educational services founding on the section 13 implied duty, the Court held at paragraph [61] that:

> "The approach to a claim brought in contract in reliance upon section 13 of the 1982 Act is for practical purposes the same as one brought in negligence… A claimant must generally establish a breach of duty/contract which satisfies the *Bolam* test."

Though that decision and dictum is not binding on me, I accept it as an accurate statement of the law and that the principle applies equally when interpreting Article 3 of the 2006 Order. Indeed, absent any other definition or guidance in the legislation and in the absence of any extra-statutory material capable of providing assistance (Hansard is of no assistance according to counsel) it seems to me clear that the use of that term is intended to refer to the standard of care at common law incumbent on those providing professional services. Any other interpretation would be quite unworkable.

[23] I accept however the contention made by the agent for the pursuer that that phrase is not to be understood as necessarily requiring proof of lack of reasonable skill and care to the *Hunter* v *Hanley* standard given that there may be cases where the negligence of the

professional carrying out the survey is so obvious or which falls outwith the exercise by the professional of their professional skill and judgement, that such proof is not required. In his submissions, the agent for the defender referred to examples of such exceptions and referred to the cases of *Hyde and Associates* and *Cockburn*. By way of further illustration of that contention, may be added the decision of the Court of Appeal in the case of *Connor* v *Surrey County Council* [2010] 3 WLR 1302 (also cited in *Abramova* at paragraph [61]), a case concerning psychiatric injury to a teacher caused by the negligence of the local authority in dealing inadequately with conflicts between, and complaints generated by, the Governors of the school, the Court concluded that the *Bolam* test had no resonance in those circumstances because the business of responding to complaints required no specialist skill or learning.

[24] Turning to the averments on record, the pursuer does not dispute that the survey of the property was prepared by a chartered surveyor, that the correct property was surveyed, that the chartered surveyor inspected the property or that the survey report was prepared in a fair and unbiased way. Article 3 of Condescendence refers to the findings in the structural survey which record that: the surveyor visually inspected the property with the aid of binoculars where appropriate, that there was no evidence of significant structural movement within the limitations of the inspection, that the structural movement of the property was assessed as category 1 and that the chimney stacks were assessed as category 1 (meaning "no immediate action or repair is needed"). The survey recorded that the main walls were assessed as category 2, which means "repairs or replacement requiring future attention but estimates are still advised". It is averred that "the report did not say there were any structural problems" or give any indication of such.

[25] In Article 4, the pursuer avers that on taking possession of the property the pursuer began renovations during which serious structural problems came to light. On 13 April 2023 a civil and structural engineer inspected the property and reported to the pursuer that

> "when viewed externally there was apparent movement in the existing roof structure visible in slate finishes, that the front elevation wall of the property was noted to be out of plumb, leaning marginally outwards towards the eaves, that above the eaves level of the property behind the chimney exhibited a sideways lean and that if left unattended it was anticipated that deterioration to the roof structure will continue leading to further issues"

and there were concerns over the stability of the roof and supporting walls. The engineer recommended refurbishment of the roof and securing the integrity of the chimney stack.

[26] So far as averments of fault are concerned, the pursuer avers:

> "The defender failed to notice defects in the property that were visible from the exterior of the property. Had the survey been conducted properly the defender would have noticed the defects visible from the exterior of the property. The fact that the defender failed to notice defects in the property that were visible from the exterior of the property is evidence of negligence…. Had reasonable skill and care been taken in preparing the [survey] the defender would have detected problems with the roof and front elevation of the property. The defender would not have assessed the structure, chimney stacks, walls and roof as categories 1, 1, 2 and 2 respectively...".

[27] It is clear that the alleged negligence comprises errors by the surveyor in assessing those parts of the building which he inspected and reported on in the course of his usual duties when preparing survey reports of this type. In carrying out the inspection and preparing the report it is apparent that the surveyor was exercising a core function of a chartered surveyor. In doing so, he can be taken to have employed his professional skills, qualifications and experience both in making the observations and in reporting on them; which includes the exercise of professional assessment and judgement. Manifestly, the surveyor was acting in the usual course of the performance of his professional duties. Making a visual assessment of parts of the building like the walls and the roof and chimney

stack is required in the production of such a property survey. In making such an assessment, which includes grading parts of the building, the surveyor was not engaged in an ancillary exercise to his professional functions. Neither can it be said that the averred circumstances resemble the type of extreme case where the error is so manifest that even where the error occurs during the performance of professional functions, no specialist report is required (such as surveying the wrong house, not noticing a roof is missing or amputating the wrong leg). So, whether the "front elevation leaned marginally outwards" is a matter for professional assessment as is the question as to whether or not such a defect required any remedial action. The same is true as regards the other errors said to have been made by the surveyor. The surveyor's assessment may or may not have been accurate but if wrong, it does not follow that the surveyor was negligent. Another chartered surveyor may have reported differently on the same matters but that is not proof of negligence. Proof of negligence would require the pursuer to show that the *Hunter* v *Hanley* test was satisfied, and that would require averments to that effect, of which there are none.

[28] It does not assist the pursuer to argue, as was done at debate, that because a civil engineer 8 months later noticed certain defects, said to be obvious from a street view, the chartered surveyor ought to have noticed the same defects and have reported on them. Structural and civil engineering is not the same profession as a chartered surveyor, it hardly needs to be said. The training, qualifications and purpose of each profession are distinct. Their functions are different. What a person from one profession would be expected to do in the proper performance of that person's professional duties, what that professional might be expected to divine from a street level observation, is not necessarily be the same as what a person in the other profession might be expected to do in the same circumstances.

[29] Accordingly, on the central question in this case which is whether a relevant case has been pled by the pursuer, I find it has not. The pleadings do not come close to establishing a relevant case that the defender was negligent. The pursuer does not offer to amend and indeed candidly accepts that it cannot do so in order to cure this difficulty. The action as a whole therefore falls to be dismissed.

[30] It is as well that I deal briefly with the remaining substantive arguments by the defender. I turn to deal with the averments concerning loss and damage.

[31] In my view, the right of damages afforded to the purchaser where the purchaser has suffered material loss as a result of the survey report not meeting the requirements of Article 3(2) of the 2008 Order is to be understood as a reference to the common law assessment of damages in such cases. No other method is proposed by the legislation. In such cases, I accept the defender's submissions, for the reasons advanced, that the ordinary measure of damages in common law cases is by reference to the difference between the purchase price and the true value of the property as at the date of valuation were the survey not to have been negligently prepared. That interpretation is consistent with the definition of material loss in Article 3(3) which defines material loss as the difference between the market value and the price paid. I reject therefore the pursuer's argument that the article permits recovery of damages other than in accordance with standard common law principles applicable to cases of negligently prepared survey reports. So, the averments concerning consequential loss arising from loss of rent are irrelevant.

[32] Furthermore, in my view it is clear from the terms of Article 3 that the pursuer must aver and prove the market value of the house on the date of the prescribed survey (that is the true market value as opposed to the sum actually paid). The pursuer does not do that, therefore has not relevantly averred material loss and so is unable to show the pursuer has a

right of damages. I reject the argument that the absence of an averment as to market value is unnecessary where the pursuer offers to prove the cost of rectification of the alleged defects from which the court can deduce the true market value. I accept the defender's proposition that the cost of rectification of defects is not a measure of the reduction of the market value but rather may only be used as a crosscheck. Therefore, all the averments as to loss are irrelevant and therefore the action would have fallen to have been dismissed in any event for that reason too. Finally, given the outcome of this debate, it is unnecessary to deal with the pursuer's alternative argument for summary decree.

Expenses

[33] The parties were agreed that expenses should follow success. I therefore find the pursuer liable to the defender in the whole expenses of the cause as taxed.