OUTER HOUSE, COURT OF SESSION

[2025] CSOH 110

P892/25

OPINION OF LORD BRAID

in the Petition of

ALDI STORES LIMITED

Petitioner

for

Judicial Review of a decision to refuse or delay performing its statutory duty under section 29 of the Building (Scotland) Act 2003

Pursuer: Young; Freeths Scotland LLP
Defender: F McLeod, Solicitor Advocate; Brodies LLP

27 November 2025

Introduction

[1] In this petition for judicial review, lodged on 29 August 2025, the petitioner sought various orders designed to secure compliance by the respondent, Inverclyde Council, with what was averred to be its duty under section 29 of the Building (Scotland) Act 2003 to serve a dangerous building notice in respect of the former Glebe Sugar Refinery building in Crawfurd Street, Greenock, which adjoins the petitioner's store in Patrick Street and from which masonry had previously fallen into the store car park. On 23 September 2025, after the petition had been served on it, the respondent served a dangerous building notice. The respondent now seeks dismissal of the petition on the ground it has been rendered otiose

and academic by the service of its notice. The petitioner does not oppose dismissal, the purpose of the petition, service of a dangerous building notice, having been achieved. The controversy between the parties is in relation to the expenses of the petition. The respondent seeks a finding of no expenses due to or by either party, whereas the petitioner seeks an award of expenses in its favour. Both parties agree that the question of liability for expenses is a matter for the exercise of the court's discretion, notwithstanding that there has been no substantive decision in the case.

The Building (Scotland) Act 2003, section 29

[2] Section 29 of the 2003 Act, insofar as material, provides:

"**29 Dangerous buildings**

(1) This section applies where it appears to a local authority that a building (a 'dangerous building') constitutes a danger to persons in or about it or to the public generally or to adjacent buildings or places.

(2) The local authority must carry out such work (including, if necessary, demolition) as it considers necessary—
(a) to prevent access to the dangerous building and to any adjacent parts of any road or public place which appear to the authority to be dangerous by reason of the state of the building, and
(b) otherwise for the protection of the public and of persons or property in places adjacent to the dangerous building,
and may recover from the owner of the dangerous building any expenses reasonably incurred by it in doing so.

(3) Where the local authority considers that urgent action is necessary to reduce or remove the danger it may, after giving the owner of the building such notice (if any) as the circumstances permit, carry out such work (including, if necessary, demolition) as it considers necessary to reduce or remove the danger and may recover from the owner of the dangerous building any expenses reasonably incurred by it in doing so.

(4) The work which may be carried out under subsection (3) is work which could have been specified in a notice under subsection (6) in relation to the dangerous building.

...

(6) Except where the danger has been removed by work carried out under subsection (3), the local authority must serve on the owner of the dangerous building a notice (a 'dangerous building notice') requiring the owner to carry out such work as the notice may specify."

[3] In terms of section 30 of the Act, the work to be specified in a dangerous building notice is the work for repair, securing or demolition of the dangerous building which the local authority considers necessary to remove the danger. The notice must specify dates by which the owner must have begun and completed the work; and where the owner does not do the work (thereby committing an offence), the local authority may do it at the owner's expense. The Scottish Building Standards Procedural Handbook (3rd Edition), section 10, contains advice to local authorities on how to comply with their powers and duties under section 29. It is a useful guide as to how a local authority should proceed when faced with a dangerous building, although much of it simply restates the statutory requirements. Section 10.2.2 states that a local authority must carry out such work as it considers necessary to prevent access to a dangerous building and to any adjacent parts of any road or public place which appear to be dangerous because of the state of the building. Section 10.2.3 states that where the authority considers that other urgent action is needed to reduce or remove the danger it may carry out the necessary work and recover the costs from the owner, but that in most cases the authority will serve on the owner a dangerous building notice. Section 10.2.4 sets out a range of factors which can influence the approach to be taken, including the nature of the danger, the time of year, the building owner(s)' accessibility and their willingness to recognise danger and resolve matters, the availability of emergency contractors, and the local weather forecast. Section 10.3.3 states that in many cases the danger presented by a building is easily established. It goes on:

> "Depending on the degree of risk and the simplicity of remedial work it may be possible for the local authority to negotiate a solution with the building owner without taking formal action. For the local authority to consider such an arrangement it is imperative the owner *agrees at once* and confirms as appropriate to the local authority that they will *immediately* arrange to undertake the measures required. The advantage with this approach is an owner should be able to arrange either temporary or permanent solutions in the time it would take an authority to effect only emergency work... However, *an owner that fails to achieve the negotiated solution can expect the local authority to take action swiftly* (emphases added)".

Section 10.3.5 states that in some instances the degree of risk cannot be established except by instigating further exploratory work on the building. Section 10.3.8 provides that a notice is not required if the emergency work completely removes the danger with a long-term solution; however, if a part of the building is still dangerous a notice must be served.

Chronology

[4] The following chronology is taken partly from parties' submissions, partly from the pleadings and partly from the productions. I have assumed that the contents of emails sent by the respondent are factually correct. Where appropriate, I have added my own (italicised) commentary in square brackets.

- 24 September 2024: the respondent received notification that masonry had fallen from the building, following which it erected (or extended) a cordon on 4 October 2024, which was later (further) extended. The cordon encroached on to the petitioner's car park.
- 5 November 2024: the petitioner's solicitors wrote to the respondent, notifying it that masonry had fallen into the petitioner's car park and that the building was dangerous, and calling upon it to take urgent action.
- 11 November 2024: Danny Henderson, the respondent's Planning and Building Standards Service Manager, replied by email, stating that the respondent was

aware of the building in question and was "continuing to monitor the situation and correspond with the building's owners". [*Notwithstanding that last statement, it appears from subsequent events that correspondence with the owners had not yet begun.*]

- 15 November 2024: the petitioner's solicitors emailed Mr Henderson stating that the petitioner wished the respondent to take action regarding the danger posed by the building and asked for a timescale regarding when further action would be taken.
- 21 November 2024: following "chaser" emails on 19 and 21 November, Mr Henderson emailed back, stating that the investigation was ongoing and that an update would be provided "as soon as possible."
- December 2024: the respondent made "initial attempts" to contact the building owners [*apparently without success*. *Contrast Mr Henderson's earlier comment on 11 November 2024 implying that correspondence with the owners had already begun.*]
- January 2025: storm Eowyn caused widespread disruption. The respondent received reports of 30 dangerous buildings, which it required to review/monitor.
- 13 February 2025: the petitioner's solicitors emailed Mr Henderson asking if a dangerous building notice had been issued. Chasers were sent, on 14, 20 and 25 February, and 10 March 2025.
- 10 March 2025: Mr Henderson emailed the petitioner's solicitors apologising for the delay in responding and stating that over the past month the respondent had been monitoring the building but no dangerous building notice had been issued. The respondent "would be" instructing the owners to commission a

survey of the external façade of the building to demonstrate that the façade was no longer dangerous. He said that should the owner fail to undertake the survey, the respondent would consider the next appropriate steps.

- March 2025 [*the precise date is unclear but presumably after 10 March 2025*]: the respondent wrote to the owner requesting that a condition survey be undertaken.
- 13 March 2025: the petitioner's solicitors responded, asking why a dangerous building notice had not been issued and why further safety features such as a net had not been installed. Mr Henderson answered those queries by email of the same date, saying that he would provide further updates once a survey had been conducted.
- 4 April 2025: the petitioner's solicitors emailed Mr Henderson challenging the respondent's failure to issue a dangerous building notice and requesting confirmation of what ongoing assessments the respondent was carrying out.
- 11 April 2025: Mr Henderson replied, stating that although fallen masonry had been reported on three occasions, on only one of those was that supported by clear evidence. He reported that one of the owners had told the respondent that a condition survey of the building had been commissioned; but that "another" owner was deceased. The building was said to be under investigation by the respondent, which would be "considering use of action appropriately on the basis of the condition survey when it is received."
- 29 May 2025: the petitioner's solicitors emailed Mr Henderson, noting the lack of progress and attaching a copy of a non-intrusive survey report commissioned by the petitioner, referred to in the petition as the TDD

(Technical Due Diligence) report, based upon an inspection carried out on 22 January 2025. They pointed out that on multiple occasions throughout the report the building was assessed to be a health and safety risk with aspects found to be in a hazardous condition.

- 10 July 2025: the petitioner's solicitors sent an "open letter" to the respondent's Building Standards Team, referring to the above timeline, highlighting the key findings of the TDD report; that the overall condition assessment was that the building was in a hazardous condition, specifically including the façades; and that the report had disclosed that the building had been entered into the Buildings at Risk Register for Scotland in January 1998 and was categorised as "high risk" based on an assessment in August 2013. The letter went on to say that the petitioner considered the respondent to be in breach of its duties in terms of the 2003 Act, having regard to the length of time it had held the TDD report and the information available to it prior to that point; and that the petitioner considered that grounds for judicial review had arisen on 29 May 2025, the date when the TDD report was forward to the respondent. [*The significance of that would, or ought to have been, clear to the respondent,* viz*, that any petition for judicial review would require to be lodged by 29 August 2025, to avoid becoming time-barred.*]
- 25 July 2025: the respondent's in-house solicitor responded to the letter of 10 July 2025. She gave a detailed explanation as to why the respondent did not consider it was in breach of its section 29 duty. She said that:

"discussions with owners, where fruitful, can inform any decision that the [respondent] might make in relation to the owner's property. In particular, it can inform the [respondent] as to the owner(s) (*sic*) willingness to carry out works along

> with their available financial resources...Such discussions have been ongoing in this particular case".

She went on to say that the urgent work undertaken in November 2024 had been done in accordance with section 29(3) of the 2003 Act [*thereby acknowledging that the building had at that time been in a dangerous condition*]; that one of the two owners of the building was believed to be deceased; that the respondent had "been in discussions" with the other owner and his son for a "number of months"; that they continued to engage in correspondence with the respondent; that the respondent had written to the owner requesting that he instruct a condition survey and provide it to the respondent within 8 weeks, also suggesting that consultation with Historic Environment Scotland might be required given the building's listed building status, and stating that if the owner did not instruct such a report, the respondent would do so; and that the owner had requested an extension with a deadline of 11 July 2025. Unfortunately, no report had been provided within that deadline, and the respondent was in the process of instructing an external condition survey to be carried out by a structural engineer; a number of quotes had been received, and it was anticipated that the report would be instructed early in the following week [*ie, week commencing 28 July 2025. That was not done: see below*]. The report was to be provided by 15 August 2025 and upon receipt the respondent would consider its findings before taking any action which it deemed to be appropriate. The conclusions of the report could not be pre-empted, and the issuing of a dangerous building notice was not the only route open to the respondent. Insofar as the TDD report was concerned, the solicitor said that the respondent could not rely on it because it was not privy to the terms of instruction; the report contained a disclaimer that it was not to be relied upon by any third party for any purpose; and that the report had been prepared before storm Eowyn.

- 4 August 2025: the respondent instructed its report.
- 18 August 2025: the petitioner's solicitors requested a copy of the anticipated report.
- On 20 August 2025, a chaser email was sent.
- 21 August 2025: the respondent's solicitor emailed back stating that the appointed structural engineers were due to inspect the building on 26 August 2025 and repeating that the contents of the report would inform any action which the respondent decided to take. She asked the petitioner's solicitors to confirm on what basis the petitioner would be entitled to see the report [*thus conveying the clear impression that, once received, a copy of the report would not be disclosed*]. She further stated that she was on annual leave from 22 August 2025 and would respond to any further correspondence on her return "next week" [*presumably, week commencing 1 September 2025, after the last date for lodging a judicial review petition: see above*].
- 26 August 2025: structural engineer inspection carried out.
- 29 August 2025: the petition was presented to the court.
- 1 September 2025: the respondent received the structural engineer's report.
- 2 September 2025: the first order for intimation and service was granted.
- 8 September 2025: the petition was served on the respondent.
- 23 September 2025: the respondent served a dangerous building notice on the owners. The work specified as requiring to be done was:

"All loose parts of brickwork, concrete, render, glass, rainwater goods, window frames or other part of the building which are loose should be carefully removed or repaired accordingly to ensure that the building is no longer dangerous."

Submissions

Respondent

[5] Against all of that background, the solicitor advocate for the respondent submitted that the respondent had taken all steps reasonably required of it in terms of the 2003 Act, and the Handbook. She referred to the relevant sections of the latter, detailed above, and stressed that the primary responsibility to prevent a building falling into a dangerous condition rested with the owner, the powers and duties of a local authority merely being a safety net. As the Handbook made clear, service of a notice was but one remedy open to the respondent. When the cordon was first put in place in September 2024, the respondent had not formed the view that the building was dangerous but had taken steps to protect the public by preventing access. Thereafter, the respondent had to undertake further investigations before it was able to determine whether the building was structurally dangerous. The fact that emergency work had been undertaken under section 29(3) did not mean that a duty had arisen to serve a notice under section 29(6). The respondent did not begin the process of instructing its own report before July 2025, because it had been engaging with the surviving owner of the building and had first asked him to instruct a condition survey in March 2025. In so doing, it had followed the encouragement given by the Handbook to explore a negotiated solution with the owner. The petition had been premature and misconceived. It was predicated on the proposition that the respondent ought to have been aware by 29 May 2025 that the building was dangerous, that being the date when the TDD report was disclosed, but that was inconsistent with the respondent's duty, as the principal decision-maker, to be satisfied for itself that the building was dangerous. When it became aware that the owner had not instructed a report, the respondent took swift action to instruct its own report in accordance with the handbook.

The TDD report could not have been relied upon, because (echoing the letter of 25 July 2025) it was out of date, it recommended that a structural engineer be instructed, and it was confidential to the petitioner. The respondent had had a number of complexities to contend with, including that the building was Listed and the difficulties caused by the death of one owner and serious illness of the other. In summary, it had not breached its section 29 duty, because it had carried out sufficient site inspections between November 2024 and September 2025; it had taken steps to ensure immediate dangers were removed; it had complied with the advice in the handbook; it had kept the petitioner updated at regular intervals; it had expertise and limited funds, and had to balance those factors when assessing its duty; and having obtained its own evidence, had acted promptly. In all the circumstances, neither party had achieved success, and it was fair and reasonable that each bear its own expenses.

Petitioner

[6] Counsel for the petitioner submitted that the respondent should be found liable in expenses because the proceedings had been caused by its unreasonable conduct and the petition could have been avoided had it properly engaged in an open and candid manner. Insofar as the petition was now academic, that was down to the respondent having belatedly exercised its statutory duty. Section 29 applied only where it appeared to a local authority that a building constituted a danger, and, in that circumstance, it imposed a duty on the authority to take urgent action to reduce or remove the danger, which could be done without serving a notice; and except where such action removed the danger, the section also imposed a duty to serve a dangerous building notice requiring the owner to carry out specified work. While the petitioner accepted that a local authority may, to a degree, require

some time within which to comply with its duties, and the section was silent regarding timescales, guidance as to what margin of appreciation should be allowed for compliance with a statutory duty was to be had from *National Car Parks Ltd* v *Baird* [2004] EWCA Civ 967, per Dyson LJ at paras [60] to [61]: relevant factors were there said to be (i) the subject matter of the duty and the context in which it fell to be performed, (ii) the length of time taken to perform the duty, (iii) the reasons for any delay, and (iv) any prejudice that is, or may be, caused by the delay. The subject matter of the duty under consideration was explained in *City of Edinburgh District Council* v *Co-operative Wholesale Society Ltd* 1986 SLT (Sh Ct) 57, which contained a discussion of the terms of the statutory predecessor to section 29, which was in similar terms. The first part of the section conferred powers where immediate action was called for, whereas the second part dealt with the situation where the required work could safely wait for a longer period. It was a matter of assessment of the degree of risk. A similar structure was envisaged in the Handbook at section 10.3.3, which, however, made clear that any agreement reached with the owners had to be reached "at once". Under reference to the email correspondence, the respondent had never given any definite response to the petitioner regarding timescale, and it had not been open and candid, culminating in the letter of 26 August 2025 which gave no assurances that a notice would be served or that a copy of the respondent's report would be provided. The TDD report and the report eventually obtained by the respondent were in all material respects identical: both said that the building was dangerous and required urgent work, which ought to have been obvious without an expert report. The respondent's report belatedly said what the petitioner had been saying since November 2024. Although the respondent was entitled not to rely solely on the TDD report, that report was nonetheless an adminicle of evidence. The

golden thread running through the correspondence was long periods of delay, no communication by the respondent and a dismissive attitude towards the petitioner.

Decision

[7] I begin by observing that the purpose of the litigation has been achieved. Whether the dangerous building notice was served because of the petition, or would have been served in any event as the respondent claims, the fact of the matter is that the petitioner's objective was to secure service of a notice and a notice has now been served. It is for that reason that the petitioner does not oppose dismissal (or, more correctly, refusal) of the petition. In considering where the expenses should fall, the question is: which party caused the litigation? Was it the respondent, through its failure to comply with the duty imposed on it by section 29, and/or an unreasonable stance adopted in its correspondence with the petitioner's agents? Or did the petitioner jump the gun by presenting its petition prematurely at a time when it was aware that the respondent was in the process of obtaining its own report with a view to then considering what section 29 required of it, if anything?

[8] Although counsel for the petitioner characterised the respondent's conduct as unreasonable, causing the petitioner to bring the petition, the question of the reasonableness of the respondent's dealings with the petitioner is inextricably bound up with whether the respondent's assessment of the duty imposed on it by section 29 was correct. If, by 29 August 2025, the respondent was not in breach of that duty, then it is more likely that the approach it took in its dealings with the petitioner - which can be summarised as "we are now obtaining a report and when we have it, we will decide what to do" – could be categorised as reasonable. I will therefore begin by considering whether the respondent was, by that date, in breach of its duty.

[9] The starting point is to note three incontrovertible facts. The first is that the building was in a dangerous condition in September 2024, which can be inferred from the facts (i) that masonry had fallen from it, and (ii) that the respondent took urgent action to alleviate or mitigate the risk, which it concedes was done in terms of section 29(3): as counsel for the petitioner submitted, section 29(3) is engaged only where it appears to the local authority that the building constitutes a danger. The second incontrovertible fact is that the building has continued to be dangerous since that time to the present day. That can be inferred from (i) the fact that no repairs to the building have been carried out to remove the danger; (ii) the terms of the TDD report; and (iii) the fact that the respondent has itself now issued a dangerous building notice. The respondent's implication that the condition of the building might have changed for the better following storm Eowyn is baffling: one does not have to have specialised knowledge to know that a storm of that magnitude is unlikely to have removed, or diminished, existing dangers. The third incontrovertible fact is that it took the respondent the best part of a year to issue the dangerous building notice.

[10] As counsel for the petitioner acknowledged, consideration must be given to what degree of latitude is afforded to a local authority by section 29, and whether that was exceeded by the respondent in this case. Taking a holistic approach, it is hard to see that Parliament intended that a local authority should, for want of a better term, dilly-dally as the respondent did here, as its correspondence demonstrates. While recognising that section 29 does not prescribe a time limit within which a notice must be served, nonetheless subsection (6) provides that the local authority *must* serve a notice except where the danger has been removed by work carried out under subsection (3). True it is that the Handbook suggests that a local authority need not serve a notice if the owner agrees to do the work but, whether or not such latitude can be implied into the Act, even the Handbook at

section 10.3.3 (quoted above at para [3]) does not envisage that an owner will be given a great deal of latitude, as is made clear by the references to it being "imperative" that the owner agrees "at once" and confirms to the local authority that they will "immediately" arrange to undertake the measures required. It goes on to say that an owner that fails to achieve the negotiated solution can expect the local authority to take action "swiftly". On no view could the respondent's action here be said to have been taken swiftly.

[11] However, if one applies the more structured approach of Dyson LJ in *National Car Parks Ltd* v *Baird*, above, the same result is reached. The subject matter of the duty is the removal of danger from a building, from which masonry has fallen; clearly a matter which falls to be dealt with expeditiously. The length of time taken to perform the duty was either one year (from the date the respondent first became aware of the fallen masonry) or just short of eleven months (from the date of the petitioner's solicitors' letter of 5 November 2024). The reasons for the delay included several periods of inactivity (not least, the delay in first contacting the owners) and an unjustifiable degree of latitude given to the owners. Finally, the petitioner suffered prejudice by reason of the delay, in that it was deprived of the use of part of its car park by the cordon round the building. All of those point to the inexorable conclusion that the respondent ought to have served a notice sooner than it did.

[12] While it is the 2003 Act, rather than the Handbook, against which the respondent's actions must be judged, even measuring what the respondent did against the yardstick of the Handbook, it falls short of what was required, in a number of respects. First, there was never any question of the owner agreeing to do work "at once". The respondent itself highlighted the difficulties caused by the death of one owner and the illness of the other. Those difficulties should have caused the respondent to reconsider its approach, in light of the advice in the Handbook. Apart from that, and contrary to what Mr Henderson said in

November 2024, there was a delay of several months before the owners were even written to. Second, once the owners were written to, the request was that they instruct a report on the condition of the building. However, nowhere in either the Act, or the Handbook, is it suggested that the local authority may delay taking action until the owner has provided it with information about the state of the building. As the respondent's solicitor advocate herself pointed out, the respondent was the primary decision-maker and it was for it to satisfy itself as to whether the building was dangerous or not and what work was required to remove the danger. The agreement envisaged by section 10.3.3 is that the owner will do the work which the local authority requires to be done, not that it will provide the local authority with evidence that the building is not dangerous. Third, nowhere does section 10.3.3 state or imply that a delay of nearly a year in issuing a notice is reasonable; the wording used is all redolent of a much shorter period within which action must be taken.

[13] There is another consideration, which is that the respondent seems to have focused on whether the building might be structurally unsafe or not, thereby losing sight of the dangers which were known to exist. That was echoed in the submission of its solicitor advocate that it had to carry out further investigations to ascertain whether the building was structurally unsafe; but the Act does not require there to be a structural defect for a building to be considered dangerous. The relatively limited nature of the work specified in the actual notice served is work which could easily have been considered to be necessary, and to be encapsulated in a notice served much earlier than it was.

[14] It is not necessary for me to determine by which date a notice should have been served. It is sufficient that I reach the view that by 29 August 2025 the respondent was in

breach of its duty to serve one, or, at any rate, that it was reasonable for the petitioner to take that view.

[15] Turning to consider the terms of the respondent's correspondence with the petitioner's solicitor, it can be criticised in two respects. First, there were repeated references to whether a survey might show that the building was no longer dangerous, but having formed the view by November 2024 that the building was dangerous, and in the absence of any work having been done to repair it, that approach was hard to understand. The overall impression given in the correspondence as a whole was that the respondent was simply dragging its heels, and seeking an excuse not to comply with its statutory duty. Second, there were occasions, to which I have drawn attention in the chronology, when the respondent either gave information which was inaccurate (such as whether the owners had already been contacted) or made representations as to timescale which were not fulfilled (such as then its own report would be instructed). Even by 29 August 2025, the petition might have been averted had the respondent unequivocally undertaken to the petitioner that it would serve a notice; but it did not do so, in the knowledge that a petition for judicial review by that date had been threatened.

[16] In all of these circumstances, and for all of the foregoing reasons, I find that the petitioner was fully entitled to lodge the petition, to secure that the respondent serve a notice, and that its decision to do so was caused by the respondent's approach to its section 29 duty. The petitioner is therefore entitled to recover its expenses.

Disposal

[17] I will refuse the petition, but find the petitioner entitled to expenses from the respondent.