SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 24
CA121/16

Lord Justice Clerk
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the cause

(FIRST) JOHN ALLAN LAW and GILLIAN MARGARET LAW and LEGAL & GENERAL ASSURANCE SOCIETY LIMITED as trustees of the JAL Fish Limited Small Self-Administered Pension Scheme; (SECOND) J A L FISH LIMITED; (THIRD) GILLIAN MARGARET LAW

Pursuers and Reclaimers

against

ROBERTSON CONSTRUCTION EASTERN LIMITED

Defenders and Respondents

Pursuers and Reclaimers: Malone (sol adv); Brandon Malone & Company
Defenders and Respondents: Burnet; Clyde & Co

4 April 2018

Introduction

[1] This reclaiming motion seeks to challenge the decision of the Lord Ordinary that an obligation contained in missives for the sale of land did not amount to an "obligation

relating to land", and therefore had prescribed, in terms of the Prescription and Limitation (Scotland) Act 1973, section 6 and schedule 1, para 2(e).

[2] The relevant obligation is in the following terms (emphasis added):

> "8.1 *In exchange for payment of the Purchase Price, there will be delivered* (a) a validly executed Disposition of the Subjects in favour of the Purchaser… and (b) *the duly executed Overage Agreement*…"

In terms of clause "(c) 'the Purchase Price' means…£475,000…" and "(g) 'the Overage Agreement' means the overage agreement to be entered into between the parties the draft of which is annexed and forms part III of the Schedule" to the missives. The same definition applies to both the Subjects, as defined in the missives, and the Overage Property, as defined in the draft Overage Agreement between the same parties.

[3] The Overage Agreement itself provided for the making of certain payments in favour of the pursuers and reclaimers ("the reclaimers") in the event of the grant of certain consents or planning permission in respect of specified development of the land, and its onward sale. The defenders and respondents ("the respondents") would not, however, be obliged to seek such consents or permission, or otherwise to make payment to the reclaimers in the event that no steps were taken whatsoever towards development or sale of the land. Depending on the nature of development of the land, payment of a fixed sum would fall to be made to the reclaimers of £1.5million ("Overage Payment – Development A") or £1million ("Overage Payment – Development B"), in each case under deduction of the "Base Price" of £475,000, equating to the Purchase Price payable under the original missives. The trigger for payment in each case is the sale of the land, whether as mixed commercial and residential developments as a whole, or upon disposal of the final plot of any solely residential development ("Development B").

[4] The reclaimers seek to rely principally on the cases of *Barratt Scotland Ltd* v *Keith* 1993 SC 142 and *Glasgow City Council* v *Morrison Developments Ltd* 2003 SLT 263, and to distinguish on its facts the case of *Smith* v *Stuart* 2010 SC 490. The respondents agree that the relevant principles are to be derived from these authorities, but contend that the Lord Ordinary was correct to consider that the case of *Smith v Stuart (supra)* was binding upon him.

[5] The reclaimers concede that, if the obligation does not relate to land, then it has prescribed by virtue of section 6 of the 1973 Act, the action having been raised after expiry of the quinquennial prescriptive period.

The Lord Ordinary's decision

[6] The Lord Ordinary held ([2017] CSOH 70) that the relevant obligation was personal and collateral, in the latter sense that it did not form part of the purchase price of the land in question, as contractually defined (para [14]). The expression "any obligation relating to land" was to be given its natural and ordinary meaning, was apt to cover a wide range of obligations, not limited to real rights in land, but not covering obligations to which land was only incidental: land must be the main object of the obligation (para [17], applying *Barratt* and *Smith* v *Stuart*).

[7] The relevant focus was the nature and main object of the particular obligation in issue, rather than any counterpart obligation (para [23]; cf *Glasgow City Council* v *Morrison Developments Ltd* at paras 9 – 10, 13 and 16; and *Clydeport Properties Ltd* v *Shell UK Ltd* 2007 SLT 547 at 551D – E). It would not necessarily follow from the fact that a counterpart obligation related to land that the obligation in question would also possess that character (*ibid*; cf 1973 Act, section 15(2)).

[8] Even if the case of *Smith* v *Stuart* were not formally binding upon him, the Lord Ordinary considered that there was no justification for declining to follow the authoritative guidance contained therein, which appeared to be consistent with that set out in *Barratt (supra)*.

Submissions for the reclaimers

[9] In summary, the reclaimers maintained three broad propositions in the course of submissions. First, that the core obligations of a transaction in which an interest in land is created or transferred (which was described as a "land transaction") would all be obligations relating to land within the meaning of the 1973 Act. Secondly, that the relevant obligation in the present case, which was expressly conceded to be a mere obligation to enter into the overage agreement, was one of the core obligations in, and part of the object of, missives of sale of land, and therefore amounted to an obligation relating to land. Thirdly, that the Lord Ordinary had erred in failing to recognise it as such.

[10] The reclaimers readily conceded that, for the purposes of the 1973 Act, it was necessary to examine the nature of the particular obligation sought to be enforced (*Barratt (supra),* LJC (Ross) at 153G). The relevant obligation in the present case was the obligation to enter into the overage agreement, rather than any of the obligations contained in the overage agreement itself. Nonetheless, it was relevant to consider the context in which that obligation arose, whereby it was an obligation relating to land by virtue of being "a core obligation in a contract which has as its subject matter the creation of rights or interests in land", such as missives of sale of land (*Barratt (supra)*, Lord Kirkwood at 159D; *Glasgow City Council* v *Morrison Developments* at para 13). Where the obligation arose in that context, as a core rather than incidental obligation of a land transaction, it would amount to an obligation

relating to land. The scope of the core obligations was to be ascertained according to the terms of the particular contract before the court. However, where the obligation in question formed part of the consideration in a land transaction, it was of necessity a core obligation of that transaction, and therefore an obligation relating to land. In the present case, the obligation to enter into the overage agreement was said to be "one of the core obligations on which the parties have contracted". It was "a counterpart obligation (along with the cash price) to the grant of a disposition in favour of the purchaser" and therefore amounted to an obligation relating to land.

[11] The reclaimers would have been entitled to refuse to convey the land upon the respondents' failure to enter into the overage agreement upon settlement. The terms of the contract were certain, and there was an obligation on both parties to enter into it. Thus, the obligation was not merely incidental to the transaction, or one that could be enforced only after completion of the sale, such as a collateral warranty. The relevant clause 8.1 was not happily worded, but it had been a matter of concession before the Lord Ordinary that the clause *ought to have* expressed an exchange of the disposition on the one hand, for the purchase price and overage agreement on the other. Those were the core obligations of the contract; they encapsulated "the deal" or operative part of the missives. The overage agreement clearly favoured the reclaimers, as sellers, to the extent of a financial advantage of upwards of £1 million; such a continuing liability was of no benefit to the respondents. To the extent that it did not properly reflect where the benefit lay, therefore, the clause was acknowledged to be "wrongly worded". Properly construed, however, the overage agreement was logically part of the consideration to be received in exchange for conveyance of the land, regardless of who might deliver it to whom: it was part of the "price" in the

natural and broad sense of the word, notwithstanding that it did not fall within the contractual definition of the "Purchase Price" provided by the missives. This argument was acknowledged to be the sole fundamental point underlying the reclaimers' position. It could be viewed as an aspect of the general mutuality of obligations, rather than the correlativity of rights and obligations in the narrow sense addressed by section 15(2) of the 1973 Act. It could not be correct that an obligation to deliver a disposition subsisted, whilst the corresponding obligation to make payment prescribed; to hold otherwise would be destructive of the mutuality principle, and could lead to injustice. Thus, counterpart obligations at the core of a land transaction were to be treated as obligations relating to land.

[12] This was also a critical distinction from the circumstances pertaining in *Smith* v *Stuart,* where the unilateral undertaking was merely to enter into a contract, the terms of which had not been agreed, at some future undefined point, regarding the terms upon which payment might be made if certain events came to pass in respect of the land. Such an undertaking did not concern the creation of an interest in land, nor would the proposed contract, if entered, have done so; it existed in isolation. The obligation not existing within a land transaction, whether unilateral or bilateral in form, it could not amount to an obligation relating to land.

[13] In the present case, whilst the obligation may not, in isolation, amount to an obligation relating to land, it was properly to be regarded as such since it arose as a counter-prestation to the delivery of a disposition. It was not merely "collateral", as the Lord Ordinary had determined. In these circumstances, the *ratio* of *Smith* v *Stuart (*LJC (Ross) at paras 12 and 13*)* did not apply. The "underlying obligation", which in each case regulated the future payment of a portion of the proceeds of sale in the event of certain specified

circumstances arising, was the same at a superficial level only. In the present case, any sums due in terms of the overage agreement were, in reality, an additional element of the price under the original missives. Having regard to the bilateral nature of the parties' obligations, and the extent to which they were counter-prestations, the Lord Ordinary ought to have treated the obligation to enter into the overage agreement as an obligation relating to land.

Submissions for the respondents

[14] In reply, the respondents conceded that, whilst in strict terms of the missives, the obligation was on the reclaimers (as sellers) to deliver a signed copy of the overage agreement to the respondents (as purchasers), there was an implied obligation on the respondents to enter into the overage agreement. Nonetheless, the Lord Ordinary had been correct that it amounted to a mere personal and collateral obligation.

[15] It was necessary to demonstrate that the particular obligation in question created an interest in land, and was not merely an incidental matter within an overall contract relating to land (*Barratt (supra),* LJC (Ross) at 148D, 153 and 154C – D, Lord McCluskey at 157I and 158B – C, and Lord Kirkwood at 158F – G). To be an "obligation relating to land" the obligations required to have land as its main object. In the present case, the particular obligation sought to be enforced was the obligation to enter into the overage agreement. The obligation under the overage agreement itself was a mere obligation to pay an amount of money. An agreement to regulate the basis upon which the proceeds of a relevant future sale of land would be paid as between the parties, in the uncertain event that any of specified circumstances came to pass, did not oblige one party to confer on the other any right or interest in the land itself (*Smith* v *Stuart*) and did not have land as its main object. As a consequence, the particular obligation was not an obligation relating to land.

[16] The reclaimers took matters too far insofar as they submitted that a core obligation of a lease or contract for the sale of land would qualify *per se* as an obligation relating to land. It was not sufficient that the contract related to the creation or transfer of rights or interests in land in general: the particular obligation had to be so related. A core obligation could not simply be anything that was said to be part of a reciprocal obligation, such as reciprocal to payment of the purchase price, in order automatically to constitute an obligation relating to land. If that were correct, any obligation could be so converted, contrary to the tests set out in *Barratt* and *Smith* v *Stuart.*

[17] Whilst it was accepted that the overage agreement was to be entered as part of the overall deal between the parties, the terms of the relevant clause 8.1 dealt with the mechanics of exchange only. The respondents had been obliged to enter into the overage agreement, such that each party would retain a copy of it, but the relevant clause did not show that to be a core obligation in the manner suggested by the reclaimers.

[18] The execution and delivery of the overage agreement did not form part of the contractually defined price payable, and paid in full, in respect of the land. It was a separate obligation under the missives, albeit that the underlying "potential obligation" was to make payment following upon future sale of the land. Accordingly, the Lord Ordinary had been correct to hold that the obligation did not form part of the price in the wider sense contended by the reclaimers. The overage agreement did not even purport to create or transfer an interest in land. Nor did it preserve any such interests, such as a right in security over the subjects or real burden in favour of the reclaimers, pending further development and sale, either of which would have amounted to an obligation relating to land on the basis that it created an interest in the land.

[19] The decision in *Glasgow City Council* v *Morrison Developments Ltd* was to be treated with some caution, as the Lord Ordinary had done, at least insofar as it depended upon the particular terms of the lease at issue. Specifically, in order for the lease to take effect, the tenant first had to build and then occupy the premises. The creation of the tenant's interest in land was predicated upon the construction of the buildings. It was in that particular context that the court had concluded that it was an obligation relating to land. In the present case, there was merely an agreement in relation to future payment, which could not be said to have land as its main object. In that regard, the decision in *Smith* v *Stuart* was the most relevant case cited to the court, and an authoritative decision of the Inner House. Accordingly, it had not been open to the Lord Ordinary to decline to follow it, and he had been correct to conclude that the obligation in the present case was not an obligation relating to land.

Decision

[20] Schedule 1, para 2(e) of the Prescription and Limitation (Scotland) Act 1973 excludes from those obligations subject to the short negative prescriptive period "any obligation relating to land", which expressly includes obligations to recognise a servitude and certain statutory obligations upon the Keeper of the Registers of Scotland, but is otherwise undefined. The short question that arises, therefore, is what amounts to an "obligation relating to land"?

[21] At the outset, it may be pertinent to note that, in the context of considering "whether the scope of the category 'obligation relating to land' ought to be revisited", the Scottish Law Commission has observed that "its boundaries are now not significantly in doubt" (Discussion Paper on Prescription (SLC DP No. 160, February 2016, para 2.58, citing *Glasgow*

City Council v *Morrison Developments Ltd*; Johnston, *Prescription* at paras 6.55 – 6.62). That being so, the Commission has indicated that it is "reluctant to make proposals for change in this area in the absence of perceived problems".

[22] On a plain reading, the object of the statutory provision is the substance of the particular obligation founded upon, rather than the character of the surrounding deed or contract within which it may be found. Whilst the latter may be said to relate to land in a generalised sense and, to that extent, will inevitably contain one or more obligations relating to land, that conclusion does not, of itself, assist in the identification of any particular obligation as one relating to land. A deed or contract may relate generally to land, but a particular obligation contained within it may not.

[22] Of course, the meaning and effect of a particular obligation will be construed, in the customary manner, according to the whole terms of the surrounding deed or contract. In that sense, it will be legitimate to have regard to the wider context in order to consider whether, properly construed, the particular obligation is an obligation relating to land. Nonetheless, the proper focus is the nature of the relationship between the particular obligation and land ('any obligation *relating to* land'), which must be sufficiently strong to ensure that the statutory distinction of a category of 'obligations relating to land' is a meaningful one.

[23] In *Barratt Scotland* v *Keith*, the Second Division held (LJC (Ross) at 153H, emphasis added) that "having regard to the natural and ordinary meaning of words, an obligation *to deliver* a disposition of heritable subjects is an obligation relating to land. It matters not that the obligation is a personal obligation and that no real right is involved." That the disposition itself gave rise to an obligation relating to land was sufficient, in that case, to

confer a similar character upon the antecedent obligation to deliver the disposition (cf "an obligation arising out of a breach of an obligation relating to land is not the same thing as an obligation relating to land": *Clydeport Properties Ltd* v *Shell UK Ltd* at 551H citing *Lord Advocate* v *Shipbreaking Industries Ltd* 1991 SLT 838 at 840J-K). Thus, to say that there is "no real right…involved" (*Barratt (supra),* LJC (Ross) at 153H) is only true in the sense that such a right may not arise directly or immediately from the obligation in question: hence, the obligation to deliver a disposition of land, rather than the obligation to dispone the land or the disposition itself, is nonetheless an obligation relating to land. In that case the particular obligation is crucial to the transfer of real rights in land, brought about in terms of the disposition.

[24] In *Barratt (supra),* the court does not appear to have contemplated any obligations relating to land otherwise than in the sense of those necessarily contributing to the creation or transfer of rights or interests in land. Whilst not purporting to define the scope of "obligations relating to land", however, the court endorsed (LJC (Ross) at 154A-C) the views of the Lord Ordinary to the effect that "certain obligations in which land was dealt with only incidentally were not 'obligations relating to land'." As it was put by the Lord Ordinary in that case (at 148E):

> "With the exception of cases in which land is dealt with incidentally only, contractual and other forms of obligation, such as unilateral gratuitous promise, to create rights and interests in land, or to convey land or interests in land, are in my opinion typical 'obligations relating to land'. The sum of these examples would not adequately define the expression."

Thus, the "typical" cases of creation or transfer of land or interests in land, whether directly or indirectly, are examples of a potentially wider category. A further example may be the extinction or variation of such rights or interests, at least in the case of subordinate real

rights such as a real burden on a tenant's rights under a lease. In any event, a meaningful distinction requires to be drawn in respect of those obligations falling beyond the scope of the "typical" cases, yet still relating sufficiently closely to land in order to amount to 'obligations relating to land' for the purposes of paragraph 2(e) of schedule 1 to the 1973 Act.

[25] Plainly, something more than "some connection with land" (see, eg, *Barratt,* Lord McCluskey at 157I) is required. What is envisaged, as it has been characterised subsequently, is that "the land must be the main object of the obligation" (*Smith* v *Stuart* 2010 SC 490 (LJC (Gill) at para [10]), citing Johnston, *Prescription and Limitation,* para 6.60 as "in line with the approach in *Barratt"*.

[26] In the intervening period, between the consistent decisions of the Second Division in *Barratt* and *Smith* v *Stuart*, the courts have sought at first instance to apply the distinction between obligations relating to land and those dealing with land only incidentally, as derived from *Barratt*. To an extent, however, those decisions (for example, *Glasgow City Council* v *Morrison Developments Ltd* and *Clydeport Properties Ltd* v *Shell UK Ltd*) may have obscured the critical focus on the particular obligation to be enforced, at least as a matter of expression if not substance, before the position was subsequently clarified in *Smith* v *Stuart.*

[27] In *Glasgow City Council* v *Morrison Developments Ltd*, the court approached the issue according to whether a particular obligation could be said to form one of "the central or core obligations" of a contract relating to land (Lord Eassie at para [13]):

> "It is in my view clear from the decision in [*Barratt*] that the phrase 'obligations relating to land' is not confined to real rights and their correlative obligations but extends to personal obligations arising under contracts which have as their subject the creation of rights or interests in land or the transfer of the existing rights or interests in land. Accordingly, while under a contract of lease there may possibly be incidental or ancillary obligations which might not come within the expression 'obligations relating to land', the central or core obligations, such as the grant of the tenant's interest and the reddendum must fall within the scope of that term."

As in *Barratt*, therefore, the focus remains on the creation or transfer of rights or interests in land. However, it is of some importance to emphasise that, properly construed, the relevant question is not whether the particular obligation is "incidental or ancillary" to the *contract* in which it appears, but whether it deals only incidentally with the *land*: the same answer may or may not be produced in either case. Likewise, to ask whether the particular obligation is amongst "the central or core obligations" of a *contract* relating to land, or "correlative" of a right thereunder, may shift the focus unduly from the relevant relationship between the particular obligation and the *land*. Such an analysis may be problematic, in particular, as tending to suggest that the character of the particular obligation in question is dependent upon the core purpose of the contract, or the mutuality of obligations thereunder. A particular obligation may not be a "core obligation" of the deed or contract relating to land, of which it happens to form a part; nonetheless, it may amount to an obligation relating to land because it otherwise has land as its main object. Conversely, a particular obligation may be a "core obligation" of such a deed or contract, yet it may not have land as its main object and therefore may not amount to an obligation relating to land. In other words, it is conceivable as a matter of principle that the basis upon which the surrounding deed or contract relates generally or principally to land may differ from the basis upon which any particular obligation therein may also be deemed to relate to land.

[28] Moreover, and in any event, it must be emphasised that the "correlativity" of obligations, in the general sense of mutuality in a contractual context, is not the appropriate touchstone for the purposes of identifying whether any particular obligation relates to land (cf 1973 Act, s 15). It will be of little relevance to consider the mutuality of obligations in any

given circumstance, beyond the narrow concern as to whether implement of the particular obligation in question is necessary, directly or indirectly, to the creation or transfer of rights or interests in land.

[29] When understood in that context, the decision in *Glasgow City Council* v *Morrison Developments Ltd* is merely indicative of the fact that it will often be sufficient, in practical terms, to determine whether an obligation 'relates to land' according to whether it forms a core part of a contract creating or transferring rights or interests in land: *viz.* the "typical" case of obligations relating to land conceived of in *Barratt*. In such cases, it is tolerably clear that the particular obligation will be critical, whether directly or indirectly, to the creation or transfer of rights or interests in land (as discussed in *Barratt*), in which case the land will inevitably be the main object of the obligation (*Smith* v *Stuart*). Thus, in *Glasgow City Council* v *Morrison Developments Ltd*, the court was particularly concerned with those obligations that were essential to the creation of the tenant's subordinate interest in land. According to the highly unusual terms of the particular lease before the court, it was crucial to the very existence of the lease that the tenant was obliged to construct the subjects of let, and to make payment of the *grassum*, as direct counterparts of the grant of the tenant's interest in the land. Those obligations were entirely correlative and interdependent to that end, and on that basis amounted to obligations relating to land. In that particular factual context, the court's reliance on correlativity ought to be understood as merely demonstrative of the essential nature of the tenant's obligations to the creation of his interest in the land. The general mutuality of obligations under the lease was otherwise irrelevant and, on a fair reading, the court ought not to be taken to have decided anything to the contrary.

[30] A similar approach was adopted in *Clydeport Properties Ltd v Shell UK Ltd*, where the court considered whether the particular obligations in question formed "an intrinsic part of the lease or, to use the expression in *Glasgow City Council* v *Morrison Developments Ltd*, correlative with the grant of the interest in the land." Yet again, therefore, the fact that an obligation is demonstrably intrinsic or correlative to the grant of such an interest in land is of some significance, insofar as it may be indicative of the correlative obligation, itself, relating to land. Such an analysis must be recognised, however, as a shorthand method of identifying the relevant relationship between the particular obligation and land. The purpose is not to consider the intrinsic parts of the lease, in the sense of merely identifying the material or substantial aspects of such a contract: a test of materiality is inevitably far broader in scope, and would seriously undermine the meaningful distinction of a category of particular obligations 'relating to land' from those obligations subject to the effects of short negative prescription (cf eg 1973 Act, sch 1, para 1(g): "any obligation arising from…a contract or promise…").

[31] In *Clydeport*, the court was satisfied that land could not be said to be "only incidental" to the obligations in question, apparently having regard to the fact that the obligations were contained within a contract creating or transferring rights or interests in land (ie a lease), and that they fell upon the tenant by virtue of their interest in the land. It may be difficult, otherwise, to discern the basis upon which to distinguish the obligations in that case from any other obligations to carry out "repairs to heritable fixtures" where land is "merely the environment" within which the works are to be carried out, which would not ordinarily amount to obligations relating to land (cf *Barratt (supra),* LJC (Ross) at 154A – C, cited in *Clydeport* at 551B; see, also, *Cumbernauld Housing Partnership* v *Davies* 2015 SC 532,

Opinion of the Court delivered by Lord Brodie at para [17]: "a construction of the 1973 Act which has the result that what are essentially tradesmen's bills do not prescribe before the passage of 20 years seems extravagant"). Be that as it may, the decision in *Clydeport* proceeded upon the basis of significant concessions made by counsel, and ought not to be taken to establish any general principle to the effect that materiality to such a contract is sufficient to establish that a particular obligation therein relates to land, or otherwise to extend the scope of the *ratio* to be derived from *Barratt*.

[32] In the present case, returning to the context of missives for the sale of land, the reclaimers seek to rely upon the three constituent elements of clause 8.1, namely (i) payment of the purchase price; (ii) delivery of the executed disposition; and (iii) delivery of the executed overage agreement, as amounting to the core "deal" between the parties. In essence, the analysis commended to us by the reclaimers was that it would be sufficient to consider the substance of that transaction, as a land transaction in the round, in order to determine that those (three) "core" or "non-incidental" obligations, including the particular obligation to deliver the executed overage agreement, were obligations relating to land. Specifically, it was argued that, in substance if not in form, the obligation to deliver the executed overage agreement was to be deemed a part of the consideration in return for which the land was transferred: in its broadest sense, the land was sold in return for a cash price together with the separate payment obligations contained within the overage agreement.

[33] Whilst it is readily conceivable that the overage agreement formed a material part of those arrangements, that is not the relevant question before us. The task is for this court to consider, not the general nature of the whole transaction, as reflected in the contractual

terms, but the nature of the particular obligation sought to be enforced. The fundamental flaw underlying the reclaimers' approach has been to assume that the character of the contract, as embodying a "land transaction", and the identification of an obligation as one of the central features of that transaction, will be sufficient and determinative of the obligation relating to land. Such an approach adopts the wrong starting point, namely an analysis of the contract as a whole, rather than the particular obligation. Moreover, it encourages a focus on the wrong relationship, namely that between the obligation and the wider features of the contract, rather than the obligation and the land itself. Neither of these matters will be determinative of the issue before us. Thus, in the present circumstances, the assumed equivalence of a central feature of the whole transaction between the parties, and an obligation relating to land, has led the reclaimers astray.

[34] The reclaimers recognised that the contractual clause 8.1 relied upon by them does not achieve what the parties may have intended: namely, that the delivery of a duly executed overage agreement was to form a part of the consideration to be made over in exchange for conveyance of the land. Nonetheless, it is that admittedly failed intention upon which the reclaimers seek to rely, and to which the court is encouraged to give effect, as the only basis upon which it is contended that the particular obligation is an obligation "relating to land". No doubt for these reasons, the reclaimers sought to emphasise in the course of submissions that the relevant obligation was that falling upon the respondents to enter into the overage agreement, whereas the obligation to deliver the executed deed would appear, at least on the face of the relevant clause, to fall upon the reclaimers themselves, such is the apparent oddity of the drafting.

[35] For the avoidance of doubt, the court does not consider that anything material turns on the distinction between an obligation to enter the overage agreement, and the obligation to deliver a duly executed overage agreement, as at the date of entry. As in *Barratt (supra),* however, whether it is analysed on the basis of the obligation to deliver or execute the overage agreement, or having regard to the payment obligations arising from the overage agreement itself, it is not an obligation of which land is the main object. In the present case, albeit that the parties may have intended otherwise, the delivery of the duly executed overage agreement did not form part of the contractually defined purchase price in respect of the land; nor did it otherwise amount to a direct counterpart, by way of consideration, in exchange for delivery of the disposition, on a plain reading of the particular clause founded upon.

[36] Whilst the court notes the reclaimers' assertion as to the true substance and intended effect of the transaction, and the substantial benefit of the overage agreement being in their favour, it is conceivable that the respondents enjoyed some practical benefit from such an arrangement, by which any development potential of the land was not accounted for in the purchase price payable immediately upon settlement, but deferred, potentially indefinitely. In any event, the fact remains that, beyond any questions of consideration or relative benefit, there is no other basis upon which this court is invited to conclude that the particular obligation relied upon by the reclaimers, in the specific terms placed before us, amounts to an obligation relating to land. Specifically, it is not contended that the obligation to execute or deliver the overage agreement, in isolation, amounts to an obligation relating to land. Nor is the overage agreement founded upon as a 'land transaction' of itself, such that it may

be said to contain obligations relating to land, or to confer a similar character upon any obligation to execute or deliver it.

[37] For all of the foregoing reasons, the court considers that the Lord Ordinary correctly identified and applied the relevant legal principles in the particular circumstances of this case. The outcome, in the present case and others of this type, must be recognised as highly fact-specific, depending upon the terms of the particular obligation before the court. That being so, the Lord Ordinary cannot be criticised for having regard to what was fairly characterised as the 'authoritative guidance' of the Inner House in its application of well-established general principle in the similar case of *Smith* v *Stuart* albeit that the factual context in that case was not "on all fours" with the present case. The reclaiming motion is refused.