OUTER HOUSE, COURT OF SESSION

2021 CSOH 29

CA59/20

OPINION OF LADY WOLFFE

In the cause

GRANTON CENTRAL DEVELOPMENTS LIMITED

Pursuer

against

CITY OF EDINBURGH COUNCIL

Defender

Pursuer: Campbell QC; Turcan Connell
Defender: Burnet QC; CMS Cameron McKenna Nabarro Olswang LLP

19 March 2021

Background

The Parties

The pursuer

[1] In June 2003 the defender ("the Council") entered into an agreement ("the Agreement") under section 75 of the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act") with Forth Ports plc ("Forth") in respect of approximately 33 hectares of land ("the Land") forming part of a development site at Granton Harbour in Edinburgh ("the Development"). The pursuer in the present action was not a party to the Agreement, nor (on present information) has it succeeded to the rights of Forth under the Agreement by

assignation. On 23 June 2004 the Council granted outline planning permission ("the outline planning permission") for the Development, which included provision for a tram line along a specified tram line route ("the TLR").

[2] As after-noted, the pursuer acquired ownership from Forth of part of the Land (including the TLR) on 11 June 2014. On that same date, the pursuer transferred title to some of that land (but including the TLR, which is the subject of dispute between the parties), to its funder ("Alpha"), and became the tenant of that land (including the TLR) under a long lease ("the long lease") from Alpha.

The Council

[3] The Council is the planning authority. It was the counterparty to the Agreement entered into with Forth in June 2003. As noted below, in exercise of its powers under section 195 of the 1997 Act, it acquired the TLR from Alpha by virtue of a general vesting declaration ("the GVD") on 6 May 2016.

The core issue in dispute

[4] The pursuer asserts that it is entitled to a reconveyance of the TLR from the Council. The Council resists this. It asserts that the pursuer's case is irrelevant, on a variety of bases. The matter called before me on a 2-day debate on 11 and 12 February 2021. I summarise the agreed matters of fact and the terms of the Agreement parties referred to, before setting out the issues to be debated.

The Joint Minute

[5] The parties entered into a joint minute ("the Joint Minute") for the purposes of the debate. I have summarised this in paras [1] to [3], [6] and [8] to [9] of this Opinion. As brief reference was made in submissions to the Crichel Down Rules, I set out what parties had agreed in respect of them, which was as follows:

> "16. The terms of section 30 of the Tram Act require the acquiring authority to apply the rules set out in Scottish Development Department Circular 38 of 1992 ('Disposal of Surplus Government Land - The Crichel Down Rules') 'as may be amended or superseded from time to time' In the event that the authorised undertaker compulsorily acquires land as authorised by section 23 (Power to acquire land) and that land is subsequently declared by the authorised undertaker to be surplus to the authorised undertaker's requirements. In or around October 2011 the Scottish Government published Circular 5 of 2011 'Disposal of Surplus Government Land - The Crichel Down Rules' ('Circular 5/2011'). Circular 5/2011 superseded Circular 38/1992 and replaced it in terms of Section 30 of the Tram Act. The general principle underlying the Crichel Down Rules and Circular 5/2011 is that where land that has been acquired by compulsory purchase or under the threat of compulsory purchase becomes surplus to the requirements the former owners will be given a first opportunity to repurchase the land previously in their ownership, provided that it has not been materially changed in character since acquisition."

The dealings with the TLR

[6] There are a number of dealings with the Land, including one or more break-off dispositions. It suffices to note those concerning the TLR:

1) 11 June 2014: A conveyance by Forth (who was the heritable proprietor of the Land at the time the Agreement was entered into) in favour of the pursuer on 11 June 2014;

2) 11 June 2014: A conveyance from the pursuer to Alpha (whose title was registered on 18 June 2014). The pursuer retained some of the land acquired from Forth, but the land it retained did not include the TLR;

3) 11 June 2014: The grant of a long lease by Alpha in favour of the pursuer (whose title under the long lease was registered on 25 June 2014); and

4) 6 May 2016: The Council's making of a GVD, vesting title to the TLR in it, and the subsequent registration of the GVD in the Land Register on 26 August 2016.

It will be noted that from 11 June 2014 to 6 May 2016 Alpha was the heritable proprietor of *inter alia* the TLR. The pursuer's interest during that same period was as a tenant under the long lease.

The limited duration of the period for which the pursuer had title as owner to the TLR

[7] In consequence of the dealings just noted, the pursuer was the heritable proprietor of the TLR only on 11 June 2014. It was not clear at the debate whether the pursuer ever registered its title in the Land Register (and thereby obtained a real right to the TLR), although that is likely to be relevant (if at all) only to the title to sue issue. The pursuer did not have heritable title to the TLR either at the time the Agreement was entered into or at the time the Council compulsorily acquired title to the TLR by virtue of the GVD. At most, the pursuer was only an intermediate successor to Forth as heritable proprietor to the TLR.

The Agreement (and any obligation embodied within it) was not included in schedule 2 to the GVD

[8] In each of the titles relating to the dealings referred in para [6(1) to (4)] above, the Agreement was noted in the burdens section of the title sheet. However, the Agreement was not recorded as a burden in the title sheet for the GVD which vested the land in the Council.

[9] Furthermore, in schedule 2 to the GVD the word "none" appears. Section 194(1) of the 1997 Act provides for the reservation of certain types of obligations set out in

subsection 194(1) (a) (including private rights of way, real burdens and servitudes). This is done by recording them in schedule 2 to a general vesting declaration, with the effect that they are not extinguished. Accordingly, the significance of "none" in schedule 2 to the GVD is that no such right or real burden (or similar land obligation) affecting the TLR was preserved from the extinctive effect of the GVD in respect of those types of rights.

Compensation paid by the Council to the pursuer and Alpha

[10] Consequent on the GVD, the Council paid £299,000 to Alpha for its interest as the heritable proprietor of the TLR compulsorily acquired by the GVD, and it paid £99,550 to the pursuer in respect of its interest as tenant in the land thus taken.

The orders the pursuer seeks in this commercial action

[11] The pursuer seeks the following orders (collectively "the Orders"):

1) Declarator that the TLR referred to in cl 5.4 of the Agreement is sufficiently described by reference to the parcels of land in the GVD;
2) Declarator that clause 5.4 contains an obligation requiring the Council to re-convey the TLR to the pursuer ("the second declarator"); and
3) Implement of the "full terms of clause 5.4 of [the Agreement]…., by means of an Order of the Court requiring the re-conveyance by [the Council] to the pursuer of the subjects" comprising the TLR.

The Agreement

Clause 5

[12] As is clear from the terms of the Orders, the dispute between the parties centres on clause 5.4. I set out the whole of clause 5:

> "5 Tram Line Route
> 5.1 Forth shall retain title so far as within their ownership as at the date of this Agreement to the tram line route or such other route as Forth and the Council shall agree together with land reasonably required for any tram stops along the tram line route. The Council and Forth will together use all reasonable endeavours to procure that the extent of land to be occupied by and required for the tram line route and associated trams stops will be minimised so far as practicable. It is accepted by the Council that no warranty is given as to existing site conditions along the tram line route.
>
> 5.2 In the event that the Council notifies Forth prior to 1 January 2020 that it requires the tram line route then **Forth** (or the relevant heritable proprietor of the affected land as the case may be as Forth shall be bound to use reasonable endeavours to procure) **shall convey** the land forming the solum of the tram line route to the Council **at no cost to the Council** and that within not more than fourteen working days after the date of Royal Assent being granted for a Parliamentary Order for the construction of the Tram Line. Such conveyance will be granted by means of a duly subscribed conveyance in statutory form in terms of the Lands Clauses Consolidation (Scotland) Act l845 or the equivalent provision as may be then applicable and incorporating a taxative plan. Each party shall bear its own costs associated with the transfer of such land). The Council acknowledges that such land is in part affected by long leasehold interests and that as between Forth and the Council it will be for the Council to procure the partial renunciation of such interests to the extent required by means of Compulsory Purchase powers if necessary. Forth will fully cooperate with the Council in this regard.
>
> 5.3 Forth undertakes save to the extent hereinafter specified not to construct without the approval in writing of the Council (which consent will not be unreasonably withheld or a decision thereon unreasonably delayed) any permanent road crossings nor alter any ground levels or locate any services within the tram line route until such time as the Council notifies Forth in writing that it does not require the transfer of the tram line route or 1 January 2020 whichever is the earlier date SAVE THAT Forth shall be entitled without requiring the further consent of the Council to construct the principal transport corridor to serve the Site (being Middle Pier Road or such other route or routes as may be determined in substitution for such Road), form such other roads, associated services and other works anticipated by and incorporated by reference in the Planning Permission and to construct such other services and others as are reasonably required in connection with the development of the Site provided always that in forming such roads. installing such services and

carrying out such other works Forth will have due and proper regard to the need to ensure that in crossing the tram line route the roads, services and other works are designed and located in a way which will enable them to be maintained replaced and investigated or renewed all without disruption to the structure of the tram line route and the continuous uninterrupted operation of the tram.

5.4 In the event that construction of the tram line has not been commenced on the tram line route by 1 January 2020 the tram line route (to the extent by that date conveyed by Forth to the Council) shall be **re-conveyed** by the Council to Forth **at no cost** to **Forth** within fourteen days whereupon the obligations in Clauses 5.1, 5.2 and 5.3 above will cease to have effect. It is hereby agreed that each party shall bear its own costs associated with the transfer of the tram line route.

5.5 In the event that on or prior to 1 January 2020 the Council has at any time notified Forth in writing that it no longer intends to develop the tram line route Forth will forthwith be entitled to develop the extent of the tram line route within its title for any other purpose and shall not be bound by clause 5 hereof.

5.6 At such time as the Consent is to be implemented in respect of Phase 3 the parties will agree upon the building line and tram line adjacent to Phase 3.

5.7 The parties acknowledge that the Photo Images demonstrate the intended route for the Tram line between the Development Site and the Tram Depot Site as envisaged at the date of this Agreement." (Emphasis added.)

I have highlighted the passages founded on by the Council in bold and those founded on by the pursuer are underlined.

Other provisions of the Agreement parties noted

[13] Parties concentrated their submission on clause 5. The pursuer focused on clause 5.4 (which was said to constitute a free-standing obligation) and the defender focused on clause 5.2 and 5.4 (which were said to be linked). Otherwise, parties took the remainder of the Agreement lightly. For his part, Mr Burnet QC, who appeared for the Council, referred to other parts of the Agreement, namely:

1) The designations: The designation of the parties, in which there was reference to the Council and its successors but no provision for "successors" to Forth;

2) The recitals: Recital (iii) which referred to the Council's power to enter into agreements under section 75 of the 1997 Act for the purpose of regulating or restricting the development and use of land; and recital (vi), narrating that the Council had resolved to grant planning permission "subject… to the conclusion of an agreement under Section 75 of the 1997 Act" (ie the Agreement);

3) Definitions: The definitions of "the Consent" (being the outline planning permission) and of "the Development Site" (which included the TLR) and, of course the definition of the TLR itself. It is not necessary to note the precise terms of any of these.

4) Clause headings: Some of the headings of the other clauses (eg Affordable Housing" in cl 2 were noted *en passant*). It was noted that in clause 2.11 there were references to Forth's "successors in title" and to "at least one successor in title" to Forth;

5) Clause 3.1: the opening phrase was noted:

> "Subject to clauses 3.2 and 3.6 hereof, Forth shall be bound to procure in each sale of any residential plot…that the housing developer(s) purchasing such will pay the educational contribution…";

6) Clause 3.9: This was the last sub-clause in clause 3, and it provided:

> "**In the event that the Council does not take title** to the Primary School Site prior to the education long-stop date [this was defined as 31 July 2010], School Site Costs **shall be repaid** by the Council to the appropriate housing developer together with any accrued interest and that within twenty one days of the expiry of [31 July 2010]" (emphasis added); and

7) Clause 10: This related to land required for construction of a tram depot. Clauses 10.3 and 10.5 were similar in certain respects to clauses 5.2 and 5.4, respectively. Clause 10.3 was structured in the same way as clause 5.2, beginning:

> "**In the event that the Council notifies** Forth prior to 1 January 2010 that it requires the tram depot site **then** Forth …**shall** convey the tram depot site to the Council **at no cost** to the Council…"

Clause 10.4 imposed an obligation on the Council for the tram depot site to be "**re-conveyed** by the Council to Forth, again "at no cost", in the event construction had not been commenced by 1 January 2020.

[14] For his part, Mr Campbell QC, who appeared for the pursuer, confined his references to parts of clause 5.4 (being those passages underlined above, at para [12]) and to the reference in clause 2.11 to "successors" to Forth.

Issues set down for debate

The materials considered

[15] In advance of the debate parties produced adjusted pleadings, notes of arguments, the Joint Minute, a joint bundle of 17 authorities and their core productions. I have reviewed all of these materials. I do not propose to rehearse these or set them out *ad longam* in this Opinion. Additional materials were lodged on the morning of the second day relating to the title to sue issue.

The scope of the debate

Title to sue, the relevancy of the pursuer's construction of clause 5.4 and personal bar

[16] The Council moved for its first, second, third and fifth pleas in law to be sustained and for the pursuer's action to be dismissed. These pleas corresponded with the Council's challenge to the pursuer's title to sue (plea in law 1); its challenge to the relevancy of the pursuer's interpretation of clause 5.4 ("the contract interpretation issue") (pleas in law 2 and 3); and its assertion that the pursuer is personally barred from seeking conveyance of

the TLR (plea in law 5). The latter plea was advanced on the basis that, notwithstanding that this was a debate, there was sufficient agreed factual material before the Court to determine that issue.

The submission anent registration of the GVD

[17] The Council also advanced a discrete submission in relation to the effect of registration of the GVD. In part, this may have been to counter the pursuer's interpretation of and reliance on section 75(4), as amended, as part of the pursuer's contention that, as a "planning obligation", the right in clause 5.4 was a right *in rem* but not a real burden. (If it were a real burden it would be susceptible to extinction by the GVD.) In short, the Council's submission was that the GVD extinguished the whole rights and obligations of Clause 5 of the Agreement and that, otherwise, by virtue of section 75 (as in force at the time the Agreement was entered into), registration of the Agreement specifically empowered the Council to enforce the Agreement against Forth's successor in title.

The pursuer's motion seeking leave to amend

[18] At the close of the first day, Mr Campbell sought leave to lodge a minute of amendment. That motion was continued overnight, to afford Mr Campbell an opportunity to take instructions and to frame an amendment. At the start of the second day, the pursuer lodged a minute of amendment ("the Minute of Amendment"), together with three documents among the pursuer, its holding company and Alpha ("the additional documents"). The pursuer's Minute of Amendment sought principally to address the title to sue point, as did the additional documents. The other parts of the Minute of Amendment sought either to insert what were essentially legal submissions into the pursuer's pleadings

or to make a minor stylistic change. Mr Burnet opposed those parts of the Minute of Amendment seeking materially to augment the pursuer's averments on title to sue (being unnumbered paragraphs 4 and 5 of the Minute of Amendment, seeking to insert new articles of condescendence 8A and 17A). Mr Burnet did not oppose the other parts of the Minute of Amendment (unnumbered paragraphs 1 to 3 and 6), and the pursuer's pleadings were amended to include the following passages:

1) In Cond 4, page 5, line 1 by deleting from "That obligation…" to "…by a fixed date." in line 8 and substituting

> "The obligation to reconvey the land comprising the TLR, as expressed in cl. 5.4 of the Agreement is a postponed obligation contained in a relevant instrument, intended at the date of the Agreement as between Forth and its successors on the one hand, and the defender and its successors on the other, to provide for a change of ownership of the land comprising the TLR, but only in the event that the tram works had not commenced by 1 January 2020. Accordingly, no obligation to reconvey the land comprising the TLR could have arisen before 1 January 2020, and even then only if the tram works had not been commenced. The obligation to reconvey arises as a direct result of a term of the Agreement, contemplated by the parties at the time the Agreement was concluded".

2) In Cond 18, by deleting the second sentence, and substituting

> "The terms of cl. 5.4 would only be reciprocal to cl. 5.2 if the conveyance of the TLR by Alpha had taken place at the behest of the defender, and at no cost. For its own reasons, the defender elected to use the GVD and compulsory purchase process to secure acquisition of the TLR. That process did not elide the terms of cl. 5.4, which stands apart from cl 5.2 and depends on the tram works not having been commenced by the given date. The GVD process incorporates a statutory conveyance. Properly understood, cl. 5.4 requires the reversal of that conveyance by means of a re-conveyance to the successor to Forth within 14 days, in the event that tram works had not commenced by 1 January 2020. Until then, no right to a reconveyance existed."

The scope of the debate narrowed to the contract interpretation issue

[19] Mr Burnet moved for consideration of the opposed parts of the Minute of Amendment to be held over until the end of the debate. In practical terms, this meant that

the pursuer would confine his reply to the contract interpretation issue. This was a discrete issue and this course would mean that the two days of debate would not be wholly lost. Mr Campbell confirmed he was in a position to continue the debate and to reply on that issue. Accordingly, the debate, and hence this Opinion is, focused on the contract interpretation issue. The issue of title to sue was held over for consideration at a continuation of the debate.

Discussion

The relevance of the Agreement as a section 75 Agreement

[20] In my view it is highly material that the Agreement is one entered into in terms of section 75 of the 1997 Act. This is stated in terms in recital (iii) (see para [13(2)], above). Recitals (iv) and (v) record that the counterparty, Forth, were the heritable proprietors of the Development Site and in respect of which they made an application for outline planning permission. Further, and significantly, recital (vi) recorded that the Council had

> "**resolved to grant planning permission** …for the mixed use development including residential, commercial, retail and public amenity development, public open space provision and associated access, service and landscaping arrangement … **subject**, *inter* alia, **to the conclusion of an agreement under Section 75 of the 1997 Act**". (Emphasis added.)

[21] Several features flow from the character of the Agreement as a section 75 Agreement. First, the Agreement was entered into to achieve a purpose which is extrinsic to it, namely, to facilitate the development of the Site and to secure the planning gains in relation to it. The Council's objective in entering into it was to secure planning gains from the counterparty, Forth. This is not so much a "commercial" purpose, as one pursued by the Council in its capacity as the planning authority: see paragraph 56 of *Morris Homes Limited and Anr* v *Cheshire West and Chester Council* [2020] EWCA Civ 1516, *per* Singh LJ. Secondly,

because the Agreement has been registered, obligations in the Agreement will be enforceable as a matter of law (by virtue of section 75(3), in its original form and which was in force at the time of the Agreement) against any person deriving title to the land from Forth. This is to be contrasted with the position that contractual obligations impose personal obligations which are, in the absence of assignation or the application of the doctrine of *jus quaesitum tertio*, generally binding only on the contracting parties. The enforceability against successors arises from section 75(3) and is reinforced by the provision in the Agreement itself for registration "for preservation **and execution**" (cl 15.1). (Emphasis added.) Accordingly, the Agreement falls to be construed consistently with these planning purposes and in the context that the grant of outline planning permission was predicated on Forth entering into the Agreement.

The structure and subject matter of the Agreement

[22] Turning to the structure of the Agreement, it is comprised of a section containing the definitions used in the Agreement (in section 1), a section dealing with dispute resolution (in section 13.1, by arbitration, but which neither party has invoked for the purposes of the subject-matter of this action); and there are the usual clauses about the giving of notices under the Agreement, registration, jurisdiction, and the expenses of the Agreement (clauses 14, 15, 17 and 18). Turning to the substance of the Agreement, each of clauses 2 to 11 is framed as imposing certain obligations on Forth to provide the planning gain specified ("the planning gain clauses"). By language and content, these clauses created planning gains which formed part of the Council's consideration in granting the outline planning permission. The particular planning gains are affordable housing (cl 2), infrastructure contributions for schools (cl 3), infrastructure works for what is described as

"Easter & Western Corridors" as well as the realignment of Lower Granton Road (cl 4), the TLR (cl 5), a cycle route (cl 6), improvements to Granton Square (cl 7), the restriction of the grant of any new lease for an industrial unit falling vacant on the Granton Industrial Estate, in contemplation that it was also to be developed for uses compatible with the Development (cl 8), a Travel Plan (cl 9), a Tram depot (cl 10) and a breakwater (cl 11). Having regard to the language used, it must be noted these impose obligations **on** Forth.

The terms of the discharge

[23] The terms of the discharge (in cl 12) reinforce the character of the Agreement as being concerned principally to impose obligations on Forth. It is notable that the terms of the discharge do not contemplate the grant of bilateral discharges (ie by each party to the other). The discharge only provides for discharge **by the Council**, which reinforces the character of the Agreement as an agreement under section 75 of the 1997 Act imposing obligation **on Forth** for the **benefit of the Council**. It reads:

> "**The Council shall grant a discharge** of these presents as soon as reasonably practicable upon the **completion of the obligations** in terms of the Consent (and any variations therefrom from time to time)".

The "Consent" is defined as the planning permission "to be issued by the Council in respect of the Development Site **pursuant to the completion of this Agreement**…" (Emphasis added.) In other words, the Council was the 'creditor' in the obligation and the only party in whose gift it was to grant a discharge. Conversely, the primary obligations brought into play by clauses 2 to 11 are owed **by** Forth. While individual clauses might also impose ancillary or conditional obligations on the Council (eg to act reasonably in agreeing certain matters (cl 7.2) or to repay the School Site costs if the Council did not take title to the Primary School Site (cl 3.9)), overwhelmingly, the Agreement imposes obligation on Forth.

Clause 5

[24] I turn to consider clause 5, the full text of which is set out in para [12], above.

The Council's submissions

[25] Mr Burnet's submission was, essentially, that clause 5.2 and 5.4 should be construed together. He identified several features as demonstrating that these clauses were linked:

1) the fact that the provision in both clause 5.2 and 5.4 was for the dealing to be "at no cost" suggested that they mirrored each other;

2) that the use of the word "re-convey" in clause 5.4, necessarily pointed back to an initial conveyance under clause 5.2;

3) allied to this last point was his submission that the words "under this Agreement" should be read into clause 5.4 (at the end of the passage in parentheses); and

4) the use of the phrase in parentheses ("to the extent **by that date conveyed** by Forth to the Council" (emphasis added)) further reinforced the fact that clause 5.4 could come into play only if there had been a conveyance pursuant to clause 5.2.

In his submission, clause 5.2 was an option exercisable at the instance of the Council for a time-limited period. In support of his submission that the Agreement should be "construed as a whole", he referred to clauses 10.3 and 10.4 which were, in his submission, similarly interlinked.

The pursuer's submissions

[26] Mr Campbell submitted that the Agreement fell to be construed as a whole. Although that amounted to no more than taking note of some of the headings of what I have referred to as the planning gain clauses (clauses 2 to 11). As his submission developed, Mr Campbell's primary submission was that clause 5.4 was a standalone provision. Indeed, in the course of his reply on the second day of the debate, Mr Campbell abandoned his contention that clause 5.4 created rights *in rem*. His final position (which Mr Burnet fairly described as a 180-degree about-turn), was that clause 5.4 only created personal rights. Mr Campbell went so far as to suggest that clause 5.4 was inapposite in a section 75 agreement, because it wasn't concerned with the regulation or use of land, and was improperly contained within the Agreement (which he attributed to the inept drafting).

[27] In relation to the word "convey" in clause 5.2, in his submission this should be construed broadly. Further, in his submission it mattered not how the Council acquired title to the TLR and which, on his analysis, brought it within the terms of clause 5.4. It was a matter for the Council that it had not acquired the TLR under clause 5.2 but had chosen to proceed by way of the GVD, and thereby to incur an obligation to pay compensation. (This line of argument echoes the Minute of Amendment, set out in para [18(2)], above.)

[28] In relation to the reference to "Forth" in clause 5.4, but not to "its successors", this was, he submitted, also inept drafting. There were other instances when the Agreement extended expressly to Forth and its successors. Those words should be read into clause 5.4. In support of this reading, he argued that the long duration contemplated in the Agreement, which was signed in 2003 and had a long-stop date for certain matters of 1 January 2020, meant that parties must have contemplated changes of parties to the Agreement and, on that basis, a reference to "Forth" in clause 5.4 should be read as "Forth and its successors in title".

(This line of argument, which is reflected in the Minute of Amendment, set out in para [18(1)], above, is pertinent to the title to sue point and which is outwith the scope of this Opinion.)

Discussion of clause 5

[29] In my view, Mr Burnet is correct to characterise clause 5.2 as an option. It is patently conceived in favour of the Council: "[i]n the event the **Council** notifies…" (Emphasis added). If the other criteria were satisfied (notice prior to 1 January 2020 and otherwise given within 14 days of the Royal Assent for a Parliamentary Order for construction of the tram line), then Forth came under an obligation to convey (it "**shall** convey") the *solum* of the TLR at "no cost to the Council". Clause 5.2 is also a classic 'if-then' conditional sentence: only if the hypothesis (or *protasis*) in the first part occurs (the Council gives the requisite notice within the stipulated time-frame), does the consequence in the second part of the sentence (the *apodosis*) result. The second part of clause 5.2 is that Forth comes under an obligation to convey the TLR land acquired "at no cost".

[30] As is clear from clause 5.2, the Council had the option to secure the TLR at no cost, but only if it was "required" to construct the tram line. What was to happen if the Council exercised the option in clause 5.2, but then failed to commence the TLR within the anticipated timeframe? In my view, the Agreement anticipated this scenario and provided for it in clause 5.4. This further demonstrates that clauses 5.2 and 5.4 are interlinked.

[31] Like clause 5.2, clause 5.4 is also in the form of a conditional sentence. Unlike clause 5.2, it is not an option at the instance of the Council; rather, it contains a contingent obligation which was triggered in certain circumstances. These circumstances were if the Council had not commenced the tram line by 1 January 2020, then it came under an

obligation to re-convey "at no cost". The words in parentheses, "to the extent by that date conveyed by Forth to the Council", define the scope of the contingent obligation in clause 5.4. Leaving aside for the moment the import of "convey", in terms of the phrase "…to the extent that" in clause 5.4, the Council was obliged to re-convey only what it had earlier acquired, but no more than that. In this respect, clauses 5.2 and 5.4 are functionally interrelated.

[32] The same drafting technique used in clauses 5.2 and 5.4 is deployed in clauses 10.3 and 10.4, of providing a mechanism (in cl 10.4 ("In the event…the tram depot site "shall be **re-conveyed** by the Council….at no cost")) to reverse a transfer of land (for the tram depot, made under cl 10.3 ("Forth… shall **convey** … to the Council at no cost…")) if a certain state of affairs (commencement of the construction of the tram depot) had not been achieved by a longstop date. Likewise, clause 3.9 provides for certain sums to be "**repaid**" by the Council (described as the "School Site Cost" in cl 3.5 and which was imposed an obligation "**to pay**" to the Council under cl 3.6), in the event that the purpose for which it was paid (the Council taking title to the "Primary School Site") was not brought to fruition. In each case, the language used ("to **re**pay" or to "**re**-convey") necessarily requires consideration of the earlier benefit conferred on the Council which is being reversed (because the purpose for which the benefit was conferred has not been commenced within the stipulated time-frame). On this analysis, clauses 10.3 and 10.4 are inextricably linked. This militates against a similarly structured obligation to reverse a state of affairs, to re-convey the TLR in clause 5.4, being free-standing from the benefit-conferring clause, clause 5.2.

[33] Clauses 5.2 and 5.4 also display linguistic congruities. Each clause commences with the same provisional phrasing, "[i]n the event that …", and each contingency is tied to the same longstop date (of 1 January 2020). The use of the word "convey (in clause 5.2) and

"**re-**conveyed" (in clause 5.4) further reinforces the analysis that clause 5.4 is dependent on the exercise of the option embodied in clause 5.2. There can be no "re-conveyance" if there has not been an original conveyance. Mr Campbell did not address the usage or implication of "**re**-conveyance" in clause 5.4 and it is no answer simply to contend that "convey" should be widely construed.

[34] For these reasons, in my view, clauses 5.4 and 5.2 fall to be read together and to be construed consistently with the purposes for which the Agreement was entered into. Accordingly, and contrary to what the pursuer argues, properly construed, clause 5.4 applies only in the event that the conveyance in favour of the Council was achieved under clause 5.2. This is clear from the language used and, in my view, no additional words require to be read into clause 5.4 (namely the words "under this Agreement", as suggested by Mr Burnet). That clause 5.4 is dependent on the exercise of the option in clause 5.2 flows from the drafter's use of the word "convey", which connotes a *voluntary* disposition of the land by the owner for the time-being (Forth) to the disponee (here, the Council). That word is simply not habile to include a *compulsory* acquisition by the acquiring authority, and in which the land is "vested". Had clause 5.4 been intended to apply regardless of how the Council came to hold heritable title to the TLR, different and, in my view clear, language would have been required.

[35] In this context, it is important to note that there is nothing in clause 5 to preclude the Council from using statutory powers of compulsory purchase, if it chose to do so. Indeed, at the end of clause 5.2 it is noted in terms that the Council might require to use compulsory purchase powers to secure renunciation of the tenant's interest under the long lease of the TLR. This is consonant with the very nature of compulsory powers, in which private property rights yield to the exercise of statutory powers. Accordingly, having regard to the

framing of clause 5.2 as an option and the explicit recognition of the availability of the Council's powers of compulsory purchase, it is clear that the parties understood, or it may reasonably be inferred to have been within their contemplation as part of the relevant context, that the Council could choose not to exercise the option in clause 5.2, but to proceed by using a general vesting declaration (as it in fact did).

[36] The use of compulsory purchase powers would, of course, require payment of statutory compensation to those whose interests have been abrogated. On the other hand, if the TLR land so acquired eventually proved surplus to requirement, the Council would be obliged in terms of the Crichel Down Rules ("the Rules") first to offer the land back to Forth at its market value. (This is for the reasons recorded in para 16 of the Joint Minute, quoted at para [5], above.) In addition to the fairness afforded to the original owner to re-acquire the compulsorily acquired land which is now surplus (and which was the genesis of the Rules), there is a degree of financial parity for the acquiring and now-disposing public authority. The payment made by way of compensation would (in broad terms) be financially recouped by disposal under the Rules.

[37] The effect of the pursuer's interpretation of clause 5.4 would be three-fold. First, it would result in a windfall benefit to Forth, in that it would obtain at no cost the return of the TLR even though it has already been paid full compensation for it as a consequence of the GVD. (Mr Campbell acknowledged the force of this point, and suggested that a remedy for the Council may lie in unjustified enrichment.) Secondly, and conversely, the Council would in effect have paid something for nothing, in the form of the compensation it has already paid to Forth to acquire the TLR but (if the pursuer's interpretation of clause 5.4 were correct) followed by return of the TLR at no cost to Forth (or, if the pursuer is correct, to it). This would defeat the financial parity which is a feature of the Rules and which

parties also contracted for in the provisions that any transfer under clauses 5.2 and 5.4 were both "at no cost". The third effect of the pursuer's interpretation of clause 5.4 is the most problematic. If the pursuer's interpretation were correct, then this could be seen as constituting an attempt by the Council to contract out of the Rules which (in terms of section 30 of the Edinburgh Tram (Line One) Act 2006 (asp 7)) they are obliged to apply. At the very least, this would cast doubt on the *vires* of the Council to enter into contractual provision purporting to do so. It is unlikely that a responsible public authority would assume a contractual obligation which could *prima facie* put it in breach of an express and mandatory statutory obligation. This militates against the interpretation the pursuer contends for. It is for these reasons that I say clear language would be required in clause 5.4 to impose an obligation on the Council to re-convey the TLR at no cost, where it acquired the TLR otherwise than under clause 5.2 but decided to do so in the exercise of compulsory powers (as, indeed was the case). The results of the pursuer's interpretation, just described, are also, in my view, inimical to the purposes of an agreement entered into by a planning authority (discussed above, at para [21]), as the Agreement was.

[38] I turn to Mr Campbell's submission that, because clause 5.4 did not regulate the use of land but imposed an obligation on the Council, it had no place in a section 75 agreement. That is, if I may say so, to do a disservice to the drafters of, and signatories to, the Agreement. There is no such tension between clause 5.4 and its place within a section 75 agreement, if clause 5.4 is understood as being a contingent obligation, the effect of which, if engaged, was to reverse a conveyance made to the Council for a planning gain which has not been realised. (It is, as it were, a form of contractual *causa data causa non secuta*). While clause 5.4 may impose an obligation *on* the Council (and whereas section 75 agreements typically create obligations enforceable *by* a planning authority), clause 5.4 is ancillary to

clause 5.2 (which gave the Council an option to secure a particular planning gain) because, as explained at para [30], it provides for restoration of the *status quo ante* if the planning purpose for which the Council had acquired the TLR under clause 5.2 was not commenced within the stipulated timeframe. On that analysis, the obligation in clause 5.4 is conditional on and accessory to the exercise by the Council of the option in its favour in clause 5.2, and is unobjectionable in a section 75 agreement.

[39] It follows that I do not accept Mr Campbell's submission that clause 5.4 is free-standing or that it is inapt for a section 75 agreement. It also follows that I reject any contention that clause 5.4 was (in some *de facto* sense) severable from the Agreement (because not appropriate to it), which was the logical (if extreme) consequence of Mr Campbell's profoundly a-contextual analysis.

[40] For completeness, I should record that I also reject the pursuer's assertion that the words "and their successors" fell to be inserted after the reference to "Forth" in clause 5.4. Contrary to Mr Campbell's submission that the omission of these words was attributable to inept drafting, their omission may in fact reflect the fact that terms of clause 5.4 was a counterpart to clause 5.2. In other words, if there is no right under clause 5.4 capable of transmission to a third party successor to Forth, then it would be otiose to provide otherwise.

[41] For these reasons, I conclude that the pursuer's case, insofar as predicated on clause 5.4 of the Agreement is irrelevant.

The continued debate

[42] At the conclusion of the second day of the debate, it was agreed that the Court should determine the contractual interpretation issue, which I have done in this Opinion. At

that time, I allowed the remaining parts of the Minute of Amendment to be received (seeking to insert new articles 8A and 17A of condescendence) and allowed the Council seven days to lodge answers. The debate was continued to 4 March 2021, for consideration of the title to sue issue (on either the original pleadings or the amended pleadings, if amendment is allowed). In the event that parties wish the continued debate to proceed to enable the title to sue point to be resolved, I shall refrain meantime from issuing an interlocutor sustaining the defender's second or third pleas.

The Council's registration point

[43] I have averted to the Council's registration point (see para [17], above). Lest the matter go further, it is appropriate that I express my view on that argument.

[44] The Council argued that the "rights and obligations in terms of Clause 5 of the Agreement were extinguished by or at the time of the GVD". For its part, and perhaps in response to this line of argument, the pursuer had averred, and initially argued, that clause 5.4 of the Agreement was a "planning obligation" within the scope of section 75(4), as amended, which thereby created rights *in rem*, but which were not real burdens. (It was acknowledged that real burdens would have been extinguished by the GVD, if not expressly saved in schedule 2 to it.) The pursuer faced certain difficulties in advancing this argument, which was predicated on section 75(4) as amended, because there was no equivalent provision contained in section 75 in force at the time the Agreement was entered into, and because the amendment in clause 75(4) was not retrospective: section 23(2) of the Planning etc (Scotland) Act 2006 (asp 17), a point which I understood Mr Campbell ultimately to accept.

[45] As noted above, in the course of his reply on the second day, Mr Campbell candidly abandoned any analysis of clause 5.4 being a real right, a right *in rem* or some form of "hybrid right" (as contended for in his submissions); his ultimate position was that the right in clause 5.4 was, in fact, only a personal right. Given the evolution of the pursuer's argument, the registration point fell away.

[46] Had the defender's registration point been a good point, it would have been conclusive of the outcome of the debate. In my view, however, the contention that the effect of the GVD was to extinguish "all" rights and obligations in clause 5 of the Agreement is too broad, even if it were confined to the rights in favour of Forth. (There is no need or logic in the exercise of a power of compulsory purchase to extinguishing rights *in favour* of the acquiring planning authority.) At my request, parties produced an excerpt from one of the standard texts addressing the effect of a general vesting declaration on personal rights. However, it did not shed light on the registration point.

[47] Briefly, my reasons for concluding that the Council's registration point (insofar as it applies to the kinds of rights in clause 5) is not a good one are as follows. It is trite that the power of a planning (or other public) authority to acquire land compulsorily for development (or other public) purposes would lack utility, if real rights or servitudes subsisted in respect of the land acquired. That explains the character of the rights referred to in section 194(1) of the 1997 Act (being essentially rights of way and servitudes) and susceptible to extinction unless expressly preserved in the vesting declaration itself. (The ability to preserve specified rights from extinction upon vesting is provided for in form 6 to The Compulsory Purchase of Land (Scotland) Regulations 2003 (SSI 2003 no. 446).) It respectfully seems to me that there is no need to provide for the extinction of contractual rights exercisable in respect of land compulsorily purchased or enforceable against the

owner. This is because contractual rights are personal, not *praedial*; they do not run with the land and so would not be transmissible or enforceable against the acquiring authority. The effect of the unenforceability of those contractual rights *inter se* the contracting parties would be determined by the law on frustration, not planning law or the law of compulsory purchase. An unusual feature here is that the Council was a party to the Agreement. Be that as it may, having regard to my resolution of the contractual interpretation issue, that fact, or my rejection of the Council's registration point, is of no avail to the pursuer.

Decision

[48] I issued my Opinion to parties on 19 February, a week after the first debate, to enable parties to take into account the Court's decision on the contract interpretation issue in advance of the second debate. The second debate proceeded on 4 March on the title to sue issue and a separate opinion is issued of even date with this one. In light of my decision on the contract interpretation issue, the defender's second plea in law will be sustained and the pursuer's action dismissed.