



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 30

CA59/20

OPINION (No 2) 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

Introduction

The first opinion and the proper construction of clause 5 of the Agreement

[1] This is the second opinion in this commercial action. It addresses the question of the pursuer's title to sue and which was the subject matter of the second debate.

[2] The first opinion, issued to parties on 19 February 2021 following their debate on 11 and 12 February 2021 ("the first opinion" and the "first debate", respectively), dealt with the proper construction of clause 5 of a section 75 agreement ("the Agreement") entered into in June 2003 between the defender as the planning authority ("the Council") and Forth Ports

plc (“Forth”) as the then-owner of the land forming part of a development site at Granton Harbour in Edinburgh (“the development” or “the site” as the context requires).

The background

[3] The background to the Agreement, its terms and the prior dealings with the land in question are set out more fully in the first opinion. I summarise the background below, in order to provide the essential context of the parties’ submissions on title to sue.

The grant of planning permission and the parties to the Agreement

[4] The Council is the planning authority. It was the counterparty to the Agreement entered into with Forth in June 2003. Shortly after the Agreement was entered into, the Council granted outline planning permission (“the outline planning permission”) for the Development on 23 June 2004, which included provision for a tram line along a specified tram line route (“the TLR”). As noted below, in exercise of its powers as the planning authority under section 195 of the Town and Country Planning (Scotland) Act 1997 (“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 on the merits: the pursuer’s reliance on clause 5.4 of the Agreement

[5] The pursuer asserts that it is entitled to a reconveyance of the TLR from the Council. It relied on clause 5.4 of the Agreement. The Council resists this. It asserts that the pursuer’s case is irrelevant, on a variety of bases. After the first debate, I rejected the pursuer’s construction of clause 5.4. My reasoning is set out at paras [29] to [39] of the first

opinion. In light of that decision, the defender's second plea in law (to the relevancy of the pursuer's case on the merits) falls to be upheld.

[6] For present purposes it suffices to note that I determined that clause 5.4 (which imposed an obligation on the Council to "reconvey" the TLR to Forth) applied only if there had been an initial conveyance by Forth to the Council under clause 5.2; that the effect of the GVD was to extinguish certain interests or rights in respect of the TLR; and that, in any event, the obligation in clause 5.4 was imposed on Forth alone (in contrast to other obligations the Agreement imposed on Forth "and its successors").

The dealings with the TLR

[7] 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.

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

[8] 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 either the first or the second debates whether the pursuer ever registered its title in the Land Register (and thereby obtained a real right to the TLR), and thereby acquired a real right *inter alia* to the TLR. Alpha acquired the TLR (and other land) from the pursuer on 11 June 2014. From that date, until the GVD on 6 May 2016, Alpha was the heritable proprietor of *inter alia* the TLR. It was the heritable proprietor of the TLR at the time title thereto was compulsorily acquired by the Council by virtue of the GVD. Furthermore, no 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. The pursuer's interest during that same period was as a tenant under the long lease.

[9] 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 under a long lease of the land comprised in the TLR thus taken.

Comment on the sources of title and interest not available to the pursuer

[10] In light of the foregoing, it should be noted that 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, either as heritable proprietor to the TLR (assuming its title was registered) or, if its title was never registered in the Land Register, as the disponee under a disposition with certain contractual or personal rights in respect of *inter alia* the TLR

as against the disponent. Alpha was the heritable proprietor of the TLR at the time title thereto was compulsorily acquired by the Council by virtue of the GVD. At the time of the GVD the pursuer's title to the TLR was only that of a tenant under a long lease and for which it received compensation.

[11] In relation to the Agreement, the pursuer was not a party to the Agreement. It does not rely on any *jus quaesitum tertio* derived from the Agreement in its favour. Nor has it succeeded to the rights of Forth under the Agreement by an assignation of any right in its favour by Forth.

[12] As noted at para [18] of the first opinion, on the morning of the second day of the first debate the pursuer lodged (i) a Buy Back Agreement (dated June 2014) among Alpha, the pursuer and its holding company ("the BBA"), (ii) a Minute of Variation of the BBA (dated May 2018) ("the BBA Variation") and (iii) an Assignation among Alpha, the pursuer, and its holding company (dated March and April 2018) ("the Assignation"), and which collectively I refer to as "the additional documents". In neither its amended pleadings nor in its supplementary note of argument does the pursuer identify any specific provision of the additional documents as conferring title to sue on it. While the additional documents were produced for the second debate, the pursuer's Senior Counsel, Mr Campbell did not in the course of his oral submissions at the second debate identify or found on any specific provision of any of the additional documents. The defender's Senior Counsel, Mr Burnet, noted that the Assignation related solely to the redirection of the sums paid by the Council as compensation arising from its compulsory acquisition of the TLR. Mr Campbell did not dispute that as a proper characterisation of the terms or import of the Assignation.

The pursuer's minute of amendment

[13] As explained at para [41] of the first opinion, the pursuer sought leave to amend on the second morning of the first debate. The pursuer's pleadings were allowed to be amended in certain respects, but insofar as the pursuer's minute of amendment sought to alter its averments of title to sue, it was simply allowed to be received, with the defender being given seven days to lodge answers. The question of the pursuer's title to sue was held over to a second debate, on 4 March 2021 ("the second debate").

[14] The remaining parts of the pursuer's minute of amendment, insofar as not given effect to at the first debate, were as follows (being the words in italics):

- 1) In its averment in article 3 anent being successor to Forth under the Agreement, it changed the definite to the indefinite article:

"The Agreement is produced. The pursuer is a successor in title to Forth in respect of the Tram Line Route, all as hereinafter described."

- 2) It added a new article 8A:

"8A. By means of a Buy Back Agreement dated 9 and 11 and registered 19 June 2014, and an Assignment dated 9 March and 6 April 2018, among Alpha, Granton Holdings Ltd and the Pursuer, those parties agreed that the Pursuer or its nominee would have the right to buy back from Alpha certain of the properties subject to the Pursuer's lease. By means of a Minute of Variation of the Buy Back Agreement dated 6 and 17 April and registered 21 May 2018, those parties agreed to bestow upon the Pursuer the right to nominate the recipient of any compensation payment received following the General Vesting Declaration. Those agreements are produced. The payments of compensation referred to in Article 3 were made to the Pursuer's nominee, namely Granton Holdings Ltd. The Assignment of 6 April 2018 identifies the plots which were subject to buy backs, but which were reduced in area owing to the effect of the GVD. The plots are first identified in the Assignment by reference to a letter of the alphabet, and then labelled by that letter 'ex GVD.' So as to show that distinction. The plot at 51 West Harbour Road has been bought back; all other plots including plots B, C and D are held under the Pursuer's long lease from Alpha and are subject to long leases in favour of third parties. The Pursuer has secured from the defender Deeds of Servitude over road ends for other plots that have been bought back because all rights of access over those sections of the road were extinguished by the GVD. Plot I has been bought back. Plot I is owned by the Pursuer's nominee Granton Holdings Limited, but under exception of the land taken by the GVD. "

3) It added a new article 17A:

“17A. The Pursuer has masterminded, controlled, financed and managed the Granton Harbour Estate development since it acquired the subjects within the Granton Harbour Estate from Forth. It has controlled and managed all development and planning, the obtaining of finance, permissions, Reserved Matters and AMC applications, Building Warrants, disposals of property and all related matters. In implement of Forth’s 2003 OPP it has acted as owner of the site. It controls all its subsidiaries. On Granton Harbour Estate there is built or is being built more than 700 housing units, one third of which are affordable. The defender’s policy requirement is for just 15% of housing to be in that category. The Agreement itself was registered so as to enable the 2003 OPP and the terms and conditions within the Agreement to be accessible, and to be enforceable if required under the guiding hand of the Pursuer. The diversification of ownerships and land tenure is irrelevant to the question of the effect of cl. 5.4, which has not been eradicated by the GVD, nor amended, varied or extinguished by consent of the parties to it, or the Pursuer itself. The defender itself has followed the Agreement in respect of the granting or refusal of Reserved Matters or matters requiring additional permissions, for example in respect of the requirements for the supply of affordable or other housing, retail premises, infrastructure, and other forms of development. Properly understood, the parties to the Agreement recognised the context for development within the Granton Harbour Estate, the substitution of the Pursuer for Forth, and the pre-eminent position of the Pursuer in that regard. Accordingly, any term of the Agreement requiring to be implemented would be implemented at the behest of the Pursuer, it being in control of the entire development process.”

[15] On the morning of the second debate, Mr Burnet noted that the pursuer had abandoned any contention that it had some form of real or heritable right. He also observed that he did not understand the pursuer’s new position and, indeed, he queried whether the pursuer’s minute of amendment cured the deficiencies in its pleadings on the question of title to sue. After sundry discussion, and essentially on the grounds of expediency (and discussion of the efficacy of the amendment would be more fully addressed in the debate), the pursuer’s pleadings were amended. The expenses of that process were reserved.

The second debate

[16] In advance of the second debate, the parties produce supplementary notes of argument. Given the discussion just noted, it was agreed that Mr Campbell would begin the debate. I set out parties submissions (oral and written) on title to sue.

The pursuer's supplementary note of argument

[17] Lest I do any injustice to his argument by summarising it, I set out the text of Mr Campbell's supplementary note of argument (omitting paragraphs dealing with procedural matters or background which is not in dispute or is otherwise noted in this opinion), and reflecting amendments to the text made in his oral submissions:

"BACKGROUND FACTS

- 5 The background facts are reiterated here, so far as relevant to the question now under review.
- 6 This Commercial Action concerns the correct construction of a clause in a s.75 agreement signed by the pursuers' predecessor Forth Ports plc (**Forth**) in 2003 (**the Agreement**) alongside an Outline grant of Planning Permission (**the 2003 OPP**) permitting and regulating part of an extensive range of housing and other built development at Granton Waterfront, Edinburgh.
- 7 To be properly understood [...] the Agreement read as a whole. Ascertainment of the pursuer's title to sue is a question of construction of the contract as a whole, not a mere incident of title.
- 8 The pursuers contend (1) that they are successors to Forth and stand in place of Forth in the Agreement, and (2) that clause 5 is a free standing suite of obligations concerning the TLR, being a small part only of the land covered by the Agreement. The obligations it creates are private law contractual obligations, not 'planning obligations' as that term is normally understood. They do not regulate development.

[...]

IMPLEMENTATION

10. Both the Agreement and the 2003 OPP have been honoured and acted upon by each of the parties in a range of ways since 2003, so as to implement development on the site or sites making up the Granton Harbour Estate. The pursuer has acted as, and been recognised in every respect by the defender as, the successor to Forth since it acquired the Granton Harbour Estate in 2014.

11. In relation to clause 5.2 of the Agreement, which *ex facie* [permits] the transfer of the Tram Line Route (TLR) to CEC at no cost to the defender, by choice that provision was not activated by the defender over a period of about 13 years. Rather, on 5 May 2016, the defender published a General Vesting Declaration to secure transfer of the TLR to itself. That transfer took the form of a statutory conveyance. That method carries with it the duty upon the acquiring authority to compensate the transferor of land for such an acquisition. Agreed compensation was in due course paid by the defender to the pursuer and its funder, known as 'Alpha'. Money paid to Alpha was paid the pursuer.
12. Clause 5.4 of the Agreement *ex facie* permits the *conditional* transfer - the 'reconveyance' -- of the TLR to the original transferor. The conditions were, first, that no obligation to 'reconvey' could arise until after 1st January 2020, which is the deadline date agreed when the Agreement was signed in 2003. The TLR appeared in the 2003 Masterplan which highlighted the forthcoming tram works. Had the works begun, the obligation would not have arisen. Secondly, the parties agreed at the same time that the reconveyance was to be at no cost to the pursuers, who stand in the agreement a successors to Forth.
13. Although the defender asserts in pleading (Ans. 18) that tram works had begun by 1 January 2020, that averment is denied. No evidence of such works has been adduced. The pursuer is clear that there have been no tram works.
14. The defender elected *ex proprio motu* to use the compulsory purchase process to acquire the TLR. It did so on the day before the Edinburgh (Tram One) Act expired. It was not required to use that process, since clause 5.2 in the Agreement provided it with a clear 'no cost' option to acquire the land. Nevertheless, it elected to do so, and accordingly came under a duty to pay compensation. The pursuer did not contest the CPO, presented as a *fait accompli*. The defender ignored its own rights in terms of the Agreement.
15. The obligation contained in cl. 5.2 remains extant and available to the contracting party's successor, i.e. the pursuer. The term of the contract has not been varied nor extinguished.
16. In the light of those facts, the pursuer asserts that properly construed, the contract bestows upon it a title to sue, otherwise 'proper standing' to bring these proceedings.

[...]

TITLE TO SUE UNDER THE AGREEMENT

18. The pursuer has a registered interest in Granton Harbour and surrounding land known as the Granton Harbour Estate, having acquired the same from Forth in 2014. The defender has registered interests in, and the use of, neighbouring land, including the TLR, and is also the Planning Authority.
19. The Agreement is dated 19 and 20 June 2003 and was registered in the Land Register of Scotland under title No MID29481 on 4 July 2003. It runs with the land. It has regulated, and continues to regulate a range of development matters including housing, affordable housing, travel, access, transport, cycle routes, urban realm improvements, schools, Granton Harbour, a proposed Marina and

Hotel, infrastructure contribution, the Tram Depot and the Edinburgh Tram Line Route (TLR). It is referred to for its full terms.

[...]

AUTHORITIES – TITLE TO SUE AND STANDING

27. A pursuer must demonstrate not merely some formal title or interest in or to the subject matter of the action, but also that it has standing; see *D & J Nicol v Dundee Harbour Trustees* 1915 SC (HL) 7 and *Axa General Insurance v Lord Advocate*, [2011] JSC 46, per Lord Hope at § 62, Lord Reed at §§170-171.
28. Taking those cases in turn, it is submitted that *D & J Nicol v Dundee Harbour Trustees* 1915 SC (HL) 7, *Ld Dunedin* at 17 in fact supports the pursuer's case. His Lordship would not 'attempt a general pronouncement as to when there is title and when there is not.' He used the word 'title' meaning a lawful entitlement to raise an action. The case is highly fact specific, and fell in favour of the would-be pursuers because they were 'members of the constituency erected by the Act of Parliament to elect Trustees and...are also persons for whose benefit the harbour is kept up...' (He said) 'I cannot doubt that they have a title to prevent an ultra vires act of the appellants. which affects the property under their care.....they have an interest in the administration of a fund to which they have contributed.' So it is obvious that the absence of a direct heritable title was in the end no barrier to a title to sue.
29. In the present case, it may easily be stated that the pursuer is a member of a class of persons for whose benefit as successors to and purchasers from Forth these arrangements have been erected. Lord Dunedin was exploring these issues at a time when perhaps actual title issues were more important than they are now. The right to sue or to intervene today may be granted, for example, to charities with an interest in the subject matter of the case (as with unit pricing for alcohol, right-to-life cases, or as may occur in environmental cases with pressure groups such as Friends of the Earth, Greenpeace, or ad hoc groups of objectors opposed to a particular development.
30. The scope and range of Lord Reed's seminal opinion in *Axa General Insurance v Lord Advocate*, [2011] JSC 46, per Lord Hope at § 62, Lord Reed at §§170-171 make it clear that a liberal and open approach to the Courts is to be encouraged.
31. *Axa General* allows that a rights-based approach is incompatible with the performance of the Courts' function of preserving the rule of law. Lord Reed was speaking in a public law context; and the oddity of the present action is that the private law contractual provision with which we are concerned is enshrined within a public law agreement, referable to planning obligations and the implement of planning permission.
32. Emphasising the purposive approach set out in *Rainy Sky*, *Arnold v Brittain* and *Wood v Capita*, the zenith of modern *Scots Law* reasoning on the proper manner of construction is to be found in Lord Drummond Young's careful reasoning in *Ashtead Properties v Granton Central*, which is of recent date.
33. It is clear and may now confidently be submitted that after perhaps centuries of Scottish EXclusivity, the tide has turned 180 degrees towards INclusivity. As Lord Hodge said in *Wood*, in the construction of contracts, textualism and

contextualism are not mutually exclusive. That approach places the pursuer firmly in the driving seat in this case.

34. The pursuer as existing leaseholder of neighbouring land is directly affected by the terms of the Agreement, as well as by the compulsory purchase of the land comprising the TLR. To repeat; the Agreement is of course registered against those parts of its title which were not subject to the GVD.
35. Forth signed the Agreement as heritable proprietor on 19 and 20 June 2003. The 2003 OPP was issued to Forth by the defender on 23 June 2003. *Inter alia* the Agreement and the 2003 OPP permit and regulate development on the entire Granton Harbour Estate, including the leasehold land.
36. Section 75(3) of the 1997 Act (as enacted) stipulated that after registration in the Land Register, obligations (contained in a s. 75 Agreement) may be enforceable against persons *deriving title to the land from whom the agreement was entered into*. It is submitted that the pursuer fell into that category when the GVD was granted. It retains rights in 'the land', though as a long lease holder, not as heritable proprietor. It is submitted that that makes no difference. There is nothing intrinsically objectionable in seeking a conveyance to the pursuer *qua* long leaseholder.
37. The '*obligations*' in this reference are the obligations within the Agreement, to the benefit of which the pursuers are entitled by virtue of their succession to Forth, unless that entitlement has been excluded *ex contractu*, which it is not. It was not excluded by the terms of the GVD, nor by any ancillary contractual provision. Notwithstanding the exclusion of the Agreement from the Burdens Clause in the GVD Registration, it is submitted that clearly the pursuer retained its contractual rights under the Agreement, since it is the direct successor to Forth, as described. Put another way, they do not fly off simply because of a conveyance to its funder. Accordingly, the obligation in clause 5.4 is operative to enable return of the land to its former owner, absent any tram works by 1 January 2020."

Pursuer's submissions at the second debate

[18] In his oral submissions, Mr Campbell made the following points or responded to questions from the Court:

- 1) No specific provision from any of the additional documents was preyed in aid of the pursuer's amended pleadings or in its submissions on its title to sue. In relation to the import of the additional documents, the arrangement whereby Alpha was owner of the land was, in essence, to give it the protection of ownership rather than to rely on a standard security *vis a vis* its debtor, the pursuer. Once development of a phase was nearing completion and ready for

release to the retail market, then Alpha would reconvey that part of the site to the pursuer;

- 2) The new article 17A was inserted to rebut the Council's "textual" analysis of clause 5.4 and the omission of reference in that clause to the "successors" to Forth. In his submission, the reality was that the Council had dealt with the pursuer "as the controlling mastermind", whom he also described as "being in the driver's seat", of the development. The Council and the pursuer had acted upon the Agreement. It was not open to the Council now to say that some part of the Agreement did not apply to the pursuer. The whole of the Agreement was transmissible to the pursuer;
- 3) The pursuer had bought the land from Forth and developed it. The corollary of the Council's position was that the Agreement ceased to be effective upon the sale of the land in 2014. That was not the case. The Agreement had never been declared to be of no force and effect by the parties. The Council appeared to be "cherry-picking" parts of the Agreement and ignoring others because the pursuer was not the heritable proprietor of the TLR; and
- 4) It remained the case that the pursuer did not rely on an assignation in its favour of any right under clause 5.4. Nor did it invoke any doctrine of *jus quaesitum tertio*.

[19] In respect of the cases, *D & J Nicol v Dundee Harbour Trs* 1915 SC (HL) 7 ("*D & J Nicol*"), Mr Campbell submitted that this was fact-dependant. In any event, that case had to be read subject to *AXA General Insurance Company Ltd v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122 ("*AXA*"). Mr Campbell referred to the final sentence of paragraph of 170 in the opinion of Lord Reed in *AXA*, which read:

“What is to be regarded as sufficient interest to justify a particular applicant’s bringing a particular application before the court, and thus conferring standing, depends therefore upon context, and in particular upon what will best serve the purposes of judicial review in that context.”

In Mr Campbell’s submission *AXA* opened the door and all that the pursuer required to show was that it had an interest. He did not accept the proposition that this articulated the test in public law cases or that a different test of title and interest applied in respect of the vindication of private rights.

[20] In summarising the pursuer’s position on title to sue, Mr Campbell identified five points:

- 1) The pursuer is the successor in title as long-lease holders from Forth as heritable proprietors;
- 2) The pursuer has title under a long lease from its funder, Alpha;
- 3) The pursuer is the “controlling mind” of all of the development;
- 4) There was nothing intrinsically objectionable to a tenant under a long lease, such as the pursuer, operating clause 5.4. The pursuer did not need to be a heritable proprietor in order to benefit from clause 5.4; and
- 5) Clause 5.4 had not been extinguished. It remained prestable after 1 January 2021.

In response to a question from the Court, that if the pursuer was relying in some general sense on being one of “the successors” to Forth under the Agreement (which is reflected in the change in article 3 to the indefinite article: see para [14(1)], above), what would the correct position be if there were competing applications, from Forth or Alpha, to secure the reconveyance of the TLR under clause 5.4? As I understood Mr Campbell’s answer, it would not be Forth, but it could be either Alpha or the pursuer, but it would depend on the

relationship as disclosed in the documents as between the funder, Alpha, and its principal, the pursuer. Once Alpha divested itself, it no longer had an interest.

The defender's note of argument quoad title to sue

[21] The Council's note of argument for the first debate addressed the pursuer's title and interest. So far as relevant to the defender's challenge to the pursuer's title to sue, the defender's note of argument was as follows:

"Title and Interest

4. A pursuer requires to establish that it has some legal relation which gives it a right which the defender has either infringed or denied and some benefit arising from asserting the right (*D&J Nicol v Dundee Harbour Trs* 1915 SC (HL) 7 (at p12)). Third parties who are not a party to a contract do not generally acquire rights or duties under it.

[...]

**On its own pleadings the Pursuer is bound to fail
Title and Interest**

8. The Agreement which the Pursuer relies upon was entered into by the Defender and Forth Ports plc ('Forth'). The Pursuer was not a party to the Agreement. The Agreement does not purport to bind the successors in title of the parties to the Agreement.
9. At the time the Agreement was entered into section 75 of the 1997 Act was in force in its original terms. It did not include the provisions referred to by the Pursuer in article 2 of Condescence. It provided that a planning authority could enforce the terms of a Section 75 Agreement against successors in title to the party entering into the agreement, if it was registered in the land register, but it did not explicitly provide that an obligation entered into by the planning authority in favour of the then owner would be transferred to their successors in title. Section 75(3) and 75(4) provided that '(3) *An agreement made under this section with any person interested in land may, if the agreement has been recorded in the appropriate Register of Sasines or, as the case may be, registered in the Land Register of Scotland, be enforceable at the instance of the planning authority against persons deriving title to the land from the person with whom the agreement was entered into. (4) No such agreement shall at any time be enforceable against a third party who has in good faith and for value acquired right (whether completed by infestment or not) to the land prior to the agreement being recorded or registered or against any person deriving title from such third party.*' The terms of the Agreement do not state that any

obligations owed by the Defender to Forth in terms of Clause 5 of the Agreement would pass to Forth's successors in title.

10. In accordance with its own pleadings the Pursuer's title as at 11 June 2014 was limited to the area covered by MID153783. The Pursuer's ownership of the whole of MID153783 was limited to, at most, the single day, 11 June 2014. From 11 June 2014 to 5 April 2016 heritable title to the tram line route was in the ownership of Alpha. As at 11 June 2014 Alpha became the owner of land including the tram line route under title number MID153786. After 11 June 2014 the Pursuer avers its interest in the tram line route was as the tenant under a long lease.
11. The Pursuer did not convey the tram line route land to the Defender. It is a matter of agreement in parties' pleadings that the Defender acquired title to the tram line route on 6 May 2016 as the result of the terms of the GVD made in exercise of its powers conferred by section 195 of the 1997 Act and the authorisation given to it by the Edinburgh Tram (Line One) Act 2006 ('the Tram Act'). It was acquired by the Defender from Alpha as a result of the GVD. Even if the terms of Clause 5.4 applied (which is denied), Clause 5.4 obliges the defender to 're-convey' the tram line route land to Forth. Even if the terms of Clause 5.4 of the Agreement passed to Forth's successors in title (which is denied) it could not sensibly be retained by a successor in title who had divested themselves of title to another third party within a day. Even if the terms of Clause 5.4 applied, they could only apply to the party in which title to the tram line route land was vested immediately prior to its transfer to the Defender. The obligation in Clause 5.4 was to 're-convey' the tram line route land. The heritable proprietor of the tram line route land from whom the Defender took title was Alpha. The Pursuer ceased to be the heritable proprietor of the tram line route on 11 June 2014. The Pursuer has no remaining interest in the Agreement in relation to the tram line route as a result of a conveyance by it of land including the tram line route to Alpha on 11 June 2014. The Pursuer has no right title or interest in raising and action seeking a conveyance of the tram line route land to it rather than Forth or Alpha."

[22] In its supplementary note of argument the Council advanced the further arguments:

"Supplementary Arguments in relation to Title and Interest to Sue

4. In addition to the submissions already made in relation to title and interest to sue the Defender makes the following points.
5. As recognised in the draft Opinion of the Court, during the course of submissions, the Pursuer's position changed significantly. It no longer argues that its right to seek the remedies that it seeks arises from having the benefit of a real right *in rem* available to be enforced by a successor in title to Forth created by the registration of the Agreement. On the contrary, it now argues that the terms of Clause 5.4 of the Agreement are inapposite in a Section 75 agreement and only created personal contractual rights. It therefore relies solely on an alleged inference that the rights under Clause 5.4 of the Agreement were intended by the contracting parties to transfer from the contracting party Forth to a successor in title to Forth and that the Pursuer is such a successor.

6. As the Lord Ordinary has observed in paragraph [21] of her draft Opinion, because the Agreement has been registered, obligations in the Agreement will be enforceable as a matter of law (by virtue of section 75(3)) by the planning authority against any person deriving title to the land from Forth. That 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. In the current case the Pursuer now relies on such contractual obligations which impose personal obligations in a situation where there has been no assignation of Forth's rights under the contract to the Pursuer. There is also no proper basis to infer the doctrine of *jus quaesitum tertio* comes to the aid of this Pursuer in the circumstances.
7. As previously submitted in a private law action such as the present, the pursuer requires to establish that it has some legal relation which gives it a right which the defender has either infringed or denied and some benefit arising from asserting the right (*D&J Nicol v Dundee Harbour Trs* 1915 SC (HL) 7 (at p12-13)). The public law test for engagement of the supervisory jurisdiction of the court set down in *AXA General Insurance Company Ltd v The Lord Advocate*¹ does not apply in a situation where the pursuer is seeking to enforce a personal contractual right.
8. While similar considerations to those in *AXA* were considered sufficient to base a competent private declaratory action in the *Hill of Rubislaw (Q Seven) Limited v Rubislaw Quarry Aberdeen Limited*² case previously referred to. That case can be distinguished from the current situation. In the *Hill of Rubislaw* case the pursuer was seeking declarators in relation to the meaning and extent of restrictions on the use of land and whether or not they amounted to real burdens. At paragraph [1] of the Opinion of the Court it is noted that the contract included a provision that the benefit of the terms of the contract would '*transmit to the respective successors of the property interests held by the parties to the agreement*'. It would therefore benefit and bind whoever the relevant landowners were. The pursuer had a concluded contract to become a landowner and the issue was really only one of timing - whether the petitioner's case was premature and he had to complete title before raising it and seeking to clarify whether there would be a real burden on his property. The decision in relation to title and interest turned predominantly on the fact that it was a declaratory action. At paragraph [30] Lord Malcom observed that '*... in general, a third party cannot enforce or sue under a contract. In most cases a summons is aimed at such a remedy, but the purpose of a declaratory action is different. The present pursuers are not attempting to enforce any provision in the contract. They are not vindicating a remedy thereunder... The pursuers are simply asking the court to determine and declare the proper meaning and effect of the agreement.*' The current case is the opposite. The pursuer is seeking to enforce a provision of a contract to which it is not a party. It is seeking a declarator that the contract to which it is not a party contains an obligation

¹ 2012 SC (UKSC) 122 per Lord Hope at paragraphs 62-63 and Lord Reed at paragraphs 171-172

² [2013] CSOH 131 at paragraph 35

requiring action in its favour and seeking a remedy of transfer of heritable property to it and it alone.

9. In the current situation the *dicta* in *D&J Nicol v Dundee Harbour Trs* is still relevant in relation to establishing title and interest to sue in private law actions (for example *Anderson v Wilson* 2019 SC 271 (at para 33)). There is no relevant legal relationship between the parties.
10. The Agreement which the Pursuer relies upon was entered into by the Defender and Forth Ports plc ('Forth'). The Pursuer was not a party to the Agreement. The Agreement does not purport to transfer the benefit of obligations under the Agreement to the successors in title to Forth. The terms of the Agreement do not state that any obligations owed by the Defender to Forth in terms of Clause 5.4 of the Agreement would pass to Forth's successors in title. By contrast, elsewhere in the Agreement specific consideration is given to rights that will be transferable to successors in title to Forth.
11. In any event the Pursuer on its own averments is not the relevant successor in title to Forth. It has amended its averments in article 3 of *Condescence* to clarify that it is 'a' rather than 'the' successor in title to Forth. In article 5 of *Condescence* it has amended its averments to in a manner that suggests it now relies on its current leasehold title rather than its former heritable title to base its title and interest to sue. In its amended version of article *Condescence* 18 the Pursuer avers that 'properly understood clause 5.4 requires the reversal of [the transfer of the TLR by Alpha to the Defender by the GVD] by means of a re-conveyance to the successor to Forth.' That demonstrates its position is confused and misconceived. 'A' successor in title who (even if they have taken registered title and obtained a real right for a period of time (which in this case has not been demonstrated by the Pursuer)) but has then transferred title to a new owner is not 'the' successor in title who would be entitled to any obligations owed to the successors under the contract. After 11 June 2014 the Pursuer avers its interest in the tram line route was as the tenant under a long lease that does not give it sufficient title to sue under the contract even on its own interpretation of the right of successors to the benefit of the contract. On its own averments 'the' successor in title to Forth is Alpha. The Pursuer has no right title or interest in raising and action seeking a conveyance of the tram line route land to it rather than Forth or Alpha.

Provisional Arguments in relation to the Pursuer's proposed amendments

12. Even if the Pursuer is permitted to amend its pleadings as proposed in its Minute of Amendment, it will not have established any proper title and interest to sue under the Agreement. The Pursuer fails to explain on what proper basis it contends that the arrangements referred to in the agreements it seeks to introduce into article 8A of *Condescence* give it a right to enforce any terms of the Agreement against the Defender. The agreements referred to do not assign any interest Alpha may have inherited from Forth in the Agreement to the Pursuer, let alone any title to sue under it. The Pursuer avers that the Buy Back Agreement gives the Pursuer a right to buy back from Alpha certain properties. That is a private contractual agreement between Alpha and the Pursuer. It has

no effect on the rights and obligations under the Agreement. It cannot give the Pursuer a title to sue.

13. The 2018 Assignment does not assign any interest or title to sue Alpha has under the Agreement to the Pursuer. On the contrary the 2018 Assignment assigns Alpha's rights to compensation under the GVD to the Pursuer. That is consistent with Alpha and the Pursuer recognizing that the Pursuer would be unable to exercise any buy-back option in relation to the GVD Land after the land had vested in the Defender. It suggests that *in lieu* of the buy-back option in relation to the GVD Land, Alpha agreed to allow the Pursuer to claim the compensation from the compulsory purchase. That indicates that the Pursuer sought some form of recompense from Alpha or Alpha's inability to be able to perform the contract between it and the Pursuer. The Pursuer accepts that the Defender paid the full amount of compensation as assessed by the District Valuer to the Pursuer for the acquisition of both the Pursuer's interest as tenant and Alpha's interest as heritable proprietor in terms of the Tram Act. That calls into doubt whether, even on the Pursuer's interpretation of the contract Alpha would be obliged to allow the Pursuer to buy-back the GVD Land if it was returned to Alpha as a result of the Defender's obligations under Clause 5.4 and certainly does not give the Pursuer the right to rely on the Agreement to seek a court order to transfer the land directly to it. Any remedy the Pursuer might have should therefore lie between it and Alpha as that is the party with which it has a contractual relationship.
14. The averments that the Pursuer proposes to introduce into a new article 17A of Condescence are largely irrelevant and, in any event do not establish that the Pursuer has title and interest to sue. At best, the Pursuer confuses the concept of interest in achieving an outcome with the concept of having a legal title to sue under a contract to which it is not a party. The assertions that it has '*acted as owner of the site*' and that the '*diversification of ownerships and land tenure is irrelevant to the question of the effect of Clause 5.4*' are of no assistance to the Pursuer. The Court is concerned with the legal rights flowing from the contract and who is entitled to enforce them.
15. Further, the averments that '*the parties to the Agreement recognized the context of the development within the Granton Harbour Estate, the substitution of the Pursuer for Forth and the pre-eminent position of the Pursuer in that regard*' are unspecified and unjustified assertions for which no basis is offered. In any event, on its own averments the Pursuer's involvement in ownership or lease of any part of the development site commenced in 2014 some 11 years after the original parties entered into the Agreement. They do not assist or alter any interpretation of the actual words used in the Agreement in relation to the parties' intentions as to who would benefit from its terms."

The Council's oral submissions

[23] In light of the Court's decision in the first opinion, Mr Burnet moved for the

Council's second plea in law to be upheld. The second debate was confined to the pursuer's

title to sue and he moved the Court to sustain the Council's first plea in law that the pursuer had no title to sue.

[24] He noted that the pursuer now appeared to rely on clause 5 of the Agreement as creating a personal right in its favour and that it reiterated its reliance on clause 5.4 as a "successor" to Forth, notwithstanding the terms of clause 5.4. It remained the case that the pursuer required to establish a proper basis in order to assert that it has rights which had fallen to Forth under the Agreement. However, the pursuer had not established that it had title to sue under the Agreement, a document to which it was not a party. It appeared that the pursuer now relied on an interest as a lease holder or on some *de facto* controlling interest. None of these demonstrated the requisite title and interest.

[25] In respect of the pursuer's reading of *AXA*, as setting down a test for title to sue in private law, he invited the Court to reject that reading. As was clear from paras [167] to [170] of *AXA*, this was all directed to the test for standing in public law and it was inapposite in a private law context.

[26] In respect of the five factors Mr Campbell invoked at the end of his submissions, the pursuer's interest as the tenant under a long lease was not the relevant interest as "successor" to Forth and it did not thereby inherit any of the rights Forth enjoyed as owner. The relevant interest of the pursuer at the time of the GVD was as a tenant. The effect of the GVD was to extinguish the pursuer's rights to the TLR as tenant under a long lease and for which it was paid compensation. The interest as tenant under a long lease does not revive, even if the TLR fell to be re-conveyed by the Council to the owner from whom the TLR had been compulsorily acquired (ie Alpha).

[27] To characterise the pursuer as being "the controlling mind" or having *de facto* "control" of the site was of no relevance to the Agreement. The pursuer required to bring

itself into some legal relationship under the Agreement. It had failed to do so. Having regard to the pursuer's substitution of the indefinite article, so that it was no more than "a" successor to Forth, even if that were correct, the pursuer had to show that it was successor *as owner* to the TLR land. This was because the GVD had effected a transfer from Alpha to the Council and therefore any reconveyance in reversal of that, under clause 5.4 of the Agreement, had to be back to Alpha. It remained the case that there was simply no explanation of how the pursuer was a successor to one of the contracting parties (ie Forth) under the Agreement.

[28] In testing the question of title in a private law context, Mr Burnet turned to *Eagle Lodge Limited v Keir and Cawder Estates Limited* 1964 SC 30 ("*Eagle Lodge*"). In *Eagle Lodge* the pursuer was the tenant of heritable property. The feu disposition granted by the feudal superior to the tenant's landlord, as owner of the *dominium utile*, contained a restriction on building without the superior's consent. The tenant raised an action against the feudal superior for declarator that the tenant was entitled to construct a building without the superior's consent. The First Division of the Inner House upheld the superior's plea that the tenant had no title to sue. Under references to observations to that effect by Lord President Clyde (at pages 36, 37 to 38), Lord Sorn (at pages 42, 43, 44 to 45) and Lord Guthrie (at 46 and 47), Mr Burnet submitted that the facts in that case were analogous to the facts in the instant case. By a parity of reasoning, if by virtue of being the tenant under a long lease of the TLR the pursuer retained some residual right, it would require to ask Alpha as owner (and analogous to the tenant's landlord in *Eagle Lodge*) to sue. If there was any failure, the pursuer's remedy was against Alpha, not the Council. It remained the case that the only way the pursuer could enjoy rights under clause 5.4 would have been by an assignation in

its favour (assuming that clause 5.4 created the kind of right that the pursuer seeks to enforce).

[29] Looking at clause 2.1 of the Assignment, this simply involved a re-allocation of the monies paid as compensation following the GVD. It had no effect on the Agreement. In any event, Alpha supplanted the pursuer as successor to Forth as owner of the TLR. There was nothing in the additional documentation to support the contention that somehow the pursuer could step into Alpha's shoes, assuming that it had become a successor to Forth under clause 5.4. The Council's first plea, of no title to sue, should be upheld.

Discussion

[30] I have no hesitation in preferring the submissions of the Council and I will uphold its first plea in law, that the pursuer has no title to sue, for the following reasons. I consider first the pursuer's reliance on *AXA* before turning to address the factors relied on by the pursuer.

The test for title to sue apposite to an ordinary action to enforce a private law right

The pursuer's reliance on AXA

[31] Mr Campbell referred only to para [170] in *AXA*, for the observations that standing should not be rights-based and that what is "sufficient interest" will depend on context. He sought to rely on these observations to justify the pursuer's action to enforce clause 5.4 of the Agreement. With respect to Mr Campbell, this is a misreading of this passage and one that ignores its context and what the Supreme Court in *AXA* actually decided. A close reader of para [170] would note the references to "judicial review" and would understand that Lord Reed was discussing standing in that context, ie in the sphere of public law

applications to the Court's supervisory jurisdiction. This is clear beyond peradventure if para [170] is placed in the context of Lord Reed's fuller discussion in *AXA*.

[32] Lord Reed began his discussion of the issues in *AXA* from para [159] (under the rubric "Discussion"), and did do by *contrasting* public law applications to the supervisory jurisdiction (that is, by judicial review) with ordinary actions:

"Putting it broadly, in an **ordinary** action in **private law** the pursuer is seeking to **vindicate his rights** against the defender. The right on which the action is founded constitutes his title to sue." (Emphasis added.)

After tracing the emergence and development in Scots law and procedure of public law applications by judicial review, and describing the nature and implications of the difference between private and public law applications (from paragraphs 160 to 165), Lord Reed returned to the question of title to sue in private law cases. After quoting Lord Dunedin's *dictum* in *D & J Nicol* (at paragraph 165), Lord Reed observed (at paragraph 166 and at paragraph 169, respectively):

"... his observations are valuable as a guide to title and interest to bring an **ordinary action in private law**. For the reasons I have explained, they are **inapposite** in the context of applications to the **supervisory jurisdiction**." (Emphasis added.)

[...]

"The approach to standing which was stated by Lord Dunedin in *D & J Nicol v Dundee Harbour Trs* is appropriate to proceedings where the function of the courts is to protect **legal rights**: in that context, **only those who maintain that their legal rights** require protection have a good reason to use the procedures established in order for the courts to perform that function." (Emphasis added.)

From the words I have highlighted, it could not be clearer that in Scots law different tests for title to sue apply to ordinary actions (to vindicate a private law right) and to public law applications for judicial review, and that the narrower rights-based test for the former was inapposite for public law applications to the Court's supervisory jurisdiction. Lord Reed's

further observations in paras [169] and [170] provide the reasons for the distinction between the two tests.

[33] While *AXA* enlarged the concept of *locus standi* in public law cases, it must be stressed that it did not do so for private cases. In *AXA* the Supreme Court endorsed the long-established test for private law cases articulated in *D & J Nicol*. In my view, the pursuer's attempt to read across from *AXA* into a case involving the enforcement of a private law right (clause 5.4 under the Agreement) constitutes an impermissible inversion of *AXA*. The effect of the pursuer's approach would be wholly to obliterate the distinction between private and public law tests of title to bring actions, and which the Supreme Court in *AXA* was careful to preserve. The pursuer's approach conflates the public law test of standing as articulated in *AXA* with that in *D & J Nicol*, and it seeks to apply the *AXA* test in a case involving private rights (ie the rights under the Agreement). In my view, nothing in the reasoning of the Court in *AXA*, which was concerned to decouple questions of *locus standi* in public law cases from the constraints of a private law test (but to preserve the test in *D & J Nicol* in its application to ordinary private law actions), supports the pursuer's approach.

Has the pursuer demonstrated title and interest?

[34] As Mr Campbell suggested in his submissions, although the *dictums* in *D & J Nicol* is well-known, it may be useful to be reminded of its terms. In that case, Lord Dunedin said:

“By the law of Scotland a litigant, and in particular a pursuer, must always qualify title and interest. Though the phrase ‘title to sue’ has been a heading under which cases have been collected from at least the time of Morison's Dictionary and Brown's Synopsis, I am not aware that anyone of authority has risked a definition of what constitutes title to sue. I am not disposed to do so, but **I think it may fairly be said that for a person to have such title he must be a party** (using the word in its widest

sense) to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies.” (Emphasis added.)

In *AXA*, Lord Reed paraphrased this (at para [159]) as “the pursuer is seeking to **vindicate his rights** against the defender. The **right** on which the action is founded constitutes his **title to sue.**” (Emphasis added.) I propose to follow this approach when addressing the factors that the pursuer invokes to establish its title and interest to enforce clause 5.4 against the Council.

[35] In light of the *dicta* just noted, has the pursuer demonstrated “some legal relation which gives him some right” to enforce clause 5.4 against the Council? In my view, it wholly fails to do so. In considering this branch of the pursuer’s case I assume that clause 5.4 is capable of being construed (i) as affording a free-standing right to seek reconveyance of the TLR from the Council, notwithstanding that the Council did not exercise the option in clause 5.2 to secure a transfer of title to the TLR at no cost but had acquired title to the TLR outside the terms of the Agreement, and (ii) as available to a “successor” to Forth, notwithstanding that those words do not appear in clause 5.4. Even on those hypotheses, it remains the case that the pursuer was not a party to the Agreement and that it has never acquired by assignation from Forth any right to stand in Forth’s shoes, as the assignee of the cedent’s rights. (The want of an assignation by Forth of any right under clause 5.4 might infer that there was nothing in clause 5.4 susceptible to assignation.) Nor does the pursuer rely on any right conceived of in its favour under the Agreement (notwithstanding that it was not a party to the Agreement) by application of the doctrine of *jus quaesitum tertio*. I did not understand Mr Campbell to challenge Mr Burnet’s analysis that the Assignation was concerned with a very different matter, concerning the

re-allocation of the compensation payable as a consequence of the GVD, and was wholly unconnected with the Agreement.

[36] As noted at paras [20] and [21] of the first opinion, one of the consequences that flows from the character of the Agreement as one made under section 75 of the 1997 Act is that certain obligations were enforceable *by* the Council as planning authority against any person deriving title to the land from Forth. It is to enable a planning authority to secure compliance with the terms of the planning permission or the delivery of the particular planning gains constituted in section 75 Agreements. In my view, *that* is the reason why the Council “treated” the pursuer as bound by those parts of the Agreement which are enforceable against the party implementing the planning permission. That is of no consequence in respect of the kind of right embodied in clause 5.4, enforceable *against* the Council, and which Mr Campbell was anxious to characterise as a wholly private right (and, as such, out of place in a section 75 Agreement: see his submission at para [26], and the Court’s consideration of this argument at paras [38] to [39], of the first opinion).

[37] Mr Campbell did not identify or rely on any term of the additional documents to support the pursuer’s case on its title to sue. This may not be surprising, given that Forth were not, seemingly, a party to any of these deeds. While the additional documents might, in the most general terms, indicate that title to the TLR remained with the pursuer’s funder, Alpha, no doubt for considered commercial or possibly tax reasons, that reinforces the point that Mr Burnet made under reference to *Eagle Lodge*: even if Alpha were the “successor” to Forth under clause 5.4, the pursuer remained at one remove from having any title to enforce clause 5.4 as against the Council. Mr Campbell never engaged with the hard fact that clause 5.4 concerns a reversal of title to or *ownership* of the TLR back into the hands of the party from whom the Council acquired title. Nor did Mr Campbell explain why an

intermediate owner, such as the pursuer, would displace the right of the final owner (Alpha) from whom the Council acquired the TLR by compulsory purchase, to trigger clause 5.4 (on the hypotheses noted at para [35], above).

[38] Turning to the pursuer's averments added by its amended case, in article 8A of its Summons, these simply refer to the BBA or the BBA Variation. The averments in article 8A do no more than narrate, in bare outline, a generalised power of the pursuer to buy back "certain of the properties subject to the pursuer's lease", but these bear to be "ex GVD", meaning under exclusion of the land taken by the GVD. In any event, on the pursuer's amended case, this power appears to have been exercised only in relation to one plot. In my view, the pursuer's averments in its amended case do not instruct any relevant case of title to sue.

[39] It remains the case that the relevant interest the pursuer had at the time of GVD was as the tenant under a long lease. I accept Mr Burnet's submission that such an interest is not relevant to the circumstances contemplated in clause 5.4 for reconveyance to Forth or its successor as the heritable owner of the TLR.

[40] At its highest, the pursuer's appeal was to an inchoate or impressionistic assertion that it was 'in the driving seat' or that it was 'the controlling mind or hand' of the development, and for which the additional documents provided colour. The pursuer's conduct in implementing the planning permission, and the Council's dealings with it on that basis, are entirely consistent with the qualities of a section 75 agreement, already noted. More fundamentally, the pursuer failed to identify or provide anything to instruct the kind of "legal relation" desiderated by Lord Dunedin which gives it some right to enforce clause 5.4 of the Agreement against the Council.

Decision

[41] For this reasons, I find that the pursuer's averments of title to sue are irrelevant. I will uphold the Council's first plea of no title to sue. I will also give effect to my decision in the first opinion, and uphold the Council's second plea in law to the relevancy of the pursuer's case on the merits. I will reserve all question of expenses meantime.