OUTER HOUSE, COURT OF SESSION

[2021] CSOH 61

CA42/20

OPINION OF LORD ERICHT

In the cause

GAVIN LOUDON

Pursuer

against

STEWART MILNE GROUP LIMITED

Defenders

Pursuer: Lake QC, Watt; MBM Commercial LLP
Defenders: McBrearty QC, G Reid; Burness Paull LLP

11 June 2021

Introduction

[1] An executive in a construction company was entitled to a bonus under his contract of employment. After he was made redundant, there was disagreement between him and his employer as to whether he remained entitled to bonuses, and if so in respect of which construction projects. In order to resolve that disagreement, the executive brought an action against the employer seeking certain declarators which addressed the various matters in dispute. The case called before me for proof before answer.

Declarators sought

[2] The declarators sought were set out in the conclusions as follows:

"1. For declarator that the pursuer is entitled to a bonus in terms of clause 6(i) of his contract of employment with the defenders dated 10 November 1999 on each occasion that planning permission for residential uses is granted for any of the following sites, *viz*:

(i) Area of ground referred to as the 'Elmford Subjects' at Robroyston, Glasgow
(ii) Area of ground at the farm and lands of Mosside Farm, Coatbridge being subjects registered under Title Number LAN96560.
(iii) Area of ground at Thornton Farm, Jackton, East Kilbride
(iv) Area of ground at Southhill of Dripps Farm, Thorntonhall
(v) Area of ground at Brackenhill Farm, Hamilton
(vi) Area of ground referred to as 'Site 1' at Barrance Farm, Newton Mearns forming part of subjects registered under title number REN62574
(vii) Area of ground referred to as 'Site 2' at Barrance Farm, Newton Mearns comprising subjects registered under title number REN117539.
(viii) Area of ground comprising 18.09 acres or thereby West Hillhead, Mauchline
(ix) Area of ground comprising 18.845 acres or thereby at Burnfoot Road, Lochwinnoch
(x) Area of ground at Glentyan Estate, Locher Road, Kilbarchan
(xi) Area of ground at Auchenlodment Road, Elderslie
(xii) Area of ground at Ranfurly Estate, Shillingworth, Bridge of Weir
(xiii) Area of ground comprising 18 acres or thereby at Barochan Road, Houston
(xiv) Area of ground comprising 16 acres or thereby at Waulkers Farm, Eaglesham
(xv) Area of ground comprising part of subjects registered under title number LAN35967 at Nerston, East Kilbride
(xvi) Areas of ground at Flatfield, Symington, South Ayrshire
(xvii) Area of ground at Langfaulds, Bearsden
(xviii) Areas of ground at East Auchinloch, Lenzie
(xix) Area of ground at Newhouses Farm, Quarryhall, Strathaven

2. For declarator that, in terms of the pursuer's contract of employment with the defenders dated 10 November 1999, when a bonus becomes payable under clause 6(i) ('volume bonus)', the amount due is the proportion of such sum as represents £7,500 for every 100 residential units included in the permission and *pro rata* in respect of any part of 100 residential units as reasonably reflects the proportion of the work required to obtain that permission that had been carried out by 31 March 2020.

3. For declarator that the pursuer is entitled to a bonus in terms of clause 6(ii) of his contract of employment with the defenders dated 10 November 1999 on each occasion that the defenders or any person or entity controlled by it or which is nominated by it, purchases all or any part of the following sites, *viz*:

(i) Area of ground referred to as the 'Elmford Subjects' at Robroyston, Glasgow
(ii) Area of ground at the farm and lands of Mosside Farm, Coatbridge being subjects registered under Title Number LAN96560
(iii) Area of ground at Thornton Farm, Jackton, East Kilbride
(iv) Area of ground at Southhill of Dripps Farm, Thorntonhall
(v) Area of ground at Brackenhill Farm, Hamilton
(vi) Area of ground referred to as 'Site 1' at Barrance Farm, Newton Mearns forming part of subjects registered under title number REN62574
(vii) Area of ground referred to as 'Site 2' at Barrance Farm, Newton Mearns comprising subjects registered under title number REN117539
(viii) Area of ground comprising 18.09 acres or thereby at West Hillhead, Mauchline
(ix) Area of ground comprising 18.845 acres or thereby at Burnfoot Road, Lochwinnoch
(x) Area of ground at Glentyan Estate, Locher Road, Kilbarchan
(xi) Area of ground at Auchenlodment Road, Elderslie
(xii) Area of ground at Ranfurly Estate, Shillingwoth, Bridge of Weir
(xiii) Area of ground comprising 18 acres or thereby at Barochan Road, Houston
(xiv) Area of ground comprising 16 acres or thereby at Waulkers Farm, Eaglesham
(xv) Area of ground forming part of the subjects registered under title number LAN35967 at Nerston, East Kilbride
(xvi) Areas of ground at Flatfield, Symington, South Ayrshire
(xvii) Area of ground at Langfaulds, Bearsden
(xviii) Areas of ground at East Auchinloch, Lenzie
(xix) Area of ground at Newhouses Farm, Quarryhall, Strathaven

4. For declarator that, in terms of the pursuer's contract of employment with the defenders dated 10 November 1999, when a bonus becomes payable under clause 6(ii) ('value bonus'), the amount is the proportion of such sum as is equivalent to 13.5% of the difference between,

(a) the total cost to the defenders of acquiring the land in question including the purchase price and all normal costs of acquisition such as legal costs, planning and planning appeal costs, environmental audit and ground investigation costs, and
(b) the figure which, when used in a normal company land appraisal calculation carried out within one month after acquisition, produces a

gross margin, before overheads, but after development interest, of 15% or such other lesser margin as the Company has accepted as being appropriate to acquire the site as reasonably reflects the proportion of the work leading to the purchase that had been carried out by 31 March 2010.

5. For declarator that the pursuer is entitled to a bonus on each occasion that the defenders or any person or entity controlled by it, or which is nominated by it, receives a fee (variously referred to as a management, disposal, developer's or promoter's fee) in relation to all or any part of the following sites in respect of which the owners have concluded agreements with the defenders, viz:

   (i) Area of ground referred to as the 'Elmford Subjects' at Robroyston, Glasgow
   (ii) Area of ground at the farm and lands of Mosside Farm, Coatbridge being subjects registered under Title Number LAN96560
   (iii) Area of ground referred to as 'Site 1' at Barrance Farm, Newton Mearns forming part of subjects registered under title number REN62574
   (iv) Area of ground referred to as 'Site 2' at Barrance Farm, Newton Mearns comprising subjects registered under title number REN117539
   (v) Area of ground at Langfaulds, Bearsden
   (vi) Areas of ground at East Auchinloch, Lenzie

6. For declarator that, when a bonus becomes payable as result of a fee referred to in conclusion 5 having been received by the defenders or any person or entity controlled by it, or which is nominated by it, the amount due is the proportion of the sum equivalent to 13.5% of the fee which reasonably reflects the proportion of the work leading to the payment of the fee that had been carried out by 31 March 2020.

7. For declarator that the pursuer is entitled to a bonus payment from the defenders upon the receipt by the defenders or any person or entity which is nominated by it, of any payment, whether paid by dividend or otherwise, representing a share of profits generated in relation to the site at Clober, Milngavie owned by Stewart Milne (Glasgow) Limited.

8. For declarator that any bonus payment due to the pursuer in relation to the site at Clober, Milngavie is the proportion of such sum as is equivalent to 13.5% of any payment of a share of the profits of Stewart Milne (Glasgow) Limited in relation to that site as is paid, whether paid by dividend or otherwise, by that company to the defenders or any person or entity which is nominated by it, as reasonably reflects the proportion of the work leading to the payment that had been carried out by 31 March 2020."

The Terms of the Contract

[3] On 10 November 1999 the pursuer entered into an employment contract with the defenders which contained the following provision:

> "6. You will be eligible for a performance bonus based on the achievement of the criteria set out here or as the Company and the Employee may otherwise agree. The parties recognise that it is not possible to predict all the circumstances in which a bonus will be payable, but a performance bonus will be payable in the following 2 circumstances:
>
> (i) Volume Bonus
>
> A bonus of £7,500 will be paid for every 100 residential units on new land controlled or purchased by the Company achieving planning permission acceptable to the Company. This new land must be identified and introduced to the company by you or otherwise included by agreement within the bonus structure where an appropriate amount of your time has been devoted to the acquisition of the new land and/or obtaining the planning permission.
>
> In the event that planning permission is obtained for uses other than residential on new land introduced by you to the Company or otherwise included by agreement within the bonus structure, a bonus will be calculated on commensurate terms by reference to equivalent volumes.
>
> The bonus will be payable one month after the achievement of planning permission acceptable to the Company. This may be either outline planning permission or detailed planning permission (entirely dependent on the Company's decision). For the avoidance of doubt, this element of the bonus can only be paid out once in respect of any piece of land.
>
> (ii) Value Bonus
>
> This element of the bonus relates to you receiving a share of any amount under Market Value at which new land is purchased. This new land must be identified and introduced to the company by you or otherwise included by agreement within the bonus structure where an appropriate amount of your time has been devoted to the acquisition of the new land and/or obtaining the planning permission.
>
> Where new land is purchased by the Company at a Company land cost of no more than 95% of Market Value you will receive a bonus of 13.5% of the differential between full Market Value and the total price paid by the Company.

The bonus will be payable one month after the completion of the purchase (i.e. payment of the purchase price) of the new land.

Where payment of the Purchase Price is phased, the bonus will be paid within two years of first completion, in three equal payments, one at completion and two subsequent equal payments made annually. The exception is the purchase of major areas of land in excess of 5 years supply such as land at Robroyston, where the bonus will be paid within four years of first completion, in five equal payments, one at completion and four subsequent equal payments made annually.

Where the total price to be paid by the Company still remains undetermined at the time a bonus is to be calculated, the price shall be calculated on a notional basis, based on best evidence available at the time.

In the event of you leaving the employment of the Company with the express agreement of the Company, or you retiring from the Company in line with the Company's normal retirement policy, all bonuses which are earned at that time but which have not been paid will remain due and payable on the timescale as set out in Clause 6 (i) and (ii).

Definition:

Market Value is the price which when used in a normal Company land appraisal calculation produces a gross margin, before overheads, but after development interest, of 15% or such other lesser margin as the Company has accepted as being appropriate to acquire the site.

Company land cost is the total cost to the company of acquiring land, including all normal costs of acquisition, such as legal costs, planning and planning appeal costs, environmental audit and ground investigation costs.

From the year 2001 onwards, in any year in which a payment under Clause 14 (ii) has been made to the Employee's personal pension plan, any such bonuses shall only be paid to the extent that the aggregate bonus payments payable in such year exceed £16,600. From the year 2001 onwards, if the aggregate bonus payments fall short of £16,600, any such shortfall will be deducted from aggregate bonus payments which exceed £16,600 which are earned in any future year."

[4] The contract also included a one year restrictive covenant.

Witnesses

[5] The pursuer gave oral evidence. Oral evidence was led by the defenders from the following witnesses. Mr Allison had worked within Stewart Milne group for 30 years. He was the group finance director between 1989 and 2000, became group managing director in 2000/2001 and then chief executive officer between 2012 and his retiral in March 2019. Steve Loomes was a planner who had come into the housebuilding industry in 2000 working initially for a company within the defenders' group for 2½ years before leaving and then re-joining in 2015 as the land director for north of Scotland. He was employed as the managing director for the defenders' Strategic Land Division until April 2020 when he became a strategic land consultant for the group until July 2020. Since then he has been Strategic Land Director for another company. Stuart McGregor is a qualified chartered accountant and is currently the chief executive officer of the defenders. He joined the defenders in 2015 as group finance director, was appointed chief operating officer in August 2018 and then as chief executive officer in March 2019 upon the retirement of Mr Allison. Mr McGregor's evidence was of little assistance as he had had little direct personal involvement in the contentious issues and was largely reliant on what he had learned from others. The evidence of the pursuer's witnesses Brian Clark, Kenneth Ross, Brian Dempsey and John Irvine, and the defenders' witness Stewart Milne was agreed by joint minute.

The pursuer's employment with the defenders

[6] The pursuer qualified as a chartered surveyor in 1968. In 1968 he became Managing Director of Bovis Homes Scotland at the age of 23. In 1974 he set up his own construction company Ambion ("Ambion 1") which he sold to Alfred McAlpine PLC in 1984 and worked for them until moving to the USA in 1989. In 1990 he returned to Scotland and acquired a

substantial Scottish housebuilding company, Lovell Homes (Scotland) Ltd which he renamed as Ambion ("Ambion 2"). He sold Ambion (2) to the defenders in 1996, since when he was employed as a director of the defenders' Strategic Land Division from 2013 until he was made redundant at the end of March 2020. For some time the defenders have been trying to remove the pursuer from his employment. Mr Allison gave evidence that from 2007 his usefulness to the defenders was neutral and from around 2012-13 the defenders had been trying to find an acceptable method of him leaving the business as they had come to the conclusion that the pursuer was becoming counter-productive to the defenders. That this came as news to the pursuer, who learned of it in the course of the litigation, is not surprising as the evidence from the defenders' witnesses demonstrates that the pursuer continued to do productive work for the defenders during that period, continuing to introduce projects, make progress on obtaining planning permissions and receive bonuses from the defenders. The defenders terminated the pursuer's employment on 31 March 2020.

Interpretation of the contractual bonus scheme (Conclusions 1 and 3).

[7] The drafting of clause 6 does not provide a comprehensive, exclusive definition of the circumstances in which a bonus is payable. As is stated in the clause:

> "The parties recognise that it is not possible to predict all the circumstances in which a bonus will be payable"

Consequently, the drafting of the clause is not restrictive. The clause begins:

> "You will be eligible for a performance bonus based on the achievement of the criteria set out here or as the Company and the Employee may otherwise agree" (the "Introductory Sentence")

The reference to criteria is a reference to the following sentence (the "Bonus Sentence") which appears in both 6(i) and 6(ii):

> "This new land must be identified and introduced to the company by you or otherwise included by agreement within the bonus structure where an appropriate amount of your time has been devoted to the acquisition of the new land and/or obtaining the planning permission."

This question of whether the bonuses sought in this action fall within the contractual bonus scheme turns on the correct interpretation of the Bonus Sentence.

Submissions for the pursuer

[8] Senior counsel for the pursuer submitted that in respect of each claimed bonus there were two ways in which the land may qualify: (a) it is "identified and introduced" by the pursuer or (b) it is included in the bonus structure by agreement - either in terms of the opening sentence of clause 6 or the wording of sub-paragraphs (i) and (ii). "Identified and introduced" should be given a purposive construction to reward the pursuer for the work he had done to get planning permissions and/or for putting the defenders in the position to acquire land on advantageous terms, where he had been the one that brought about the benefit to the company because he had the day to day control of promotion of the site or was primarily responsible for securing the defender's control of a site. In any event a more narrow interpretation of "identified and introduced" would still result in an entitlement to bonus.

[9] Counsel further submitted that in any event there was an entitlement to bonuses as a result of agreement of the parties in terms of the contract to expand the remit of the bonus structure. The parties recognised that the position would develop and should not be fixed at the outset. A contract of employment is not necessarily static (*LIFFE Administration and Management* v *Pinkava* [2007] ICR 1489 at 1510. The agreement was not a variation of the contract but was an implement of it. The actings in paying of bonuses as of right and not on

a discretionary basis for the sites at Skaethorn Street, Glasgow, Bogton/Thornton, Jackton, South Lanarkshire, Towerwood, Newton Mearns, Inverkip, Inverclyde, Prestonpans, East Lothian, Stewarton, East Ayrshire and Gadloch Green, Auchinloch constituted or evidenced an agreement that the pursuer would be entitled to bonus where he had pursued the planning status of the site.

Submissions for the defenders

[10] Senior counsel for the defenders submitted that *esto* bonus claims survived termination, a number of the sites identified in the summons did not fall within the contractual provisions which gave rise to an automatic bonus entitlement under clause 6(i) or (ii). He divided the sites named in the summons into three categories:

(1) sites where bonus would be payable provided that the remaining criteria in clauses 6 (i) and (ii) are met and calculated in accordance with the contract: Robroyston (in respect of the part of the site to be acquired by the defenders,) Thornton Farm, Southhill of Dripps, Brackenhill Farm, West Hillhead Mauchline, Kilbarchan and Symington. No bonus would be payable in respect of Mosside Farm or Robroyston in respect of a management fee rather than an acquisition.

(2) Sites where no bonus is payable because the site in question was not identified and introduced by the pursuer as required by clause 6: Lochwinnoch, Elderslie, Bridge of Weir, Houston two, Eaglesham, Newhouses Farm and Nerston. Clause 6 should be given its ordinary meaning and the land must be identified by the pursuer, rather than someone else, and must be introduced by the pursuer, in other words the pursuer must be responsible for bringing the transaction to the defenders. This interpretation was in accordance with the commercial context of the bonus

provisions, whose purpose was to reward the pursuer for finding land for the defenders' land supply and to allow the pursuer to share in the value generated by that land, rather than as compensation for time and effort expended in the performance of his ordinary contractual duties. The clause incentivised the pursuer for finding land that otherwise would not have been known to the defenders.

(3) Sites where no bonus is payable because the site in question was not identified and introduced by the pursuer and the claim did not in any event relate to land to be purchased by the defenders: Barrance Farm sites 1 and 2, Clober, Langfaulds and East Auchinloch.

[11] Counsel further submitted that there had been no variation of the contract to expand the bonus scheme. Contracts can only be varied by party's conduct where there are facts and circumstances only explicable by the contract having been varied (*Scanmudring AS* v *James Fisher* [2017] CSOH 91, *Solectron Scotland Ltd* v *Roper and Others* [2004] IRLR 4). An objective approach should be taken in assessing whether there had been verbal agreement (*Minevco Ltd* v *Barratt Southern Ltd* [2000] SLT 790, *RTS Flexible Systems* v *Molkerei Alois Müller* [2010] 1 WLR 753, *Scanmudring AS).* The contract recognised that bonuses were likely to be paid in circumstances other than those identified in clause 6(i) and (ii) and this was not an instance of party's agreeing to vary the contract but an application of the contract's express provisions as to bonus payments by agreement on a site by site basis.

Analysis

[12] In my opinion the language of the Bonus Sentence is plain. The land must either be (a) identified and introduced or (b) included by agreement where an appropriate amount of time has been devoted.

[13] I do not accept the pursuer's contention (upon which his purposive interpretation is founded) that the meaning of the Bonus Sentence is that the land must either be (a) identified or introduced where an appropriate amount of time has been devoted or (b) included by agreement where an appropriate amount of time has been devoted. The grammatical sense of the sentence is that the words from "where an appropriate" to the end of the sentence qualify only the second alternative and not the first alternative. The objective commercial common sense of the sentence is that there will be an automatic bonus where the pursuer has introduced and identified land, but there is also scope for a bonus to be agreed where the pursuer has not identified or introduced the land, but has done substantial work on the project. This is consistent with the introductory words in clause 6 that "the parties recognise that it is not possible to predict all the circumstances in which a bonus will be payable."

[14] I do not accept the defenders' contention that the bonus provisions did not concern themselves with the ordinary performance of the pursuer's duties, for which he was well remunerated. There is nothing unusual about an employee being eligible for a bonus in respect of his normal duties. Indeed, the usual purpose of a bonus is to incentivise an employee to produce outstanding results in the course of his duties as employee. The defenders' witnesses were keen to make the point that the pursuer was well remunerated in terms of his salary, and was paid more than other equivalent persons within the group. While I can see that that might have been a management issue for the defenders to deal with if other employees were unhappy with the differential, it makes no difference to the legal issue which I require to determine. The defenders entered into a contract of employment with the pursuer including a bonus provision, and if the defenders later regretted how much was due by way of bonus or regretted that in their view the bonus meant that the pursuer

was being over-remunerated compared with other employees, then such regrets at entering into what the defenders later thought was a bad bargain do not invalidate the bargain made. In my view the wording of the Bonus Sentence is clear and applies to the performance of his normal duties as an employee.

Which of the sites listed in the conclusions fall within the contractual bonus scheme as having been "identified and introduced" by the pursuer? (Conclusions 1 and 3)?

Thornton Farm, Jackton, East Kilbride; South Hill of Dripps Farm, Thortonhall; Brackenhill Farm, Hamilton; West Hillhead, Mauchline 2nd site; Kilbarchan and Symington, South Ayrshire.

[15] The parties agreed by Joint Minute that the pursuer identified and introduced these sites to the defenders. Accordingly I find that these sites were "identified and introduced" by the pursuer and fall within the bonus scheme.

"Elmford Subjects", Robroyston; Mosside Farm, Coatbridge

[16] The parties agreed by Joint Minute that the pursuer identified and introduced these sites to the defenders. Accordingly I find that these sites were "identified and introduced" by the pursuer. However, because the reward to the defenders was in the form of a fee, the parties disagreed whether they fell within the bonus scheme. I return to that disagreement below when considering Conclusion 6.

Burnfoot Road, Lochwinnoch

[17] There was a dispute on the facts as to whether this site had been identified and introduced by the pursuer.

[18] The pursuer's evidence was that he had personally identified Lochwinnoch as a village with future development site potential, so undertook an examination of the entire village. Once he had satisfied himself that this was worth pursuing, he employed landscape consultants and engineers who helped him to identify this site as a future prospect. Engagement took place with the agent acting for the owner and an option agreement for the defenders was put in place by the pursuer in July 2015. The pursuer had been extensively engaged thereafter in the promotion of the site and a detailed planning application was submitted in November 2019 further to meetings between the pursuer and council officials.

[19] Mr Loomes' evidence was that the site was not identified nor introduced by the pursuer. The defenders undertook a site search process across West Central Scotland and the site was identified as a reasonable prospect. The pursuer may have instructed a third party to source the land owner or his agent from where initial contact would have been established. The pursuer led the commercial negotiation of the defenders' option to purchase, and led the contractual and planning promotion work.

[20] I find that this site was identified and introduced by the pursuer. The village was identified by him personally. The site was identified by him on the basis of reports on the village which he had instructed from consultants. He made the arrangements to find and make initial contact with the owner's agent. Mr Loomes' position that the site was not identified or introduced by the pursuer because it was the defenders who undertook the search site process is misconceived. It was the pursuer who instructed and directed the search process. He did so in the course of his employment by the defenders. His employment contract provides for a bonus in respect of work carried out in the course of his employment. The defenders' search for this site was work undertaken by the pursuer in the course of his employment.

[21] Accordingly I find that this site was "identified and introduced" by the pursuer and falls within the bonus scheme.

Auchenlodment Road, Elderslie

[26] There was a dispute on the facts as to whether this site had been identified and introduced by the pursuer.

[22] The pursuer's evidence was that the site had been identified and introduced by him as the result of his longstanding association with Richard Thompson of Savilles, which went back to the 1970s/1980s in respect of Ambion 1 and Alfred McAlpine. Mr Thompson initially telephoned to see if the pursuer would be interested in this site and spoke to the pursuer's assistant Mr Partington. Mr Partington passed the matter to the pursuer who concluded that the defenders would take it on. It was the pursuer who negotiated with Mr Thompson. There was not a limited tender. The option agreement was concluded in 2017 and the pursuer began promotion of the site, as a direct consequence of which it has been included in the draft Renfrewshire Council local plan.

[23] Mr Loomes' evidence was that the site was not identified and introduced by Mr Loudon. The defenders tendered on a limited tender basis. The opportunity came through Mr Loomes' contact Mr Thompson. The first point of contact by Mr Thompson was with Mr Loomes at high level asking if the defenders would be interested and then Mr Loomes advised Mr Partington to expect a call. Having secured preferred bidder status the pursuer and Mr Loomes worked through the contract negotiating with agents for the landowners. The pursuer led on planning promotion.

[24] Mr Allison's evidence was the site was introduced to the defenders by Steve Loomes but this was a mere assertion unsupported by other evidence, and I give no weight to that assertion or similar assertions by Mr Allison in respect of other sites.

[25] I prefer the evidence of the pursuer. There was no challenge to the pursuer's evidence that the pursuer had a longstanding relationship with Mr Thompson. It would not be surprising that an agent such as Mr Thompson would contact someone with whom he had had such a long relationship. Nor is it surprising that in contacting the pursuer Mr Thompson would have spoken first to the pursuer's assistant for the assistant to pass the matter on to the pursuer. The pursuer lodged email correspondence between the pursuer and Mr Thompson dated 16, 19 and 21 December 2016 which supported the pursuer's evidence that it was the pursuer who negotiated with Mr Thompson. I do not accept Mr Loomes' evidence that Mr Loomes worked through the contract negotiation stage with Mr Thompson: the email correspondence is not copied to Mr Loomes, nor does it mention him. While I do not doubt that Mr Thompson and Mr Loomes knew each other, I do not accept Mr Loomes' evidence that Mr Thompson initially contacted Mr Loomes and Mr Loomes advised Mr Partington to expect a call. The defenders led no supporting evidence from Mr Thompson or Mr Partington in support of this. Given that the emails show that the negotiations were undertaken by the pursuer and not Mr Partington, Mr Loomes' emphasis on advising Mr Partington (as opposed to the pursuer) to expect a call makes little sense. Further, I do not accept Mr Loomes' evidence that the site was identified and introduced through a limited tender process. Mr Thompson's invoice for legal fees on behalf of his client, which was lodged as an attachment to the email of 21 December makes no reference to a tender process and instead refers to negotiating heads of terms.

[26] Accordingly I find that this site was "identified and introduced" by the pursuer and falls within the bonus scheme.

Ranfurly Estate, Shillingworth, Bridge of Weir

[27] There was a dispute on the facts as to whether this site had been identified and introduced by the pursuer.

[27] The pursuer's evidence was that in 2013, as part of his continuing strategic search for possible development sites in Renfrewshire, he commissioned consultants, Mark Turnbull Landscape Architects ("MTLA") to look at the villages of Houston, Bridge of Weir, Kilbarchan and Howwood. In February 2014, the consultants produced their report which indicated the suitability of this site and the pursuer instructed the consultants to undertake more detailed work on the site. Following an informal call to the pursuer, Mr Thompson wrote to the pursuer's assistant Mr Partington on 7 June 2015 offering the site to the defenders as part of a tender process. The email of 7 June 2015 was produced. The pursuer completed the tender offer which was accepted and a formal option agreement entered into. The pursuer prepared a detailed submission on planning for the council.

[28] Mr Loomes' evidence was that the site was not identified and introduced by the pursuer. The defenders tendered for the site on a limited tender basis. The opportunity came through Mr Loomes' contact Mr Thompson who contacted Mr Loomes first, prior to sending the email of 7 June. Mr Thompson had telephoned Mr Loomes to establish the defenders' interest. In cross-examination Mr Loomes stated that there was no reason to doubt that Mr Thompson called both the pursuer and Mr Loomes. As with Elderslie, the pursuer and Mr Loomes worked through the contract negotiation stage with the landowner. The pursuer led the planning promotion. In cross-examination Mr Loomes confirmed that

although both he and the pursuer were involved, the pursuer was dealing with the detail and taking the lead.

[29] I find that this site was identified and introduced by the pursuer. There was no challenge to the pursuer's evidence that the site was identified in the MTLA report which was commissioned by the pursuer. The pursuer had a long working relationship with Mr Thompson, and Mr Loomes did not doubt that Mr Thompson had called the pursuer. In considering whether the pursuer is entitled to bonus the focus is on the pursuer: as Mr Thompson contacted the pursuer to offer the pursuer the opportunity to tender for the site, it does not matter that Mr Thompson may also have spoken to Mr Loomes. The defenders did not lead any evidence from Mr Thompson to contradict the pursuer's account. I do not accept Mr Loomes' evidence that Mr Loomes worked through the contract stage with the owner as Mr Loomes had done in Elderslie: I have found above that it was the pursuer and not Mr Loomes who did the work with the owner in Elderslie, and the defenders offered no supporting evidence that the situation was any different in relation to Bridge of Weir. It makes no difference that the introduction was effected through an initial contact plus a successful tender: there is nothing in clause 6 which restricts the methods by which an introduction may be effected.

[30] Accordingly I find that this site was "identified and introduced" by the pursuer and falls within the bonus scheme.

Barochan Road, Houston

[28] There was a dispute on the facts as to whether this site had been identified and introduced by the pursuer. This site was referred to as Houston 2 to distinguish it from a neighbouring site Houston 1.

[31] The pursuer's evidence was that he had identified this site as a possible follow-on site to Houston 1 through his analysis by MTLA in 2013. The site was owned by Elderslie Estates who were well known to the pursuer as he had acquired and developed sites from them in 1972 and 1983 in respect of his previous businesses. As a consequence of that, the pursuer approached Elderslie Estates' agent Chris Addison Scott of CKD Galbraith, and entered into an option agreement in 2017. The pursuer appointed an appropriate team to work on planning permission, culminating in a detailed submission to the council.

[32] Mr Loomes' evidence in his original witness statement was that this was not a site where the pursuer or anyone else at the defenders identified and introduced it to the defenders. An option over the site was previously held by a third party house builder. When that option lapsed, the owner's agent CKD Galbraith approached the defenders directly. The pursuer negotiated a further option and led the planning promotion. However, in his Supplementary Statement Mr Loomes changed his position and agreed that the pursuer would have approached the agent for the owner to start the process of negotiating an option for Houston 2. I accept his changed position, which is consistent with the evidence of the pursuer.

[33] I find that this site was identified and introduced by the pursuer. The site was identified in the MTLA report commissioned by the pursuer. The approach to the owner's agent was made by the pursuer.

[34] Accordingly I find that this site was "identified and introduced" by the pursuer and falls within the bonus scheme.

Waulkers Farm, Eaglesham

[35] There was a dispute on the facts as to whether this site had been identified and introduced by the pursuer.

[36] The pursuer's evidence was that he instructed MLTA to analyse the whole conservation village of Eaglesham in 2014, as a consequence of which this site was identified. Through the pursuer's appointed agent, Bill Robertson of CKD Galbraith, the pursuer approached the owner in 2014 who explained he was tied into an historic option. In mid-February 2015, the owner's agent Gordon McCallum approached Steve Loomes as they were friends. Mr Loomes wrote back to Mr McCallum expressing interest and referring to the defenders' business successes in securing housing land release. Mr McCallum entered into an option with the defenders because of his belief in the defenders' ability to secure development consent for his client, doubtless also influenced by his client's wishes after the prior approach in 2014. Mr Loomes put a deal together with Mr McCallum with the pursuer's input. The pursuer progressed work on the planning. It was the pursuer's ability to identify the right site, allied with the ability to promote it effectively that resulted in his level of success in converting this and other strategic sites into development sites to the direct benefit of the defenders.

[37] Mr Loomes' evidence was that the site was not identified and introduced by the pursuer. The defenders tendered for the site on a limited tender basis. The opportunity came to Mr Loomes from the owner's agent, Gordon McCallum. A letter from Mr Loomes to Mr McCallum dated 16 February 2015 was produced in which Mr Loomes thanked Mr McCallum for the opportunity to consider the site. The pursuer had led the planning promotion.

[38] I find that this site was identified by the pursuer but was not introduced by the pursuer. The site was identified in the MTLA report commissioned by the pursuer. I accept Mr Loomes' evidence, supported by the letter of 16 February that the opportunity came through Mr Loomes and not the pursuer. Although there had been a previous approach by the pursuer which would (had it been accepted) have constituted an introduction by the pursuer, that approach was not accepted. Neither the owners nor Mr McCallum gave evidence so there was no independent evidence before me that the approach by Mr McCallum to Mr Loomes was a response to the earlier approach, and there was no reference in Mr Loomes' letter to the earlier approach. I find that the site was introduced by Mr Loomes under the separate approach made to him by Mr McCallum.

[39] I find that as the site was not introduced by the pursuer, it does not fall within the first limb of the Bonus Sentence. I consider below whether it falls within the bonus scheme by agreement.

Nerston, East Kilbride

[40] There was a dispute on the facts as to whether this site had been identified and introduced by the pursuer.

[41] The pursuer's evidence was that this was a site he had identified a number of years earlier but chose not to pursue in view of other superior alternatives at the time. However in 2019, he was contacted by John Hill of Montague Evans, who had almost concluded an option deal on the site with another developer who had pulled out of the negotiations. Because the pursuer was already familiar with the site, he was able to tell Mr Hill immediately that the defenders would be interested in taking it forward and the defenders entered into a deal in early 2020.

[42] Mr Loomes' position was that the site was not identified by the pursuer. The agent telephoned the pursuer directly. The pursuer led the contract negotiations and the planning promotion.

[43] I find that this site was identified and introduced by the pursuer. I do not accept Mr Loomes' evidence that the pursuer did not identify the site, as this was a bare assertion and no evidence was led to challenge the pursuer's evidence (which I accept) that he had identified the site a number of years earlier. As there was no dispute that Mr Hill had contacted the pursuer direct, I find that the site was introduced by the pursuer.

[44] Accordingly I find that this site was "identified and introduced" by the pursuer and falls within the bonus scheme.

Langfaulds, Bearsden; East Auchinloch, Lenzie

[45] These were two out of four sites which related to joint venture arrangements with the Bank of Scotland. The third side was Clober, Milngavie which I deal with below. The fourth site was at Inverkip. The defenders paid the pursuer a bonus in respect of Inverkip in 2008. Notwithstanding that payment, the defenders maintained that there was no entitlement to bonus in respect of the remaining three sites. The defenders argued that the sites had been introduced by Bank of Scotland and not the pursuer. The defenders also argued that because of the joint venture arrangements clause 6 did not apply: the land was neither "controlled nor purchased" by the company in terms of clause 6(i) nor "purchased" by the Company in terms of clause 6(ii).

[46] I accept the pursuer's evidence (which was largely unchallenged) that Lovell Homes (Scotland) Ltd, the company which the pursuer acquired in 1991 on his return from America and renamed Albion 2, contained the active development sites of the John Lawrence Group.

The John Lawrence Group retained four greenbelt sites adjoining historic John Lawrence developments in Baljaffray Bearsden; Clober Milngavie; Auchinloch in Lenzie and Hill Farm in Inverkip. Ambion 2's bankers were Bank of Scotland, and after the acquisition of Ambion 2 by the defenders the pursuer introduced Bank of Scotland to the defenders and Bank of Scotland became the defenders' bankers. In the economic crisis of the 1990s Bank of Scotland put the remainder of the John Lawrence Group into administration and put the four sites into the Bank's Horizon group. In 1998, the Bank approached the defenders to ask if they would be interested in the four sites, having backed the pursuer as Ambion 2's bankers to purchase Lovell Homes (Scotland) Ltd in 1991. The defenders and the Bank entered into two joint venture vehicles: Stewart Milne (Glasgow) Ltd for the site at Clober and Stewart Milne (West) Ltd for the sites at Bearsden, Lenzie and Inverkip.

[47] I find that the sites at Clober, Bearsden and Lenzie were introduced to the defenders by Bank of Scotland and not by the pursuer. The pursuers' evidence was that the Bank approached the defenders in relation to the sites. Any introduction of the Bank to the defenders by the pursuer is too remote from the introduction of the particular sites to qualify as an introduction under the first limb of the Bonus Sentence. Accordingly, I find that the pursuer is not entitled to bonus for these three sites under the first limb. I consider below whether he is entitled to bonus by agreement.

Newhouses Farm, Quarryhall, Strathaven

[48] There was a dispute on the facts as to whether this site had been identified and introduced by the pursuer.

[49] The pursuer's evidence was that the owner of this site approached another company within the defenders' group who were developing an adjacent site. The site was of no

interest to that company who passed it over to the pursuer for his consideration. He put in place a twelve year option with a 20% discount to market value price and a minimum of £210,000 per acre, which was concluded in February 2019, and took forward the planning process.

[50] Mr Loomes' evidence was that the defenders were developing another site at Strathaven. Newhouses Farm site was identified as part of a wider business site search which the pursuer had oversight of and resulted in a deal for this site being struck. The pursuer led the contract negotiation and the planning promotion.

[51] I find that this site was not introduced by the pursuer. It was passed to him from another group company. As the site was not introduced by the pursuer, it does not fall within the first limb of the Bonus Sentence. I consider below whether it falls within the bonus scheme by agreement.

Barrance Farm site 1, Newton Mearns

[52] There was a dispute on the facts as to whether this site had been identified and introduced by the pursuer.

[53] The pursuer's evidence was that the Bank of Scotland put the John Dickie Group of companies into receivership and then offered Barrance Farm Site 1 and the Gadloch Green site in Auchinloch in Lenzie to the defenders via Mr Allison. The pursuer advised Mr Allison that there was sufficient likelihood of getting the sites zoned for development so that it would be worth acquiring them under option and on that basis the defenders did a deal to acquire both sites in 2012, after which both sites became the defenders' exclusive responsibility for planning promotion.

[54] Despite paying the pursuer a bonus in respect of the Auchinloch site in 2018, the defenders maintain that the pursuer is not entitled to bonus in respect of Barrance Farm site 1.

[55] I find that Barrance Farm site 1 was not introduced to the defenders by the pursuer. The pursuer's evidence was that the site was offered by the Bank to the defenders via Mr Allison.

[56] I find that as the site was not introduced by the pursuer, it does not fall within the first limb of the Bonus Sentence. I consider below whether it falls within the bonus scheme by agreement.

Barrance Farm Site 2

[57] There was a dispute on the facts as to whether this site had been identified and introduced by the pursuer.

[58] The pursuer's evidence was that when the defenders became involved with Barrance Farm 1, the owners of the neighbouring site approached the defenders via their agent, Colin Whyte. As the pursuer and Mr Whyte had had a difficult relationship in the past, the defenders thought it prudent for Mr Loomes to become Mr Whyte's contact point within the defenders, with the pursuer providing Mr Loomes with the information for the negotiation. Mr Whyte was very keen to secure the services of the defenders and in particular the pursuer because, even although they did not have an especially good personal relationship, Mr Whyte was aware from previous dealings that the pursuer was the person most likely to be successful in securing planning consent. As soon as the deal was concluded, the pursuer was asked to take over the planning objective and did so. Whilst Mr Loomes was initially involved with Mr Whyte and the owner, the ultimate responsibility to deliver all the

relevant development consents was the pursuer's and the pursuer continued to liaise with Mr Whyte and the Brown family directly. Mr Loomes played no part in the planning promotion work.

[59] Mr Loomes' evidence was that the pursuer had no involvement in negotiating the contract for site 2. Mr Loomes' contact Hamilton Portfolio approached Mr Loomes and thereafter the defenders dealt directly with the owners' agents. The pursuer led the planning promotion. Mr Loomes accepted in cross-examination that the fact that the defenders already had Barrance Farm site 1 was a significant factor in acquiring site 2.

[60] I find that Barrance Farm site 2 was not introduced to the defenders by the pursuer. The approach on behalf of the owner was dealt with by Mr Loomes and not the pursuer.

[61] I find that as the site was not introduced by the pursuer, it does not fall within the first limb of the Bonus Sentence. I consider below whether it falls within the bonus scheme by agreement.

Do the other sites listed in the conclusions fall within the contractual bonus scheme by agreement? (Conclusions 1 and 3)

[62] I now turn to consider whether the sites which I have held were not introduced and identified by the pursuer were nevertheless included in the bonus scheme by agreement, either by the Introductory Sentence or by the second limb of the Bonus Sentence.

Langfaulds, Bearsden; East Auchinloch, Lenzie; Clober, Milngavie.

[63] As explained above, these were three out of four sites acquired in similar circumstances relating to joint ventures between the defenders and the Bank of Scotland.

The defenders paid a bonus in respect of the fourth site, Inverkip. The Inverkip site was acquired by the defenders from the joint venture company in three stages: November 2001, April 2003 and June 2007. Immediately after the purchase of the final area, the defenders sold on approximately one third of the site to Redrow.

[64] On 31 May 2007 in a letter to the defenders' Mr Irvine setting out bonuses which were likely to arise in the next 12 months, the pursuer stated that he would be making a bonus claim in respect of Inverkip. His claim was made in a letter of 17 March 2008 to Mr Allison. In a memo to Mr Allison of 22 May 2008, copied to the pursuer, Mr Irvine took issue with the pursuer's calculation, and the pursuer subsequently accepted Mr Irvine's calculation.

[65] The pursuer's evidence was that there was nothing unusual about the Inverkip site other than obtaining a licence to build a bridge over a railway and he obtained planning consent on appeal after a long battle with the Council, community and others. The defenders did not at any time question his right to a bonus for Inverkip. Mr Allison's evidence was that Inverkip was not expected to get planning permission but it did due to the pursuer's efforts. It was a long and complex negotiation with the planning process spanning over a decade. The work that the pursuer carried out and the successful planning made this an exception to the contractual bonus provisions and the defenders agreed that a bonus would be paid in respect of it.

[66] There was undoubtedly an agreement to include in the bonus scheme one of the sites from the Bank of Scotland joint venture, that is Inverkip. The question for me is whether the agreement was for that site only, or covered all sites in the Bank of Scotland joint venture. In my opinion it was for the Inverkip site only. The contemporaneous correspondence about the bonus which was paid refers only to the Inverkip site and gives no indication that the

agreement extended any further than that one site. There was no evidence of any oral agreement extending the bonus scheme to the other three sites. I find that there was no agreement, under either under the Introductory Sentence or the second limb of the Bonus Sentence, to pay a bonus in respect of the other three sites.

[67] Accordingly I find that the pursuer is not entitled to a bonus in respect of Langfaulds, Bearsden; East Auchinloch, Lenzie; or Clober, Milngavie.

Waulkers Farm, Eaglesham and Newhouses Farm, Quarryhall, Strathaven

[68] No evidence was led by either party of a specific agreement to include either of these sites within the bonus scheme. Accordingly I find that there was no agreement, under either the Introductory Sentence or the second limb of the Bonus Sentence, to pay a bonus in respect of these sites.

[69] Accordingly I find that the pursuer is not entitled to a bonus in respect of Waulkers Farm, Eaglesham.

Barrance Farm Sites 1 and 2

[70] As explained above, Barrance Farm was one of two sites acquired as part of the same deal from Bank of Scotland because of the insolvency of John Dickie. A bonus was paid for the other site, Gladloch Green, in April 2018. In addition further land at Barrance Farm was acquired from the owner.

[71] There was protracted negotiation prior to the payment of the Gladloch Green bonus. On 20 December 2016 the pursuer submitted a claim for £200,962. The pursuer and the defenders were in dispute about this and various other bonuses. Lawyers were instructed on both sides and litigation was contemplated. By letter of 23 January 2018 Mr Allison

wrote to the pursuer offering to pay £180,962 in respect of the outstanding bonus position for Gladloch Green and also other sums for certain other sites. In his letter Mr Allison stated:

> "these payments are to be made on an entirely without prejudice basis to try and resolve these claims and they are not to be relied upon in any court action raised by you against Stewart Milne Group Ltd … Stewart Milne Group Limited reserves its whole rights and pleas in respect of the calculation of any other bonus payments".

Following further discussions and correspondence between the pursuer and Mr Allison, Mr Allison agreed to pay the £200,962 and payment was made.

[72] There was undoubtedly an agreement to include in the bonus scheme one of the sites acquired from the John Dickie insolvency, ie Gladloch Green. The question for me is whether the agreement was for that site only, or also covered Barrance Farm. I find that the agreement was for Gladloch Green only. The contemporaneous correspondence refers only to the Gladloch Green site and gives no indication that the agreement extended any further than that site. There was no evidence of any oral agreement extending the bonus scheme to Barrance Farm in respect either of that part of Barrance Farm acquired from insolvency or that part acquired from the owner. I find that there was no agreement, under either the Introductory Sentence or the second limb of the Bonus Sentence, to pay a bonus in respect of Barrance Farm.

[73] Accordingly I find that the pursuer is not entitled to a bonus in respect of Barrance Farm sites 1 and 2.

Is the bonus under clause 6(i) pro rata for any part of 100 residential units? (Conclusion 2)

[74] Clause 6(i) states that "A bonus of £7,500 will be paid for every 100 residential units".

[75] Senior counsel for the pursuer submitted that during the term of the contract, a practice emerged of paying on a pro-rata basis regardless of how many plots were included in a permission. Such payment had been made for the Ayr Road, Newton Mearns site on the basis of a precedent which had been set. The practice over the years coupled with an exchange of letters for Ayr Road were indicative of an agreement to pay Volume Bonus *pro rata* at the rate of £7,500 for every 100 units included in the permission regardless of the number of plots.

[76] Senior counsel for the defenders submitted that the contract did not provide for pro-rating where fewer than 100 units were involved. Such an approach was not consistent with the importance to the defenders of volume. The payments at Gadloch Green and Houston were made on a without prejudice basis and cannot be relied upon and the balance of the sites (Skeathorn, Deaconsbank and Ayr Road) were not sufficient for a variation of the contract.

[77] In my opinion on a correct interpretation of the contract the bonus is payable pro-rata for any part of 100 residential units. There does not appear to be any dispute that the contract provided for pro-rating when there were over 100 units. The defenders position (set out for example in submissions made by counsel on their behalf and Mr Allison's letter of 16 July 2014 relating to Ayr Road) was not that pro-rating did not apply at all, but only that pro-rating did not apply where there was less than 100 units as less than 100 was insufficient volume. In my opinion, there is nothing in the contractual wording which imposes a floor on the pro-rating. The wording does not differentiate in any way between the first 100 units and the second and subsequent 100 units. Given that there is no dispute between the parties that pro-rating operates for the second and subsequent 100 units, it

cannot be said on the plain wording of the agreement that pro-rating does not operate for the first 100 units.

[78] Conclusion 2 includes the words "as reasonably reflects the proportion of the work required to obtain that permission that had been carried out by 31 March 2020." The pursuer's position was that following retirement he would not be entitled to the full sum that would have been due to him had he still been in employment: the bonus was an incentive for the work he did: after he leaves, further work would require to be done by others. However, the bonuses to which I have found the pursuer to be entitled all fall within the first limb of the Bonus Sentence. He is entitled to a bonus because he has "identified and introduced" the sites. No further work in respect of identification and introduction requires to be done after the termination of his appointment. Accordingly the words "as reasonably reflects the proportion of the work required to obtain that permission that had been carried out by 31 March 2020" fall to be deleted from the conclusion.

Calculation of 6(ii) bonuses (Conclusion 4)

[79] The Value Bonus under clause 6(ii) applies "where new land is purchased by the Company at a Company land cost of no more than 95% of Market Value". The clause defines Market Value as:

> "the price which when used in a normal Company land appraisal calculation produces a gross margin, before overheads, but after development interest, of 15% or such other lesser margin as the Company has accepted as being appropriate to acquire the site."

[80] The parties disagreed about what was meant by "a normal Company land appraisal calculation". The defenders' position was that this was the land appraisal presented and approved by the defender's board prior to acquisition of the site. The pursuer's position

was that it was a land appraisal carried out at or after the purchase of a site. The pursuer's position was that whilst there had been issues in the past as to what is meant by a "normal company land appraisal calculation", the meaning of that was not to be resolved in this action. Senior counsel for the pursuer submitted that the declarator does not seek to identify any particular appraisal and the matter was not before the court. The declarator sought in conclusion 4 merely reflected the wording of the contract.

[81] In my opinion, for the court to grant a declarator which merely repeats the words of a contractual provision which both parties agree is binding on them is a pointless exercise which the court should not embark upon. The purpose of the court is to resolve disputes between parties, not to restate for no apparent purpose in a binding court order an uncontroversial legal obligation which parties agree is already binding under a contractual provision.

[82] However, in this case I do not agree with the pursuer that the declarator sought merely reflects the wording of the contract.

[83] Rather than track the wording of the contract, the declarator makes various minor changes from the wording of clause 6(ii). For no apparent reason, the drafting has reversed the way in which the bonus is expressed. The declarator expresses it as the differential between the land cost and the Market Value, whereas clause 6(ii) expresses it as the differential between the Market Value and the land cost. In respect of the Market Value, the declarator uses "price" where clause 6(ii) uses "figure". In respect of the land value, the declarator adds the words "the purchase price" which do not appear in clause 6(ii) in respect of the land cost.

[84] While these minor changes may not be of much significance, the declarator innovates on clause 6(ii) in two substantive ways.

[85] Firstly, the declarator adds the words "carried out within one month after acquisition". This has the effect of materially changing the appraisal wording to read "a normal company land appraisal carried out within one month after acquisition". Far from merely being a neutral restating of the terms of clause 6(ii), the granting of the declarator in the terms sought would resolve the dispute as to the meaning of "a normal Company land appraisal calculation" and would do so in the pursuer's favour. The appraisal contended for by the defenders takes place prior to acquisition. The appraisal contended for by the pursuer takes place after acquisition. An appraisal "carried out within one month after acquisition" could only be that contended for by the pursuer. By including these words in the declarator sought, the pursuer has put the interpretation of the words "a normal Company land appraisal calculation" squarely before the court.

[86] Senior counsel for the defenders submitted that the defenders' interpretation was consistent with the reference to the price "as the Company has accepted as being appropriate to acquire the site". It was consistent with the defenders' practice in having a final pre-acquisition appraisal approved by the defenders' Board of Directors. After acquisition, the land is handed over from the strategic land division to the development team, and subsequent valuations are referred to not as appraisals but as Monthly Cost Reports. It was the pre-acquisition appraisal that reflected the pursuer's responsibility in acquiring strategic land.

[87] Senior counsel for the pursuer made no submissions as to what document was meant by "a normal Company land appraisal calculation".

[88] The pursuer's evidence was that the initial appraisal is often based on estimates and more reliable information becomes available from the initial calculation, to the point immediately after the site is purchased and through development to completion. During

development appraisals are used to assess the continuing profitability of a development and to make a final assessment of profitability on completion. From the point immediately after the site's purchase and the commencement of development, within the defenders a land appraisal is termed as a Monthly Cost Review or MCR. The pursuer referred to various sites for which he had claimed a bonus based on an MCR and had been paid. For example, in relation to Bargeddie 1 payment was made on the basis of a compromise splitting the difference between the appraisal at the commencement of the development and the final appraisal.

[89] I prefer the defenders' interpretation. The defenders' interpretation is consistent with other wording in the contract which is predicated on the appraisal being conducted prior to the acquisition of the land. The definition of Market Value includes the wording "as the Company **has accepted** as being appropriate to acquire the site" (emphasis added). This use of the past tense is inconsistent with the pursuer's position that the appraisal is an MCR produced after acquisition. Further, the pursuer's role was in relation to acquisition of strategic development land, not in relation to development after acquisition, and so it is logical that he would be incentivised in relation to the value at acquisition, not the value after development. In addition, the words "land appraisal" are consistent with the name of the document which is approved by the board pre-acquisition, and inconsistent with the name of the MCR. Finally, the pursuer's evidence of individual agreements made to pay bonuses calculated with reference to MCRs is of no assistance in persuading me to grant the declarator as the MCRs referred to were produced many months or years after the one month deadline referred to in the declarator. Accordingly, I find that the "normal company land appraisal calculation" is the land appraisal presented to and approved by the defenders' Board of Directors prior to acquisition of the site.

[90] Secondly, the declarator adds the words "as reasonably reflects the proportion of the work required to obtain that permission that had been carried out by 31 March 2020." For the reasons set out above in relation to Conclusion 2, I shall not grant declarator in respect of these words.

[91] Accordingly, grant of declarator in terms of conclusion 4 is refused.

Is the pursuer entitled to a bonus where the defenders receive a management fee? (Conclusions 5 and 6)

[92] Conclusion 5 seeks declarator in respect of six specific named sites.

[93] I have held above that no bonus is payable in respect of four of these sites, namely Barrance Farm Site 1; Barrance Farm Site 2; Langfaulds Bearsden; and East Auchinloch, Lenzie. Accordingly the issue which conclusions 5 and 6 seek to resolve does not arise in relation to these four sites.

[94] That issue does however arise in relation to the remaining two named sites: Elmford Subjects at Robroyston and Mosside Farm, Coatbridge. These are sites which parties agree were identified and introduced by the pursuer.

[95] Senior counsel for the pursuer submitted that the practice of the parties had been that where the defenders had received a management fee (ie Bargeddie, Parkhouse and certain areas at Robroyston) instead of getting 13.5% of the difference between the value and the price, the pursuer was paid 13.5% of the fee. The effect was that the pursuer received the same proportion of the benefit that accrued to the defenders as a result of his work, thus implementing the clear intention of the contract, in the different circumstance of the management fees. The practice constituted or, alternatively was evidence of, an agreement made in terms of clause 6 to expand the bonus scheme to cover sites where as a result of the

pursuer's work in promoting the sites through the planning process, the defenders become entitled to payment of a fee.

[96] Senior counsel for the defenders submitted that there was no basis in clause 6 for an automatic entitlement to a bonus in respect of management fees. Clause 6(i) and 6(ii) applied only in the situation where land is acquired by the defenders, rather than the situation where land is managed on behalf of a third party for a fee. There had been no agreement by the defender in respect of these sites. He further submitted that it was premature to seek a declarator in respect of Mosside Farm as no bonus would be payable in respect of a management fee rather than an acquisition.

Elmford Subjects, Robroyston

[97] This relates to a large scale development project of a 325 acre former hospital. The project proceeded in stages. Parties were agreed that the project was identified and introduced by the pursuer.

[98] The development was undertaken in conjunction with the landowner, Elmford Limited. The defenders were responsible for leading the marketing and disposal of land on behalf of Elmford and for obtaining planning permission for the whole project. The defenders were only entitled to acquire a maximum of 50% of the land. Elmford was entitled to sell the remainder of the land to third parties, in which case Elmford required to pay a management fee to the defenders. In respect of the parts of the project where the defenders acquired the land, clause 6(ii) provided for the pursuer to be paid a bonus based on 13.5% of the difference between Market Value and price paid. In respect of the parts of the project where the defenders did not acquire the land, the equivalent bonus would be based on 13.5% of the management fee. However, the drafting of clause 6 did not provide

for a bonus of 13.5% of the management fee. This is therefore a situation which had not been predicted by the contract, but a bonus could be payable by agreement.

[99] I find that in relation to the Robroyston project the pursuer and defenders have agreed that the pursuer is entitled to a bonus of 13.5% of the management fee. Bonuses were paid as a percentage of the Robroyston project management fees in 2005, on two occasions in 2006 and in 2016. A further such bonus was claimed in 2016 and subsequently paid, but as the parties were in dispute at that time it was paid on the basis of the letter of 23 January 2018 referred to above. Further such bonuses were paid in 2019 in relation to three management fees. The contemporaneous correspondence (other than the one exception of the one bonus paid under the 23 January 2018 letter) from the defenders does not challenge the pursuer's right to a percentage bonus of the various management fees charged to Elmford. Instead the bonus is paid automatically and without question or comment. This is inexplicable unless there was an agreement to pay bonus on the management fees for the Robroyston project.

[100] It follows from this that declarator under conclusions 5 and 6 should be granted in respect of Robroyston. However, for the reasons set out in relation to Conclusion 2, the declarator under conclusion 6 should be granted under deletion of the words "the proportion of the sum equivalent to" and "as reasonably reflects the proportion of the work required to obtain that permission that had been carried out by 31 March 2020."

Mosside Farm

[101] The pursuer's unchallenged evidence was that there is an agreement between the owners and the defenders which includes a right for the defenders to purchase the site,

which failing the defenders will be entitled to a fee equivalent to 35% of the free proceeds of every sale at the site.

[102] The drafting of clause 6 did not provide for a bonus of 13.5% of such a fee. This is again a situation which has not been predicted by the contract, but a bonus could be payable by agreement. However, in this instance I find that there is no agreement between the pursuer and the defenders that a bonus of 13.5% of the fee is payable in respect of Mosside Farm. No payment of such a bonus for Mosside Farm has previously been made, and there is no other evidence of such an agreement in relation to Mosside Farm. Accordingly I shall refuse declarator in terms of conclusion 5 in respect of Mosside Farm.

[103] Of course, that refusal only applies in relation to bonus based on the management fee. It may be that in due course it comes to pass that no management fee is charged as instead the defenders purchase the land at Mosside Farm. If the land is purchased, then, as the land was identified and introduced by the pursuer, the pursuer will be entitled to bonus under clause 6(i) and (ii).

Is the pursuer entitled to bonus representing a share of profits generated in relation to the site at Clober, Milngavie? (Conclusions 7 and 8)

[104] The pursuer sought declarators as to the quantification of the bonus in respect of Clober.

[105] Senior counsel for the pursuer submitted that in keeping with the intention apparent from the contract that the pursuer is rewarded for his efforts by payment of 35% of the benefit that flows to the defenders, the bonus in respect of the joint venture with Bank of Scotland is 13.5% of the profits of the joint venture company paid to the defenders.

[106] Senior counsel for the defenders submitted that the bonus provisions in clause 6(i) and 6(ii), applied only to land "controlled or purchased by the company" or "purchased" by the company. Land which was controlled through joint venture arrangements was not land controlled by the defenders, but by the joint venture, and was not land purchased by the defenders. There was no contractual entitlement to a bonus in respect of sites acquired through other corporate vehicles.

[107] As I have held above that the pursuer is not entitled to bonus in relation to Clober, the issues raised in conclusions 7 and 8 as to the quantification of that bonus do not arise.

Whether the pursuer can have any entitlement to bonuses in respect of his contract following termination of his employment?

Submissions for the pursuer

[108] Senior counsel for the pursuer submitted that after ceasing employment the pursuer retained an entitlement to bonuses arising from his work by his effort (*Wood v Capita Insurance Services* [2017] AC 1173, paras 10-15; *Ashtead Plant Hire* v *Granton Central Developments* [2020] SC 244 paras 9-13.) On the ordinary wording of clause 6, which uses both the words "earned" and "payable", "earned" meant obtained in return for labour or services during the contract, as distinct from when it was payable. If the defenders' interpretation was correct, it would not have been necessary to include a term to preserve pursuer's rights following termination of the contract (*Johnson* v *Agnew* [1980] AC 367 at 396; *Hyundai Heavy Industries* v *Papadopoulos* [1980] 1 WLR 1129). There was no express or implied term to that that accrued bonuses would only become due if the pursuer was employed at the date when they were payable (*Marks & Spencer* v *BNP Paribas Securities Services Trust Co* [2016] AC 742, *Rutherford* v *Seymour Pierce* 2010 EWHC 375). When the

contract was concluded both parties were well aware of the long timescales involved in promoting strategic development land, and it was clear to both sides when the contract was concluded in 1999 that during the period of the pursuer's employment there would be a number of sites on which the pursuer had performed work but where the bonus had not become payable under the contract because planning permission had not been obtained and/or a site had not been acquired by the date of termination. It was also apparent to the parties that there would come a time when the pursuer's employment would end. The contract included a 12 month notice provision and a 12 month restrictive covenant, and was entered into when the pursuer was aged 53, at a time when the normal retirement age was 65. The purpose of a bonus was to incentivise an employee by rewarding them in addition to salary. Counsel further submitted that the pursuer's interpretation made commercial sense. The defenders were seeking to avoid application of a contract which they now saw as bad for them. The operation of the bonus scheme will require the parties to have dealing with each other for many years, but the parties had made the provisions work for 21 years and there was no reason to suppose they would be unable to do so in the future. The court should not shy away from enforcing the bargain made because of claimed difficulty (*R & J Dempster Ltd* v *Motherwell Bridge & Engineering* 1964 SC 308; Royal *Bank of Scotland* v *Carlisle* 2015 SC UKSC 93). Further the defenders' approach meant that, because of the long period required to bring strategic land sites to fruition, there would be no incentive in the final period of work for up to 10 to 15 years, which would have made no commercial sense in entering into a contract with a man aged 53. Further, an employee cannot be deprived of a bonus by an unclear provision (*Noble Enterprises* v *Lieberum* (EAT) 67/98).

Submissions for the defenders

[109] Senior counsel for the defenders submitted that, properly construed, the contract did not give rise to an entitlement to bonus payments where the events triggering the bonus take place following the pursuer's retirement. The clear scheme of the payment provisions in clauses 6(i) and (ii) is to provide for an event giving rise to the bonus, followed by a date for payment. Bonuses are "earned" on the occurrence of the trigger event (that is, the achievement of planning permission or purchase) and then "paid" one month later. The words "will remain due and payable" in the retirement provision meant that in order to "remain", bonuses must have been earned prior to retirement. Further, the defenders' approach offered clarity and certainty as it would be immediately clear what payments remained outstanding as at the date of termination.

[110] Counsel further submitted that the pursuer's approach was neither consistent with the express language of the contract, nor with commercial common sense. Taken in context, the word "earned" must mean a bonus which has become payable but which has not yet been paid. The pursuer's interpretation of clause 6 had the effect that bonus payments might still be falling due 20 years after retirement was highly improbable. It might also entitle the pursuer to a significant bonus payment in respect of a site where he had had only minimal involvement, with most of the work taking place after his retirement. There was no basis for the pursuer's contention that the amount of bonus payable was only that which reasonably reflected the proportion of the work which had been carried out by him. No guidance was provided as to how such an exercise might be carried out, and such an exercise could well have to be performed more than a decade after retirement. The necessity of assessing "proportion" would give rise to considerable uncertainty and possibly further disputes or litigation. This difficulty did not arise on the defenders' interpretation, as the

only bonuses due were those earned prior to retirement, and no question of proportionality arose. On the pursuer's construction, no bonuses would "remain due" at retirement as they would not fall due until some time after the retirement date, and it was therefore impossible to make sense of the provision that bonuses "will remain due and payable on the timescale as set out in clause 6(i) and (ii)."

[111] Counsel further submitted that as at the date of termination of employment, none of the sites identified by the pursuer in this action had been acquired by the defenders and so no entitlement to Value Bonus under clause 6(ii) had been earned. Planning permission had not been granted as at that date in relation to any of the sites except Robroyston and Brackenhill Farm which achieved outline planning permission only and had accordingly not achieved planning permission acceptable to the defenders as required by clause 6(i). In consequence, no entitlement to Volume Bonus under clause 6(i) had been earned.

Analysis and decision

[112] The question of whether the bonus scheme survived the termination of the pursuer's employment contract by the defenders is a matter of interpretation of the following part of clause 6:

> "In the event of you leaving the employment of the Company with the express agreement of the Company … all bonuses which are earned at that time but which have not been paid will remain due and payable on the timescale as set out in Clause 6(i) and 6(ii)."

The timescale set out in Clause 6(i) was:

> "The bonus will be payable one month after the achievement of planning permission acceptable to the Company."

The timescale set out in Clause 6(ii) was:

> "The bonus will be payable one month after completion of the purchase (ie purchase price) of the new land.
>
> Where payment of the Purchase Price is phased, the bonus will be paid within two years of first completion, in three equal payments, one at completion and two subsequent equal payments made annually. The exception is the purchase of major areas of land in excess of 5 years supply such as land at Robroyston, where the bonus will be paid within four years of first completion, in five equal instalments, one at completion and four subsequent equal instalments made annually.
>
> Where the total price to be paid by the Company still remains undetermined at the time a bonus is to be calculated, the price shall be calculated on a notional basis, based on the best evidence available at the time."

[113] The defenders' interpretation is to the effect that bonus is not payable after termination of employment unless planning permission is granted (or as the case may be land purchase is completed) before the termination date. I reject that interpretation for the following reasons.

[114] Firstly, the contract draws a distinction between when the bonus is earned and when it is paid. The timing of the payment is linked to the timing of the grant of planning permission or purchase. However the earning of the bonus is not. All of the sites which I have found above to fall within the bonus scheme fall within the first limb of the Bonus Sentence ie where the land is identified and introduced by the pursuer. The pursuer earns the bonus by his work in identifying and introducing the land. Payment of a bonus for that work is conditional on planning permission or land purchase or payment of a management fee. If that condition is never satisfied, then he is not entitled to payment. If that condition is satisfied prior to termination of the contract, he is entitled to payment. If that condition is satisfied after termination, it is a bonus which has been earned but not yet paid and he is entitled to payment after the condition is satisfied.

[115] Secondly, the contract must be interpreted in accordance within the factual matrix of the construction industry. As its name suggests, strategic land proceeds on a long timescale.

It can take up to ten or even more years for a project to reach the stage where planning permission is granted or the land is acquired. The purpose of the bonus was to provide the pursuer with an incentive in relation to strategic land. Given the timescales involved, a bonus scheme which ceased to pay out on termination of employment would provide little incentive in respect of strategic land. If it is going to take five to ten or even more years to obtain planning permission or acquire land, then there would be no incentive for the employee to exert himself to produce exceptional performance in the last five to ten or more years before retirement. Indeed even if the employee was younger, there would be no incentive for him to exert himself to produce exceptional performance if he thought that there was any possibility that he might not remain with the employer for a period of five to ten years or longer. Most employees cannot say with any degree of certainty that they will remain with an employer for such a long period of time: for example, the employer might make an employee redundant because of restructuring or a takeover, the employer might otherwise terminate his employment through no fault of his own, or the employee might leave with the consent of the employer in order to progress his career development and professional skills by gaining experience of working elsewhere. Far from being an incentive to promote strategic land projects, it would be an incentive for an employee to focus instead on short-term projects where planning permission or land purchase could be swiftly obtained. Against that matrix, the pursuer's interpretation, which takes account of the nature of strategic land and the timescales involved, is to be preferred.

[116] Thirdly, the law is slow to allow an employer to frustrate an employee's bonus by terminating his contract (eg *Rutherford* v *Seymour Pierce* 2010 EWHC 375; *Noble Enterprises* v *Lieberum* (EAT) 67/98). In my opinion in the circumstances of this case the defenders' interpretation would permit the defenders to deprive the pursuer of a bonus merely by

terminating his employment: the pursuer's interpretation, which does not have that result, is to be preferred.

Order

[117] I am minded to grant declarator in terms of the first and third conclusions under deletion of subparagraphs (vi), (vii), (xiv) (xvii) (xviii) and (xix); grant declarator in terms of the second conclusion under deletion of the words "as reasonably reflects the proportion of the work required to obtain that permission that had been carried out by 31 March 2020."; grant declarator in terms of the fifth conclusion in respect of (i) only; grant declarator in terms of the sixth conclusion under deletion of the words "the proportion of the sum equivalent to" and "as reasonably reflects the proportion of the work required to obtain that permission that had been carried out by 31 March 2020."; and refuse declarator in terms of the fourth, seventh and eighth conclusions. However, as requested by both parties, I shall put the case out by order for discussion of the appropriate interlocutor. I reserve all questions of expense in the meantime.