7 December 2011

PRESS SUMMARY

Aberdeen City Council (Respondent) v Stewart Milne Group Limited (Appellant) [2011] UKSC 56
On appeal from the Extra Division of the Inner House of the Court of Session

JUSTICES: Lord Hope (Deputy President), Lady Hale, Lord Mance, Lord Kerr, Lord Clarke

BACKGROUND TO THE APPEALS

The Appellants entered into a contract with the Respondents for the purchase of land with a view to its development to form a business park, or for industrial development. The purchase price was £365,000, but it was subject to a possible uplift ('the Profit Share') in the events described in clause 9 of the missives. This was to be payable if the Appellants issued a notice indicating their wish to buy out the Respondents' share of the open market value of the land, or if the Appellants wished to dispose of the whole part of the subjects by sale or by a lease for a term of more than 25 years. The Appellants took title to the subjects on 26 August 2004, and the land was developed as anticipated in the missives.

On 4 October 2006, the Appellants transferred their title to the subjects to another company in the group, called Stewart Milne (Westhill) Limited ('Westhill'). They informed the Respondents of this sale. The Appellants' contention is that the effect of this transaction was to trigger the obligation to pay the uplift to the purchase price as set out in the missives. Since the gross sale proceeds for the relevant part of the development land were less than the allowable costs which were to be deducted from the sale price in terms of the missives, the result was that no uplift was payable to the Respondents. The Respondents refused to accept that the transaction had this effect, since the open market value of the subjects at the date of the sale was greatly in excess of the consideration paid by Westhill. The Respondents raised an action for declarator that any uplift due to them in terms of the missives falls to be calculated by reference to the open market value of the subjects as at the date of sale by the Appellants to Westhill, less the allowable costs. Declarator was granted by the Outer House, and was upheld on appeal by an Extra Division in the Inner House.

JUDGMENT

The Supreme Court unanimously dismisses the appeal, upholding the declarator that was granted in favour of the Council. The leading judgment is delivered by Lord Hope. Lord Clarke gives a short concurring judgment.

REASONS FOR THE JUDGMENT

The three events which trigger the Appellants' obligation to pay the uplift are set out in clause 9. The definition of 'the Profit Share' in the Schedule then sets out three ways in which the base figure for the profit share is to be arrived at: namely, by reference to the 'estimated profit or gross sale proceeds or lease value' **[15]**. At first, they appear to be mutually exclusive, but the context tends to indicate that they have one thing in common. This is that the base figure is to be taken to be the amount which the subjects would fetch in a transaction that was conducted at arms length in the open market. Unlike the provisions for the case of a buy out or lease, no mention is made of a valuation exercise in the case of a sale. But a sale at arms length is usually taken to be the best evidence of the value of the subjects in the open market **[16]**. It is a reasonable assumption that these methods were expected to produce the same base figure, albeit by different routes or methods of calculation. Basing the calculation on the

open market was, on a fair reading of the agreement, the commercial purpose that these various methods were intended to serve **[17]**.

The problem is that it was not expressly stated that the 'gross sale proceeds' were only to be used in the event of a sale at arms length in the open market. Was this a deliberate choice, or simply an oversight? The answer is to be found by examining how the agreement can be given effect on the assumption that it was an oversight. There are, of course, well understood limits to the extent to which a court can depart from the express terms of a written agreement in solving a problem of this kind **[18]**. The wording of the definition of Profit Share does not, in terms, confine the method to be used in the case of a sale to the gross sale proceeds **[19]**. There is nothing in the definition of 'Estimated Profit' (or 'Open Market Valuation') to show that this method cannot be used in the event of a sale. There would therefore be no difficulty in implying a term to the effect that, in the event of a sale which was not at arms length in the open market, an open market valuation should be used to arrive at the base figure for the calculation of the Profit Share **[20]**.

The context shows that the intention of the parties must be taken to have been that the base figure for the calculation of the uplift was to be the open market value of the subjects at the date of the event that triggered the obligation. It can be assumed that this is what the parties would have said if they had been asked about it at the time when the missives were entered into. The question is whether effect can be given to this unspoken intention without undue violence to the words they actually used in their agreement. The court considers that the words used do not prevent its being given effect in this way **[22]**. The provisions for payment of the Profit Share on the grant of a lease over the subjects undermine the Appellants' argument that it must have been an essential element of the bargain that the profit had actually been realised before the obligation to pay the Profit Share was triggered [**23]**.

A further, alternative argument was put forward by the Appellants. They had been prevented from presenting the argument in the Inner House, presumably because it was inconsistent with the case presented in the pleadings. But the overall aim should be to do substantial justice as between the parties, so the Court considers that this further argument about how the contract should be construed should be permitted.

The Appellants' point was that any commercial absurdity could be addressed by holding that the word 'disposal' in clause 9 should be read as referring to an arms length transfer at market value rather than a transfer to an associated company for a notional value **[13-14]**. So the sale to Westhill should be disregarded and the obligation to pay the uplift triggered instead by a sale of the subjects in the open market by Westhill. But that solution cannot fit with the words used in the contract, to which Westhill are not a party. It would not be enough merely to substitute for the word 'Purchasers' in the definition words that would include an associate company. It would also be necessary to write in clauses to protect the Respondents against the obvious risks that such an arrangement would give rise to. This would involve re-writing the bargain for the parties, which the court cannot do **[25]**.

References in square brackets are to paragraphs in the judgment