



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 43

A18/21

OPINION OF LORD TYRE

In the cause

MAST GROUP LIMITED

Pursuer

against

PATRICIA CHALMERS

Defender

Pursuer: Reid; Aberdeen Considine & Co
Defender: McGuire; Allan McDougall

25 May 2022

Introduction

[1] The pursuer (“the company”) is a manufacturer and supplier of diagnostic products for clinical laboratory testing, predominantly in the area of clinical microbiology and antibiotic sensitivity testing. The products that it supplies include the machines upon which tests are carried out, test kits and other consumable items. From November 2014 until July 2021, the defender (“Ms Chalmers”) was employed by the company as technical sales representative with responsibility for a territorial area covering Scotland and the north of England. She was remunerated partly by a fixed annual salary and partly by bonuses determined according to the terms of a bonus scheme.

[2] In March 2020, at the outbreak of the Covid-19 pandemic, the company received orders from NHS Scotland for the supply of a number of diagnostic testing machines and, during the following months, it supplied large quantities of test kits and other items for the laboratory testing of samples. As a consequence, the company's sales within Ms Chalmers' territorial area for the quarter years to July 2020 and October 2020 were far higher than in previous periods. Ms Chalmers claimed bonuses calculated on the basis of those sales. The company denies that she is entitled to such bonuses and has raised the present action for various declarators to that end. Ms Chalmers counterclaims for the bonuses that she maintains are due to her.

[3] The case came before me for proof before answer. Evidence on behalf of the company was given by Mr Alexander Daun, the company's sales director, and by Mr Iain McElarney, the company's new product sales development manager. Ms Chalmers gave evidence on her own behalf. There was little factual dispute and I found all of the witnesses to be credible and reliable. The issue raised by the case is the proper interpretation of the terms of Ms Chalmers' bonus scheme.

Ms Chalmers' contract of employment

[4] By letter dated 8 October 2014, the company offered Ms Chalmers employment as its technical sales representative for the territory designated T1 - Scotland and the North of England. (By the time of the circumstances giving rise to this case her role had evolved to account manager for that territory.) Ms Chalmers was to work 30 hours per week for a salary that was pro-rated from an annual salary initially of £41,875. As regards bonus, the letter stated:

“OTE bonus

The overall scheme is based on achieving revenue growth and reaching your personal sales target by year-end - up to 5% of the value of additional sales can be earned. Full details will be made available upon commencement of employment.”

Ms Chalmers accepted the offer and the terms of her employment were set out in a Statement of Main Terms of Employment. The abbreviation “OTE” stands for On Target Earnings.

The nature of Ms Chalmers’ duties

[5] Ms Chalmers, who has a degree in biology, described her role of account manager as being responsible for all existing customers of the company within her territory. The majority of her business was in NHS laboratories of which there were about 26 in territory T1. Her job was to go out and speak to the customers, build relationships, promote the company’s products, and look for new opportunities to grow the business. Typically, the company’s products were in the microbiology sector, and she would be dealing with laboratories carrying out antibiotic sensitivity testing. In addition the company had products in the fields of virology and molecular biology. As an account manager Ms Chalmers worked in co-ordination with the company’s product specialists. These individuals were more highly qualified in their particular fields and would have specialist knowledge in relation to a particular product.

[6] Mr McElarney is one of the company’s product specialists. He provided a helpful description of the interaction between his role and that of an account manager such as Ms Chalmers. As he saw it, the account manager’s role was to create and maintain communication with customers and establish contacts with new customers. The account manager would have a list of contacts whom they would routinely visit to discuss the

customer's use of existing products and to introduce new products to them. Mr McElarney's role was to carry out an initial evaluation of a new product, including clinical trials. He would then introduce the product to the account managers who would be responsible for disseminating information to customers in their territory. Any interest expressed by a customer would be reported back to the relevant product specialist who would then work together with the account manager in seeking to achieve a sale of the product.

[7] Mr Daun's description of Ms Chalmers' role was not significantly different. An account manager such as Ms Chalmers was the face of the company, building relationships, keeping customers updated regarding products, and bringing in specialist colleagues when this was necessary to drive business forward. His phrase for this was "consultative selling". The main difference between an account manager and a product specialist was that the latter's specialist qualifications and knowledge enabled them to speak to clinicians with confidence on technical matters. The project specialists (of whom there were four) were not attached to a particular territory but were available to support account managers as and where required.

Ms Chalmers' bonus scheme for the financial year 2019-20

[8] The company's financial year runs from 1 October to 30 September, and Ms Chalmers' bonus scheme applied annually for the same period. The scheme for 2019-20 was in the same terms, *mutatis mutandis*, as those of previous years. It was set out in a letter to Ms Chalmers dated 14 January 2020, signed by Mr Daun and by Mr Brian Doyle, at that time the company's finance director:

“Dear Tricia,

I am pleased to confirm the Bonus Scheme for Financial Year 2019-20.

The overall scheme is based on achieving revenue growth and reaching your personal sales target by year-end.

Capital instrument sales

Sales of instruments are included within the main bonus scheme. However, no bonus will be payable on sales of those instruments if they are sold at less than list price (as detailed in the Equipment Supply Agreement schedule).

Sales of the Mast Uri™ System and its equipment components are not permitted without the written prior authorisation of both the Sales and Finance Directors, these will not be allowed to be sold at less than list price and will not be allowed to be sold without a signed contract for a plate supply agreement. Instruments supplied as part of a reagent rental contract will not be eligible.

Reagent rental sales

Long-term reagent rental deals offer the security of guaranteed revenue and are an increasingly important pathway to year-on-year growth. You will therefore earn additional bonus for the successful installation of the Mast Uri™ System. This bonus will be wholly independent of the quarterly and annual bonus structure.

You will earn £500 for a 5-year contract, £300 for a 3-year contract and £200 for a 2-year contract... This bonus will only be paid once per system, so for example, if a customer signed up for several two-year contracts, only the first contract would be eligible for this bonus.

...

Quarterly bonus payments

A bonus will be payable for achievement of revenue growth on a quarterly basis.

Your base figure is your achieved sales for the same period in financial year 2018/19... Any sales achieved over this figure will be payable at 3% of achieved increase.

Your base figure for the year is £820,067.

Your four quarterly base figures are:

Q1	Q2	Q3	Q4
£237,340	£203,668	£199,152	£179,907

Annual bonus payment

Your annual target is £965,009.

If you achieve your annual sales target then you will receive an additional 2% bonus payment on any increase over the annual base. This means that if you achieve your annual sales target, all sales over base will attract a total 5% bonus.

...

Payment

Quarterly payments will become due in the month following the close of each quarter, i.e. January, April, July and October.

Annual payments will become due when the audited accounts are closed and signed off, circa February..."

[9] Mr Daun explained the procedure for setting the target for the annual bonus payment as follows. In conjunction with the account manager and the product specialists, he would look at performance in the previous year and attempt to identify areas where sales could be grown. He would take account, inter alia, of customers changing techniques that could result in lower sales, and also of products that were known to be coming on to the market and expected to be launched by the company during the year ahead. No provision was made for products that were unknown at the time of setting the annual target. For her part, Ms Chalmers described the annual target as a guesstimate based partly on previous years and partly on business that was expected (or hoped) to come along in her territory during the year ahead. She learned from experience that whatever annual target she suggested, the sales director would put in a higher figure.

[10] Not all of the company's sales were allocated to a particular geographic territory. In addition to four territories covering the United Kingdom, the company operated an office account known as T11 for business that was not allocated to any geographic area. This account was used for customer-specific agreements such as private label products which

were managed directly by the sales director's office and the project specialists, and not by an account manager. Prior to the Covid pandemic, the largest account held in T11 was a test for bowel cancer screening in a national programme for England. Mr Daun explained that it was considered appropriate to have such large accounts, with greater potential revenue and attendant risk, managed and controlled centrally.

The company's business relationship with Seegene Inc

[11] Seegene Inc is a South Korean company with whom the company has had a commercial relationship since about 2007. By about 2014 the company was finding the relationship unproductive and the distribution agreement with Seegene was being terminated. In 2016 Seegene expressed interest in working with the company again, with a view to delivering marketable products in Scotland and the north of England and in Wales. Mr Daun and Mr McElarney persuaded the other directors to give the relationship another try, and to invest in some Seegene equipment with a view to supplying it to opinion leaders in the field of microbiological testing. The machines concerned were molecular testing platforms known as the Nimbus and the Starlet, which were operated in conjunction with a data processing machine known as a CFX96. One of the tests which those machines were designed to carry out was a test for HPV (human papillomavirus), but they were capable of carrying out other tests, such as testing for flu viruses. Account managers, including Ms Chalmers, were given basic training in the possible benefits to customers of use of Seegene equipment.

[12] Nimbus and CFX96 machines were installed in, but not sold to, NHS laboratories in Cardiff and Dundee for clinical trials. Mr McElarney was the principal contact with the clinicians in these laboratories. Ms Chalmers introduced him to the clinicians at Dundee and

assisted with the organisation of clinical trials. In 2019 it was noted that the equipment supplied to Dundee was not being used much; on the other hand the laboratory at Edinburgh Royal Infirmary was having difficulties with another supplier and was interested in obtaining the Seegene equipment for HPV testing. Arrangements were made by Mr McElarney, assisted by Ms Chalmers and by Mr Brad Horn, who had recently been engaged by the company as another project specialist, with Dr Kate Cuschieri and other clinical scientists in Edinburgh to transfer the equipment there from Dundee. Representatives of Seegene came from South Korea to assist with the installation, which was successfully completed.

Seegene equipment and the Covid pandemic

[13] Mr Daun became aware of the Covid-19 virus in China at around Christmas 2019. In early February he and Mr McElarney made a business trip to meet Seegene representatives in South Korea, in the course of which it was mentioned that Seegene were producing testing kits for Covid that could be used on the Nimbus/Starlet and CFX96 equipment for research though not clinical purposes. In the context of Covid, the Nimbus and the Starlet could be used to extract DNA or RNA from a patient sample provided to a laboratory. The extraction could then be analysed on the CFX96 to test for the presence of the Covid virus. Mr McElarney and Mr Horn informed Public Health England of this and supplied them with equipment and a testing kit. Another was supplied to an NHS laboratory in Cardiff where it was tested by Dr Catherine Moore, a virologist, who expressed an interest but did not wish to proceed with a trial because the virus had not yet spread to Europe. Several visits were made to Dr Moore by Mr Daun, Mr McElarney and Mr Horn.

[14] Virologists have an efficient information sharing system. On Friday 6 March 2020, Dr Kate Templeton, consultant clinical scientist and head of molecular diagnostics at Edinburgh Royal Infirmary, emailed Mr McElarney:

“Dear Iain

I hear you have a Covid-19 kit that could run on the CFX96 that is currently in our lab.

I wonder if we could try a kit –

Be great if this can be sent as soon as possible...”

Mr McElarney replied immediately, confirming that a test kit could be supplied by Tuesday. He copied his reply to Mr Horn and Ms Chalmers.

[15] On the same date, Mr McElarney emailed Mr David Taggart, NHS Scotland’s procurement officer, noting that the Seegene system for Covid-19 testing was being adopted around the world and describing in detail how the Nimbus/Starlet and CFX96 machines worked by extracting and analysing RNA. Mr McElarney gave what he called “a ball park pricing (excluding maintenance)” for the purchase of each of the three machines, the Starlet being more expensive than the Nimbus. He provided an estimate of the price per test for kits and consumables. Mr McElarney continued:

“As mentioned earlier, we have already got a Nimbus/CFX96 on loan in Edinburgh. It is possible to move it for fast tracking, but would prefer to see if we can fast track another platform to set up testing earlier. This will depend on availability when the order comes in, but of course we will be working hard with you to make it happen.

...

We look forward to working with you and getting Scotland established...”

[16] On Monday 9 March 2020, Dr Templeton emailed “Iain and Tricia”, enquiring how quickly a CFX96 would be available because “Aberdeen are keen to go live ASAP”.

Mr McElarney replied, again immediately and copying in Mr Horn and Ms Chalmers, to inform Dr Templeton that there was one loan CFX96 available that could either come to her

to help with the workload or be taken to Aberdeen. Dr Templeton replied, copying in her counterpart in NHS Grampian:

“That would be fantastic
Would it be able to be shipped to Aberdeen
They are coming to see Kate C this week to see how the test is done...”

The clinical scientist in Aberdeen, Dr Noha El Sakka, then contacted Mr McElarney directly, noting that they were very keen on starting ASAP. In his reply, Mr McElarney explained that he had sent consumables information and prices to Mr Taggart to establish the national pricing structure. He stated that Mr Horn was planning to install the CFX96 equipment on Friday.

[17] Matters continued to proceed rapidly. On 13 March 2020, Dr Templeton emailed Mr McElarney asking for a quote for Seegene kits, noting that they had got on well with the trial kit and wanted to have kits for live testing the following week. Mr McElarney replied confirming that Mr Horn and Ms Chalmers were in the process of doing the quote “to match the national prices and enable you to get a head start”. He expected to be able to supply kits from the following midweek. On 15 March, Ms Chalmers received an email enquiry from the microbiology laboratory manager at Crosshouse Hospital, Kilmarnock, expressing an interest in reviewing the Seegene platform to assess local applicability for testing.

Ms Chalmers replied, copying in Mr McElarney and Mr Horn, confirming that “National procurement have several Seegene platforms on order”, attaching product information, and indicating that any queries would be forwarded to Mr Horn as product specialist.

[18] On 16 March 2020 a meeting was held at Edinburgh Royal Infirmary, attended by inter alia Mr McElarney, Ms Chalmers, Dr Cuschieri and the laboratory’s virology consultant, Ingo Johanssen. The meeting had been arranged some time previously to

discuss use of the Seegene equipment for HPV testing, but this discussion was overtaken by the urgent need for Covid testing. Ms Chalmers' note of the meeting records:

"...HPV tender will be out shortly respond & should all be good, approx 3000 samples per yr for genotyping.
 Covid-19 all kicking off
 Iain and Brad have been having discussions with Natt Procurement - re systems.
 Ingo lead virologist came in for a chat -
 Scotland has decided to go with Seegene based on the information available at the time - Kate T tried the test Iain sent through last week and likes it - she has spread the word.
 Plan is to have 7 main sites in Scotland testing.
 Glas/Edin will both get Starlets, Abdn, Inverness, Dumfries, Ninewells, Lanarkshire will get Nimbus.
 NHS procurement will place bulk orders for consumables.
 ERI to place interim order to keep them running until bulk supplies in..."

[19] In the event NHS Scotland purchased 11 sets of Seegene equipment during 2020, together with the test kits and consumables required to carry out testing for the presence of Covid RNA. The company's total sales in Territory 1 for the third and fourth quarters of 2019-20 were £2,942,994 and £3,919,657 respectively, compared with £247,707 in the second quarter. The contribution of Seegene equipment, kits and consumables to each of these figures was £2,858,055, £3,753,539 and £61,450 respectively. Thereafter the company took a decision to remove Seegene sales from the geographic territories, including T1, and to allocate them instead to the head office account T11. For technical reasons this removal, which was intended to have effect from October 2020, was not fully completed until about February 2021.

Ms Chalmers' involvement in the Seegene sales

[20] According to Ms Chalmers' evidence, her practical participation in the sales of Seegene equipment, kits and consumables to NHS Scotland laboratories began after the meeting on 16 March 2020. Sites for the equipment having been identified, Ms Chalmers

and Mr Horn visited the sites to check their suitability, in terms of available space, power and computer ports, for installation of equipment. Ms Chalmers introduced Mr Horn to the various clinical scientists and he presented an overview of the system to them. Orders were then placed for the test kits. Ms Chalmers set up a system for receipt and speedy processing of orders. When an order was received a quotation was prepared by her or by Mr Horn. This was happening on a daily basis. Prices were fixed but quantities kept increasing in accordance with Scottish government testing targets. Ms Chalmers monitored goods in and out, and in the early days had to ration available stocks among the various customer laboratories. Mr McElarney remained the main point of contact with NHS Scotland procurement: he would instruct the preparation of quotations which would be sent to him by inter alia Ms Chalmers, to be dealt with centrally by NHS Scotland.

[21] Mr McElarney's description of Ms Chalmers' role was not dissimilar. In an email to Mr Daun dated 24 September 2020, seeking agreement of a bonus for himself "based on the Seegene sales and the maintenance of the Seegene contract to keep us in this position",

Mr McElarney stated:

"These sales have all been a direct result of the work that Brad and I have been doing directly with customers at a national and local level. There has been no direct sales efforts and generating orders from any of the sales team at all. That said, Tricia has been absolutely amazing in facilitating us to take advantage of this opportunity by supporting behind the scenes and sorting the office out..."

In his oral evidence, Mr McElarney characterised his statement that "there has been no direct sales efforts... from any of the sales team" as unduly harsh. He remained of the view that the sales for Covid testing had been generated by his contacts with the Cardiff laboratory and with Mr Taggart in NHS Scotland procurement, but he readily acknowledged that co-ordination of sales, maintenance of the supply chain, direct contact

with customers and installation of equipment could not have been achieved without Ms Chalmers' participation.

[22] It can be seen from the above chronology that Ms Chalmers was not directly responsible for the company's achievement of the bulk order from NHS Scotland for Seegene testing equipment, and the consequent sales of test kits and other materials.

The correspondence to which I have referred demonstrates that the sales derived from the initial contact made on 6 March 2020 by Dr Templeton at Edinburgh Royal Infirmary with Mr McElarney, she having been alerted to the possible use of the Seegene equipment for Covid testing by her colleague in Cardiff, who was also a contact of Mr McElarney's. I see no reason to disagree with Mr McElarney's assertion that these sales were achieved because he acted quickly, sending a rapid response to Dr Templeton and then immediately following the matter up with Mr Taggart by offering a price and assuring him of early availability.

Although Ms Chalmers was copied into correspondence more or less from the outset, she did not begin to play a practical role in the supply of the equipment until after the meeting on 16 March. Thereafter she performed a vital role in ensuring that the company fulfilled its commitments in respect of the installation of the equipment and the supply of large quantities of testing kits and other materials to the various laboratories concerned.

[23] It is a matter of agreement that the bonus paid to Ms Chalmers for the *second* quarter of 2019-20 included a sum of £1,321 attributable to sales of Seegene products for use in connection with Covid testing. Mr Daun explained that this had not been the consequence of a conscious decision by the company to pay her a bonus for Covid-related sales. The payment was made in April 2020: a "manic time" when the attention of the company's management was focused on the logistics of meeting the sudden demand for its products during the restrictions of lockdown. The payment had simply gone through unnoticed.

[24] On 1 May 2020, Mr Daun telephoned Ms Chalmers to inform her that the bonus she had claimed for the third quarter would not be paid. He followed this up with a letter dated 7 May 2020 stating that a new bonus scheme would be applied to the third and fourth quarters of 2019-20 because the bonus scheme previously offered “wasn’t designed to cover this set of circumstances”, and that the company had decided to terminate it. The proposed new scheme provided for a one-off bonus of either £25,000 or £30,000 to be paid for Covid-related sales of Seegene equipment and other items, with a percentage-based bonus retained for other sales.

The parties’ contentions

Orders sought by the company

[25] The company seeks the following declarators:

- (1) Declarator that the terms “sales”, “achieved sales”, “sales achieved” and “sales target” found in the letter establishing the company's bonus scheme for the trading year 2019-20 refer to sales of its products existing as at October 2019 and sales of the products which were the subject of known, budgeted product launches at that date.
- (2) Alternatively, declarator that it is an implied term of the contract of employment between the company and Ms Chalmers that her entitlement to quarterly and annual bonus payments in terms of the company's bonus scheme for the trading year 2019-20 falls to be calculated by reference to sales of the company's product range as it existed at October 2019 and sales of products in respect of which there were known, budgeted product launches as at October 2019.
- (3) Declarator that the company's bonus scheme for the trading year 2019-20 does not extend to the Covid-19 testing kit distributed by the company and that sales of

said testing kit do not fall to be included in the sales figures used for calculation of payments due to Ms Chalmers under the bonus scheme.

(4) Declarator that the company is under no obligation to make payment to Ms Chalmers of the sum of £326,000 in respect of her claimed entitlement under the bonus scheme for its financial year 2019-20.

Argument for the company

[26] On behalf of the company it was submitted, firstly, that properly construed, the bonus scheme extended only to sales where Ms Chalmers had “achieved” the sale in question through her own efforts. The sales of the Covid-19 testing product were not “achieved” by her and did not qualify for bonus payments.

[27] The bonus letter provided for a quarterly bonus to be “payable for achievement of revenue growth”. This bonus was to be based on “achieved sales”. An annual bonus was payable “if you achieve your annual sales target”. None of these terms was defined. The context in which the bonus letter was concluded was of significance in arriving at the correct construction of the terms “sales” and “achieved”. The express aim of the scheme was to increase revenue by way of sales. Sales, in this context, were said in the letter of offer to be “personal”. It was therefore the defender’s personal contribution to company revenue which the bonus scheme sought to incentivise. The same language was evident in the provisions relating to the bonus targets themselves: the base figure was said to be “your achieved sales”, with the requirement being that “you achieve your annual sales target”. There was no reference to any bonus being payable as a result of the broader corporate achievements of the company itself or the Mast Group.

[28] The references to “sales” and “achieved” in the bonus letter fell to be construed as references to instances where a customer had chosen to purchase a product as a result of the account manager’s efforts. The contrary construction, in terms of which the expressions “sales” and “achieved” could refer to all sales where she had any involvement with the customer, even if that involvement was after the sale itself was agreed, or where it related to earlier discussions involving a different product, did not accord with commercial common sense. On such an approach, sales could take place in an account manager’s territory which were not the result of his or her efforts (for example, through the efforts of one of the product specialists), yet trigger a substantial reward for the account manager. Such an approach was commercially improbable. The crucial question was: who was responsible for selling a particular product to a particular person?

[29] Applying that approach to sales of the Seegene Covid testing product, the sales of that product in the year 2019-20 were not sales “achieved” by Ms Chalmers and did not fall within the terms of the bonus scheme. None of the matters relied upon by Ms Chalmers, such as prior involvement with the Seegene HPV product, post-16 March site visits, or the preparation of quotations, constituted a basis for the sale having been “achieved” by her. There was no direct link between the HPV discussions and the Covid sale. The post-16 March site visits were to deal with practicalities such as installation of the machines that had already been purchased. The quotations produced by Ms Chalmers were based on prices agreed with NHS Scotland by Mr McElarney.

[30] Secondly, the bonus targets for each year were expressly based on sales from previous years. The sales target was based on the sales which the parties considered could be achieved. The bonus letter was issued against a background of expectations as to performance that were based on the pursuer’s existing product range and against a

background of expectations as to the value of that range and customer interest in it. The bonus targets focused on developing sales of existing products and existing customer relationships. The process followed in relation to sales of the Covid testing product in 2019-20 was significantly different. It was based on the urgent adoption of an entirely new product, in a process driven not by account managers and their existing relationships but rather by the product specialists who were familiar with the new product. The Seegene Covid testing product was not a matter within the contemplation of the parties at the time when the 2019-20 bonus scheme was negotiated.

[31] The exercise of construing expressions in the 2019-20 bonus letter had to be performed in light of the circumstances prevailing when the bonus scheme was negotiated and the bonus letter issued. They should be understood as referring to sales of the pursuer's existing product range and known product launches at that time. Such a construction was preferable to one which took no account of the unforeseen circumstances arising from a global pandemic and of sales achieved in a different manner of an entirely new product and on an entirely different scale.

[32] Alternatively, there existed an implied term that the bonus scheme would extend only to products existing as at October 2019 or known and budgeted product launches as at that date. Implication of such a term was necessary to give commercial and practical coherence to the contract. It reflected the way in which hypothetical parties in the parties' position at the time of contracting would have understood the background to the bonus scheme and its operation.

[33] Finally, it was submitted that Ms Chalmers was not, in any event, entitled to a bonus in respect of the value of sales of the Seegene equipment itself, because those were sales of

capital instruments at less than list price which were expressly excluded from the bonus scheme. I deal with this matter separately later in this opinion.

Orders sought by Ms Chalmers

[34] In her counterclaim, Ms Chalmers seeks declarator that the company is under a contractual obligation to make payment to her of the sum of £324,822 in respect of her claimed bonus entitlement, and payment by the company to her of that sum with interest. Alternatively, she seeks payment of the sum of £246,595.75, being the amount said to be due to her on the hypothesis that she is not entitled to any bonus in respect of the sales of capital instruments.

Argument for Ms Chalmers

[35] On behalf of Ms Chalmers it was submitted that there was no basis in the evidence for granting any of the declarators sought. The bonus scheme for 2019-20 was identical, other than the base figure and annual target, to those of previous years. Those schemes had proceeded solely on the basis of arithmetic calculation. The issue of whether or not Ms Chalmers had reached or exceeded the sales target had been determined solely by reference to sales invoiced through her territory. Proceeds of sales of unbudgeted products had not been excluded. The company's construction would require a substantial rewriting of the terms of the scheme and was contrary to commercial common sense. If for example a "new" product came on to the market in early November, sales of that product would not count towards the employee's bonus payment: this would provide no incentive for the employee to sell that product. In any event it would make no sense for such a product not to be included in the bonus scheme for subsequent quarters.

[36] There was no evidential foundation for the company's construction of the bonus scheme in terms of which a sale was only "achieved" by the account manager if the customer in question was persuaded to purchase the product as a result of the manager's personal efforts. Such a construction would be fraught with difficulty and uncertainty where, as here, there was a sales team working together to obtain a sale. Ms Chalmers had never in previous years been questioned about her role in achieving a sale. The fact that a sale had been invoiced in T1 was enough for it to enter her bonus calculation. It was significant that Ms Chalmers had been paid a bonus in the second quarter that included sales of Seegene products; Mr Daun's explanation for this had been unsatisfactory.

[37] In any event, there was clear evidence that Ms Chalmers had played a role in persuading the "customer" (essentially NHS Scotland) to purchase the Seegene products for use in relation to Covid. She had helped to set up the trials of the Nimbus in Dundee and Edinburgh. She had had an existing professional relationship with Dr Templeton. The fact that Edinburgh had a Nimbus *in situ* had enabled Dr Templeton's team swiftly to assess the equipment's testing capabilities. The company had not been the only potential supplier to customers such as health boards. Ms Chalmers had played an important role in ensuring that supplies of products and quotations had reached customers as the scale of the pandemic worsened. She made visits to seven of the eleven laboratories where Seegene equipment was installed. Her role was not restricted to "after sales" activities. The quotations were sometimes for "new" orders, albeit the price had already been fixed. Mr McElarney had recognised the contribution made by her in ensuring that customers were provided with the products that they needed.

Decision

[38] The general principles of contractual construction were summarised by Lord Drummond Young, delivering the opinion of the court in *Ashtead Plant Hire Co Ltd v Granton Central Developments Ltd* 2020 SC 244, at paragraphs 9-17. In short:

- (i) A contract must always be construed contextually.
- (ii) The exercise of construction is objective: the meaning of a particular provision is what a reasonable person in the position of the parties would have understood it to be.
- (iii) A purposive approach to interpretation should be adopted. The court should have regard to the fundamental objectives that reasonable persons in the parties' positions would have had in mind. Substance should prevail over niceties of writing or bad drafting.
- (iv) The court may have regard to commercial common sense. Where a contractual provision is capable of bearing more than one meaning, the court should adopt the construction that best accords with commercial common sense. Three features of general business conduct may be relevant:
 - contracts are based on the principle of consideration: it is normal to find that the obligations of one party are broadly equivalent to the obligations of the other;
 - parties expect to perform their contractual obligations, and will normally therefore avoid the risk of unreasonable or disproportionate burdens;
 - commercial predictability is achieved by contextual and purposive construction of the words used, rather than by literalism.

Parties were agreed that these principles fell to be applied in construing the provisions of Ms Chalmers' bonus letter.

[39] In assessing the context in which the bonus letter is to be construed, and the factual background against which to adopt a purposive construction, the following matters, which were apparent from the evidence of all three witnesses, appear to me to be of importance.

Firstly, an important aspect of the work of a territorial account manager such as Ms Chalmers is the establishment and maintenance of long-term relationships. The company's business does not consist of one-off sales. It is concerned rather with achieving repeat orders and, where appropriate, with supplying new or different products to an existing customer according to that customer's needs. The task of the account manager is to build relationships which will enable him or her to make regular visits to customers in order to ascertain their requirements and to promote the products of the company, thereby growing the company's business. Results may not be achieved immediately, but the existence of the relationship enables the account manager to take advantage of opportunities as and when they present themselves.

[40] Secondly, all of the witnesses emphasised the importance of team work in the sales process. The work of the account managers was co-ordinated with that of the product specialists. The achievement of a sale was a joint effort, to which the account manager contributed his or her relationship with the customer and understanding of the customer's needs, and the product specialist contributed his detailed technical knowledge of the company's products and his ability to discuss the products with the customers at a specialised level and thus, it would be hoped, achieve the desired sale. The product specialists had the task of providing the account managers with basic training to enable them to offer products to their contacts, and the account managers in turn had the task of

identifying opportunities for the product specialists to persuade the customers that the products were suitable for their needs. As Ms Chalmers put it, the two worked together as a team to achieve their respective bonuses. There was no question of the two being in competition for the bonus payable in the event of a successful sale.

[41] Thirdly, the sales process did not end with the achievement of an initial order. The company's profits derived not only from the sale of capital equipment but also from the regular supply of the test kits and other materials required in order to operate the equipment. (By way of example, a significantly higher proportion of the company's sales income in relation to the use of the Seegene equipment for Covid testing derived from the test kits and consumables than from the machines themselves.) Equally, the account manager might require to follow up an initial sale in order to achieve repeat sales in subsequent periods; in other cases repeat orders would come in without the need for much further promotional effort.

[42] In that factual context, I reject the pursuer's proposition that the expression "achieved sales" and similar expressions are to be construed as restricting the account manager's bonus entitlement to circumstances in which his or her efforts have led directly to a sale. There was no evidence of any process of enquiry ever having been carried out by the company, in the context of bonus entitlement, as to how or by consequence of whose efforts a sale in a territory had been achieved; Ms Chalmers' evidence, which I accept, was that there never was such enquiry. It was no doubt of considerable interest to the company management to know for various reasons how and by whom sales were being achieved, but such information played no part in the account manager's bonus calculation. Moreover, any such process would be inconsistent with, and likely to be highly disruptive of, the very appropriate system of co-operation between account manager and project specialist

described by all of the witnesses. It could lead to disputes as to who had “achieved” a sale and, ultimately, to a breakdown in co-operation as one or other of the company’s employees sought to establish and protect a bonus entitlement by minimising the involvement of the other, all to the detriment of the company’s business.

[43] As to the company’s argument that it was commercially improbable that a substantial bonus entitlement would be triggered by sales in an account manager’s territory which were not the result of his or her efforts, I regard it as equally unlikely that sales would be achieved in a territory without any previous involvement of the account manager. The sales of Seegene products for Covid testing afford an example of the importance of the establishment by the account manager of relationships with customers and potential customers. Although, as I have noted, the direct basis for these sales was the contact made by Dr Templeton with Mr McElarney, and the latter’s ability to respond rapidly and turn the enquiry into a sale, it does not follow that the sale was achieved without involvement on the part of Ms Chalmers. A key aspect of the company’s success in obtaining the Covid business from NHS Scotland was the fact that a testing machine was *in situ* at Edinburgh Royal Infirmary at the time of the outbreak. That was, at least in part, due to the previous sales efforts of Ms Chalmers in relation to use of the machine for HPV testing, including the maintenance of relationships with virologists who were opinion leaders as regards the utility of the company’s products.

[44] Nor does the use of the words “personal sales target” in the letter of offer indicate that enquiry into individual contribution is necessary or appropriate. The personal sales target is simply the target specified in the bonus scheme. The starting point of the target is the account manager’s sales achieved in the previous year - again without any enquiry into the extent to which those sales were achieved as a direct consequence of the account

manager's efforts. Entitlement to quarterly bonus requires only a comparison between sales in that territory in that quarter and the figure for the same quarter in the previous year. The same applies to the annual bonus. The "personal" element is limited to the annual target fixed by the sales director and does not imply a need for any enquiry into personal responsibility.

[45] Moreover, the pursuer's restrictive approach to construction of "achieved sales" does not take account of the fact that the process of sale of machines such as those used by NHS Scotland for Covid testing does not end with the sale of the capital instruments. Without a continuing supply of test kits and consumables, the machines sold would have been of little utility and the company's revenue stream would have dried up. It is not in dispute that Ms Chalmers played a vital role in setting up a system for such supplies and worked hard to keep it operative. A construction of "achieved sales" which disregards all such contributions and focuses only on the process by which the initial capital sale was obtained would not, in my view, accord with commercial common sense. For all of these reasons I reject the company's argument as to the proper construction of "achieved sales".

[46] I reject also the company's contention that the bonus scheme for the year 2019-20 was restricted to sales of products existing as at October 2019 or the subject of known, budgeted product launches at that date. There was no evidence that the equivalent schemes in previous years had been operated on that basis. There is nothing in the wording of the 2019-20 bonus scheme to suggest such a restriction and I find no basis in the context of the scheme to support such a restriction. A purposive construction would suggest the converse: as was pointed out on behalf of Ms Chalmers, such a scheme would provide no incentive to account managers to promote sales of products developed in the course of the

year, and in relation to which they may have received training. That would be contrary to commercial common sense.

[47] In any event it is not clear to me that this argument advances the company's cause. The Seegene capital instruments all existed as at October 2019 and account managers such as Ms Chalmers had for some time been encouraged to try to place them with potential customers. Although the machine supplied to NHS Scotland was being used for a particular purpose (HPV testing), it was a known feature of the machine that it could be used for different types of diagnostic testing. There was nothing intrinsically novel about its use in connection with the Covid virus: it simply required a different and newly-developed test kit. It would make no commercial sense to construe the bonus agreement as providing for bonuses to be paid on sales of Seegene equipment for uses developed before October 2019 but not for sales for uses developed after that date. One has the impression that if (contrary to reality) Covid testing had constituted a modest and short-term use of the Seegene equipment, it is unlikely that there would have been any dispute about Ms Chalmers' entitlement to a bonus on those sales, and that what has caused the present dispute is the unforeseen scale of sales achieved by the company as a result of the Covid pandemic, and the consequent size of the bonus due to Ms Chalmers if, as she contends, the bonus scheme provides for a purely arithmetic approach to be adopted.

[48] The company's alternative argument, that there existed an implied term that the bonus scheme would extend only to products existing as at October 2019 or known and budgeted product launches as at that date, is equally ill-founded. In its submission the company founded upon the observations of Lord Neuberger of Abbotsbury PSC (with Lord Sumption and Lord Hodge concurring) in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at paragraphs 18-21. In the context of the present

case, two of Lord Neuberger's six comments at paragraph 21 appear to me to be important. Firstly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed if it had been suggested to them. Secondly, although the test is not one of "absolute necessity", a term can only be implied if, without the term, the contract would lack commercial or practical coherence. In my opinion the implied term for which the company contends does not come close to meeting this test. It will be recalled that Ms Chalmers' maximum entitlement under the bonus scheme was 5% of sales achieved in her territory. There is nothing commercially or practically incoherent in construing the contract as conferring such an entitlement in circumstances where, through the efforts of the account manager and others, sales far in excess of expectations at the time of the agreement have been achieved, to the principal benefit of the company. The fact that the company might not have offered such a bonus, had it considered the matter, does not meet the test of business efficacy for implication of a term.

[49] I accept the submission on behalf of Ms Chalmers that, properly construed, the parties' agreement provides for a bonus entitlement calculated on an arithmetic basis. That was the way equivalent contracts had been operated in previous years. With the exception of the bonus target set by the sales director, each of the elements of the calculation was objectively derived from actual sales figures for the territory in question and required no judgement of the value or extent of the account manager's contribution. For reasons already stated, a contrary interpretation would lack commercial common sense. In relation to the modest bonus paid to Ms Chalmers for Covid-related sales in the second quarter of 2019-20, I accept Mr Daun's explanation that this payment went through unnoticed and was not the result of a conscious decision. If anything, however, that appears to me to support

Ms Chalmers' contention that the process of calculation of bonus entitlement was essentially a mechanical exercise which did not include a subjective assessment of whether sales had been "achieved" by her or by someone else.

Sale of capital instruments

[50] The company's alternative contention is that Ms Chalmers is not in any event entitled to be paid a bonus in respect of the sales of capital instruments, ie the Starlet, Nimbus and CFX96 machines themselves. The bonus letter provided that no bonus would be payable on sales of capital instruments "if they are sold at less than list price (as detailed in the Equipment Supply Agreement schedule)". According to Mr Daun's evidence, the sale prices for the Seegene equipment were significantly below list prices (in addition to being below the lower prices quoted by Mr McElarney to Mr Taggart as ballpark figures on 6 March 2020). The phrase "Equipment Supply Agreement schedule" was redundant, as it applied only to the Mast URI system. Restricting the meaning of "list price" to those products would protect the pursuer's margin in relation only to a narrow selection of the range of products offered. In context, the reference in the bonus letter to the Equipment Supply Agreement schedule should be construed as a reference to the place where the list prices for the products detailed in that schedule could be found, but not as the exclusive source of list prices for all products. "List price" should instead be given its natural meaning: the price contained in the pursuer's price list for that product.

[51] On behalf of Ms Chalmers, it was submitted that the "Capital Instruments" clause had no application to the Seegene equipment. The prices at which the equipment was sold were not disputed, but these instruments did not have an Equipment Supply Agreement schedule. If the list price was not set out in a schedule, the clause did not apply for the

purposes of the bonus scheme. In any event the company was personally barred from relying on the clause. On two previous occasions, the proceeds of sales of capital instruments at less than list price had been included in Ms Chalmers' bonus entitlement.

[52] On this matter I accept the company's submission. Mr Daun explained that the purpose of the clause was to incentivise the sales team to sell equipment at the list price. He would expect a sale below list price to be discussed with him. The company was seeking to protect its margin on sales of equipment. The clause therefore has a general application which does not depend upon the existence of an Equipment Supply Agreement schedule in relation to a particular capital instrument. Construed in context and in accordance with commercial common sense, the scope of the clause is not restricted to equipment for which such a schedule exists. I agree with the company's contention that where there is no such schedule, the expression "list price" should be given its ordinary meaning of the price for the product in the company's price list. There was a price list for the Seegene equipment, and there was unchallenged evidence that the sales with which this case is concerned were made for prices lower than those in the list. It follows that the clause applies and that Ms Chalmers' bonus entitlement does not extend to those sales.

[53] The argument based on personal bar was not developed to any significant extent, and it falls to be rejected on the facts. Mr Daun explained that on the two occasions founded upon by Ms Chalmers, he had personally authorised a payment of bonus despite being aware that the sale had been below list price. He had wished to encourage sales of a product that was in its infancy, and took a managerial decision to override the terms of the scheme in order to incentivise the account manager to sell the product. The fact that on two particular occasions the company decided not to apply the exclusion does not, in my opinion, meet the requirements for the operation of personal bar as enunciated, for example, by

Lord Birkenhead LC in *Gatty v Maclaine* 1921 SC (HL) 1 at 7. It is not a situation in which the company, by its conduct, justified Ms Chalmers in believing that a certain state of facts exists, upon which she acted to her prejudice.

[54] The sum counterclaimed by Ms Chalmers on the hypothesis that no bonus entitlement exists in relation to capital instruments is £246,595.75. It is, however, a matter of agreement that the sum of £1,321 already received by her in respect of sales in the second quarter falls to be deducted. I therefore find her entitled to payment of the sum of £245,274.75.

Disposal

[55] In the principal action I shall sustain the defender's fourth and fifth pleas in law, repel the pursuer's pleas, and grant decree of absolvitor. In the counterclaim I shall repel the pursuer's first to fourth pleas in law and grant decree for payment by the pursuer to the defender of the sum of £245,274.75, sustaining the defender's second plea in law to that extent. Questions of interest and expenses are reserved.