**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

**[2019] CSIH 12**
**CA87/17**

Lord President
Lord Menzies
Lord Drummond Young

OPINION OF LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion

in the cause

THE COAL AUTHORITY

Pursuers and Reclaimers

against

PEGASUS FIRE PROTECTION COMPANY LIMITED

Defenders and Respondents

**Pursuers and Reclaimers: Lindsay QC; DLA Piper Scotland LLP**
**Defenders and Respondents: MacColl QC; Davidson Chalmers LLP**

6 March 2019

**Introduction**

[1] Where lawful mining has taken place, the space or void occupied by the mine, and the area where the coal remains, continues in the ownership of the person in whom the mineral rights are vested (*Graham* v *Hamilton* (1871) 9 M (HL) 98, see Lord Deas (1869) 7 M 976 at 984). The owner has a right to the exclusive use of the area of the mine and can prevent encroachments upon it. Encroachments causing damage will be actionable (Rankine: *Landownership* (4th ed) 136). As a generality, the owner owes a duty of support to

the land above and adjacent (*White* v *Wm Dixon* (1883) 10 R (HL) 45, Lord Watson at 50; *Angus* v *National Coal Board* 1955 SC 175, LJC (Thomson) at 181).

[2] The liability at common law of the owner of a disused coal mine to pay damages to a surface owner as a result of subsidence can be a subject of some complexity. This is especially so when the subsidence has occurred after, and possibly been contributed to by, the construction of new buildings (see eg Rennie: *Minerals and the Law* para 4.1 *et seq* citing, *inter alia*, *Caledonian Railway Co* v *Sprot* (1856) 2 Macq 449). Concerns by housebuilders and new home owners about that complexity prompted the passing of legislation which introduced a scheme providing for the repair of, or compensation for, such damage. In its current consolidated form, this is the Coal Mining Subsidence Act 1991. The Act imposes (s 2) a duty on the British Coal Corporation, and now the pursuers (Coal Industry Act 1994, s 43), to take "remedial action" in respect of subsidence damage caused by their disused mines, or (eg s 8) to make payments in lieu of carrying out such action. Specific provision is made for dwelling-houses (eg s 22). The pursuers are a statutory consultee in planning applications in relation to areas of (former or proposed) coal working (Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013, reg 25, Sch 5, para 7).

[3] Coal-mining operations require a licence from the pursuers (1994 Act, Pt II). In addition, the pursuers operate an extra-statutory scheme of permits for any other activities which disturb their disused coal mines. These activities include initial site investigations and any subsequent treatment of mine workings. Thus, a permit is required to encroach upon the pursuers' disused mines. A standard condition of the grant of a permit is that the person to whom the permit will be issued will indemnify the pursuers against any liability for claims resulting from their acts and failures or those of their contractors. The defenders

are developers who intended to, and ultimately did, build houses at what is now Allen Court at Townsend Place, Kirkcaldy; an area above disused mine workings. Prior to doing so, they prudently decided to carry out certain exploratory works to determine the extent of any voids below the surface. In order to do this lawfully, they obtained a permit from the pursuers to drill three boreholes into the mine area, having agreed to the pursuers' standard conditions, including the indemnity. They later obtained a retrospective permit for a further 16 exploratory boreholes. The defenders' sub-contractors, who had carried out the exploratory work, then executed ground treatment works without any pre-existing permit. In due course, part of the developed land subsided, thus exposing the pursuers to multiple claims under the 1991 Act.

[4] The pursuers seek a declarator that the defenders are bound to indemnify them in respect of the cost of carrying out remedial action in respect of the subsidence damage for which they are liable. Although it is not material to the current debate, the pursuers maintain that these costs were incurred as a result of the defenders' failure to identify a mine-related risk. By interlocutor dated 12 April 2018, the commercial judge dismissed the action. The pursuers reclaim (appeal) that decision. The question which arises is whether the pursuers' averments are sufficient to establish that the defenders contracted with the pursuers in a manner which incorporated the standard indemnity undertaking.

**The pursuers' averments and related documents**

[5] On 1 December 2010, LK Consult, who were environmental consultants appointed by the defenders, completed an "application for permission to enter or disturb [the pursuers'] mining interests" by drilling three boreholes in order to investigate shallow mine workings at Townsend Place, Kirkcaldy. The works were scheduled to last for two weeks.

The application stated that there were no proposals for the treatment of the site "yet". The application form, which was signed by the consultants on the defenders' behalf, contained the following statement:

> "11 A signed copy of the 'Terms and Conditions' for Entering or Disturbing [the pursuers'] Mining Interests must be included with the application. Is it included?"

The part of the form relating to that question was left blank. The form was, however, received by the pursuers on 7 December, along with a copy of the pursuers' printed "Terms and Conditions", which had been duly signed by the consultants on behalf of the defenders on the same date.

[6] The Terms and Conditions read as follows:

> "Before permission can be given to enter or disturb [the pursuers'] mining interests, each applicant must agree with the following terms and conditions in support of their application and return a signed copy to [the pursuers] along with the original application and supporting documentation.
> ...
> 7. Should it be found necessary to significantly change the method of treatment, design or specification of the works from that contained in the application ... the prior permission of [the pursuers] must be obtained before proceeding.
> ...
> 12. The Applicant shall, for a period of 12 years from the date of completion of the works, indemnify [the pursuers] against liability for claims, losses or damages, including those made under the Coal Mining Subsidence Act 1991 and claims by the Applicant, whether arising as a result of any failure by the Applicant or the Applicant's contractors, to comply with the requirements of this permission, or as a result of any act, failure, inadequacy, omission, negligence or default by the Applicant or the Applicant's contractors in designing or carrying out the work.
> ...
> I agree to the terms and conditions set out by [the pursuers] in relation to:
> Site Location *Townsend Place, Kirkcaldy*."

By a printed permit dated 9 December 2010, the pursuers granted permission, for a period of 12 months, to the defenders to carry out "Investigation of Shallow Mine Workings, 3 boreholes". The permit was numbered 5728.

[7] In a letter dated 8 April 2011, the Acies Group, who were civil and structural engineers also acting for the defenders, accepted a quotation from Groundshire to carry out, as the defenders' sub-contractors, "nine or more" additional boreholes "to confirm the underlying strata and mine workings". Groundshire were specialists in exploratory drilling and the treatment of mine workings and shafts. On the same day, another letter was sent by Acies, this time to LK Consult, asking them to obtain a "CA licence" and to perform other services in relation to "additional on site exploratory works". In a report dated 31 May 2011, Groundshire described exploratory works involving 16 boreholes, which had been carried out for the defenders between 27 May and 9 June (*sic*) 2011 and which revealed evidence of mine workings in two coal seams beneath the site. In a report dated 7 October 2011, Groundshire described "grid drilling and pressure grouting of the shallow mineworkings", which had been carried out for the defenders as "treatment" of the ground conditions from 5 to 27 September 2011. This had involved drilling 110 grout holes and two further test holes totalling 2,048m in depth with 284 tonnes of grout and gravel being injected on site. Attached to the report was a "Method Statement Coal Authority Permit", dated 15 June 2011, which set out what was to be, and by the date of the report had been, done.

[8] In an email to Groundshire, dated 20 December 2011, the pursuers' licensing & permissions manager attached a permit with an "effective date" of 11 April 2011. The email referred to the permit as the "relevant extension Certificate for the additional SI" (site investigation). It called it a "permit extension". This granted permission for the "Investigation of shallow mine workings by 16 additional boreholes"; again to be carried out within a 12 month prospective period. There was no separate application relating to this permit produced in process. It was agreed that no further Terms and Conditions were signed as relative to this application, although it was accepted by the defenders that the

Terms and Conditions applied to the additional exploratory works. The permit was numbered 5728.1.

[9] On 16 January 2012, in response to the email of 20 December 2011, a director of Groundshire said that they had sent two reports "for the exploratory drilling and the treatment works" (*supra*) to the pursuers on CD by post. She continued:

> "Could you send me an email confirming that the extension covers the treatment works as well."

In a reply, which was timed an hour or so later, the pursuers' licensing & permissions manager emailed stating "Thanks for that. When I receive the disks we'll review and issue a permit to cover the treatment, this may be referred to as 5728.2".

[10] On 25 May 2012, the pursuers' licensing & permissions manager, referring to permit no. 5728, emailed Groundshire, as follows:

> "Thank you for providing us both with the SI report and the treatment completion report for the stabilisation works at Townsend Place. I can confirm that we are satisfied with the information provided such that the Permit (our ref. 5728) can now be closed out. The information you provided will be passed to our surveyors so that the database can reflect the treatment undertaken. The permit file has now been updated to reflect the closure and receipt of all particulars from yourselves."

Again, no separate application process had been required. No formal permit was issued.

[11] The pursuers aver that the email of 25 May 2012 constituted the grant of an extension to the earlier permits to cover the treatment works. It had been obtained for the defenders by their sub-contractors, namely Groundshire, who were acting as their agents as specialists in the treatment of mine workings. It was established custom and practice for Groundshire to act on behalf of developers in connection with the obtaining of permits from the pursuers. It was not unusual for the pursuers to grant permits retrospectively; after work had been completed. The pursuers included, by amendment, a series of averments about the

authority of Groundshire to act as works contractors and agents for the defenders. These culminate in a statement that, if they did not have express authority, they had "implied authority" based on custom and practice.

[12] The pursuers averred an "*esto*" position based on a contention that, if the permit had not been extended to encompass the treatment works, those works would constitute a further breach of clause 12 as they would amount to a failure to comply with the "Terms and Conditions".

[13] The pursuers plead:

> "2 The Defender having failed and omitted to identify a mine related risk to structures and having consequently caused damage through subsidence at the Site, which has occasioned statutory liability on the part of the Pursuer, the Pursuer is entitled to decree of declarator ...
> 3 The Defender being liable to indemnify the Pursuer in terms of Condition 12 of the Pursuer's Terms and Conditions, the Pursuer is entitled to decree of declarator ...
> 4 *Esto* the April 2011 Permission was not retrospectively extended to cover the treatment works (which is denied), the defender having failed to comply with the requirements of the April 2011 Permission and being liable to indemnify the Pursuer in terms of Condition 12 of the Pursuer's Terms and Conditions, the Pursuer is entitled to decree of declarator ...".

[14] *Quantum valeat*, the defenders deny that the email of 25 May 2012 can be construed as a retrospective extension of the earlier permit. They contend that Groundshire were not the defenders' agents for the purpose of "the negotiation or variation of any contractual indemnity".

**Commercial Judge's Opinion ([2018] CSOH 36)**

[15] The commercial judge held that the email of 25 May 2012 did not constitute an agreement by the pursuers to extend the April 2011 permission retrospectively to cover the treatment works. He reasoned that it did not refer to permit no. 5728.1, but to no. 5728. The

April 2011 permission was not an extension of the December 2010 permission. The email of 25 May did not, on the ordinary and natural meaning of the words used, extend any existing permit. The email of 16 January 2012 tended to show that any extension would have been by way of another permit, ie no. 5278.2. A permit for the treatment works would have had to have been issued before the indemnity could apply. Parole evidence from the author of the email of 25 May would not advance the pursuers' case. His intention was not a relevant consideration. The defenders' knowledge of the Terms and Conditions related only to the granting of permits 5728 and 5728.1. These were not connected to a further extension granted in respect of the treatment works. They were not all part of one process. Each permission was separate.

[16] The pattern of extensions, which were applied for and granted, did not show a relationship of agency between the defenders and Groundshire in respect of the granting or extending of an indemnity. The emails were to or from Groundshire. No correspondence with the defenders had been founded upon. It could not be argued that Groundshire were acting as agents for the defenders in respect of a contractual obligation to indemnify. The employment of a contractor, of itself, did not authorise them to act as agents for the employer in relation to a third party. The commercial judge accordingly found the pursuers' principal case to be irrelevant.

[17] The commercial judge also found that the pursuers' alternative case, that the treatment works were in any event an unauthorised failure to comply with the terms of the April 2011 permission, was irrelevant. That permission was to drill 16 boreholes. It was not to carry out treatment works. The averment, that there had thereby been a failure to comply with the terms of the April 2011 permission, was a *non sequitur*. The carrying out of treatment works did not amount to a failure to comply with the April 2011 permission. The

pursuers' complaint was one of trespass in respect of the pursuers' mining interests. They were seeking to recover damages arising from trespass, not from the engagement of a contractual indemnity.

[18] The commercial judge sustained the defenders' (first) plea-in-law to the relevancy of the pursuers' case and dismissed the action. In doing so, he also sustained their (fourth) plea relative to an obligation to indemnify.

## Submissions

### *Pursuers*

[19] The pursuers maintained that a proof before answer on all of the averments should have been allowed. They submitted, first, that the commercial judge had erred in holding that the email of 25 May 2012 had not retrospectively extended the April 2011 permit so as to cover the treatment works. The pursuers' averments were sufficient to go to proof on that issue having regard to: (1) the ordinary and natural meaning of the words used; and (2) the factual context or matrix in which it was sent. The judge had erred in stating that the case was not assisted by reference to context. Context was all important. It could not be said that the pursuers would necessarily fail (*Jamieson* v *Jamieson* 1952 SC (HL) 44 at 50, 63).

[20] Secondly, the pursuers had now amended to make it plain that Groundshire were acting as the defenders' agents at the relevant time. It was no longer necessary to decide whether the commercial judge had been correct in determining that there were insufficient averments of agency.

[21] Thirdly, it was accepted that the pursuers' submission, that the proof might cover the intention of the writer of the email, had been erroneous. The writer's intention was irrelevant. However, he could say that the email of 25 May 2012 had not been a mere

acknowledgement of documents, but a response to that of 16 January, which had requested an extension. He could also say that the email had been in lieu of a formal permit.

[22] Fourthly, the commercial judge had erred in holding that, by carrying out works which were not included in a permit, the defenders had breached condition 12, as this amounted to a failure to comply with the permission. Condition 7 provided that, if it was necessary to change the method, design or specification for the works from that contained in the application, prior permission was needed. Condition 12 required the defenders to indemnify the pursuers for their failure to restrict the works to those specified in the permits. If a permission was obtained to do something, it was implicit in that permission that the person could not do anything else. The judge's decision had the undesirable consequence that a person encroaching upon the pursuers' ground would be in a better position if he had no permission than if he had a limited permission. If that were correct, there would be no incentive to seek permission. The judge's decision had the potential to undermine the permit scheme.

[23] Finally, the commercial judge had erred in stating that the pursuers' *esto* case was truly one based on "trespass". Trespass had not formed part of the pursuers' pleadings. The case was based on the inadequacy of the treatment works. These works had not extended into the mine workings. If the works had not been carried out in those workings, there could be no trespass.

***Defenders***

[24] The defenders submitted that the commercial judge had been correct to dismiss the action. First, the pursuers had predicated their case on a contention that certain documents, notably the email of 25 May 2012, gave rise to an obligation to indemnify. The

correspondence could not be construed in this way; applying the ordinary meaning of the words used. The judge had correctly held that the email of 25 May did not retrospectively extend the 2011 permit to cover the treatment works. It did not vary or extend the indemnity. The pursuers had not pled anything by way of background which might cause the email to be read other that in accordance with its ordinary meaning. The email only noted that: reports had been provided; the pursuers were satisfied with them; and the permit 5728 could be closed. Otherwise, it only asked a question about the scope of the existing permits, even if it could be inferred from that that it was asking for a retrospective permit. It made no mention of the indemnity or that a permit was being extended. The indemnity, which had been granted by the defenders to the pursuers, covered only the works in the two permits. The email from the pursuers dated 16 January 2012 made it plain that any extension of the prior permits would be by way of a further permit. No further permit had been forwarded.

[25] Secondly, the pursuers had still not pled a relevant case of agency on the part of Groundshire in relation to the indemnity. They had averred that Groundshire were the defenders' "works contractor and agent" who had authority to obtain an extension. They did not aver that they were agents with a power to negotiate a variation of an indemnity which had been previously granted.

[26] Thirdly, as had now been conceded, the subjective intention of the writer of the emails was irrelevant (*Investors Compensation Scheme* v *West Bromwich Building Society* [1998] 1 WLR 896 at 913; *Rainy Sky* v *Kookmin Bank Co* [2011] 1 WLR 2900 at para [14]; *Arnold* v *Britton* [2015] AC 1619 at para [15] and *Wood* v *Capita Insurance Services* [2017] AC 1173 at paras [10 – 14]).

[27] Fourthly, the pursuers' alternative case was also irrelevant. The proposition that, by carrying out works beyond those permitted by the 2011 permit, there had been a failure to comply with the terms of the permit was, as the commercial judge held, a *non sequitur*. The pursuers did not offer to prove that the defenders had not carried out the works specified in the 2011 permit. Fifthly, the judge's reference to trespass was a brief observation (an "*obiter* throwaway"), which did not form part of the basis for his decision. The pursuers had originally pled a case based on delict, but that had been deleted by amendment.

**Decision**

[28] Despite the manner in which the case has been pled by the pursuers, the true question is not strictly whether the email of 25 May 2012 retrospectively extended the permit dated April 2011. It is whether, when set in its proper context, Groundshire's email of 16 January 2012 constituted an application on behalf of the defenders for permission to interfere with the pursuers' mine workings, by carrying out the (albeit already completed) treatment works. Secondly, if it did, the question then is whether it was implied, again from the surrounding circumstances, notably the defenders' knowledge of the need to accept the Terms and Conditions before a permit would be granted, that the application carried with it an implication that the defenders' Terms and Conditions would continue to apply to the works on site. Thirdly, if both questions are answered in the affirmative, the final question is whether the pursuers' emails of 16 January and 25 May 2012 constituted an acceptance of that application, thus incorporating the implied Terms and Condition into what would thereby become an extension of an existing contract. The pursuers have not asked the court to find that all three questions ought to be answered in their favour; only that the documents

should be construed in their context and the matter decided following a proof before answer.

[29] The issue is not so much a question of the proper construction of the words of what, in other cases, is agreed as amounting to a contract, but initially whether the words and deeds of the parties constituted a bargain at all, relative to the treatment works. It is only if there is a concurrence between the email of the defenders (or their agents) dated 16 January 2012 and the email of the pursuers dated 25 May 2015 that such a bargain could be said to exist. The pursuers cannot unilaterally extend a pre-existing arrangement. In this area the words of the Lord President (Dunedin) in *Muirhead & Turnbull* v *Dickson* (1905) 7 F 686 (at 694-695) continue to resonate, *viz.*:

> "...[C]ommercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say ... [I]f [parties] use words which are capable of ordinary interpretation, they must expect the persons who hear them to take them up in their ordinary significance".

[30] It is nevertheless important to look, as in the construction of a contract, at the language in its context in order to see what the reasonable person would have understood from it when set against the known factual background (*Midlothian Council* v *Bracewell Stirling Architects* 2018 SCLR 606 LP (Carloway) at para [19]). As it was put in *Wood* v *Capita Insurance Services* [2017] AC 1173 (Lord Hodge at paras 10 to 13), in relation to writings, the court must consider the formality and quality of the drafting. Each suggested interpretation should be checked against its commercial consequences. "Textualism and contextualism are not conflicting paradigms ...":

> "Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on

> the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance."

For aught yet seen, the emails in this case fall into the latter category.

[31] It cannot be said that, if all their averments are proved, the pursuers are nevertheless bound to fail. On the contrary, if they do establish the facts as averred on record, there is a reasonable prospect that a construction in their favour will prevail. It may be that, once all the relevant circumstances are analysed, the email of 25 May 2012 may be construed, as the defenders contend, as not meaning that an extension to the permit had been granted. However, that is not the immediately obvious construction of its import. On its face, it is a response to what appears to have been a request on behalf of the defenders (or their agents) to sanction works that they had already carried out in preparation for the building of housing; even if the request from Groundshire in the email of 16 January 2012 was optimistically, or even jocularly, prompting a reply which would say that the existing permit already covered the treatment works. After all, if the defenders did not have permission to insert the grout into the ground, which was presumably thought necessary prior to any new building, they would be at risk, should the pursuers take action against them for encroaching on their property, ie mining interests. At the time, they needed the pursuers' permission to proceed with the development.

[32] Groundshire's email of 16 January is a request to confirm that the existing permit already included the treatment works. That would mean that they accepted that the Terms and Conditions already applied to these works. The email request carried with it an implication that, if the permit did not include the treatment works, it should be extended to do so (ie on the same Terms and Conditions). Groundshire were not asking the pursuers to commence a new application process, but to treat their request, as they had already done for

the additional exploratory work, as an extension to the existing permit no. 5728. That permit had been to carry out works not only at the same site but also involving interference with the substrata; even if they were much more minor and rather different in nature. It may not be without importance that it was accepted that the Terms and Conditions did apply to the earlier permit extension no. 5728.1; albeit than no separate application had been required and no additional "Terms and Conditions" was signed.

[33] Looking at what the reasonable person, having the relevant background knowledge of the parties, would have understood from the language selected in Groundshire's email, it was, at least on one view and without having had the benefit of a proof, an application to permit the works to be carried out on the Terms and Conditions which already applied to the original permit (as extended). The signing of the docquet on the Terms and Conditions at the time of the original application meant that the defenders' background knowledge (and, of course that of the pursuers) included the fact that no permit would be granted by the pursuers unless the applicant had agreed to the Terms and Conditions in advance. If that is so, both parties would have been proceeding on the assumption that they would continue to apply.

[34] Although by no means decisive, it is at least interesting that the pursuers appear to have construed the Groundshire email in precisely the way described; ie as in effect an application for an extension to an existing permit, the terms of which would continue to apply to the works as extended. Their almost immediate reply was to say that, once the reports were to hand, a permit would be issued to cover the treatment, to be referred to as no. 5728.2; that is to say an extension to the existing permit and its previous extension no. 5728.1. Again, where this was to be done, the reasonable person would understand that the Terms and Conditions, which were already applicable, would apply to the new works

unless something to the contrary were stipulated. There was no protest about this method of proceeding (ie by way of an additional permit in the same process or file). In due course, the pursuer did confirm that the "permit file (singular) has been updated"; ie that it now included the treatment works. In that setting, the reasonable person reading this may well understand it to mean that the Terms and Conditions, which were already on file, would remain on the updated file; ie the indemnity would, if necessary, bite. It is of no moment that Permit no. 5728.2 was not formally issued. Quite apart from the fact that it could be issued even now, it is entirely understandable that the parties would see the end of the treatment works as closing the file. Permission had been agreed in terms of the email of 25 May 2012. The file (ie the permission) had been updated to encompass the treatment works. That included the Terms and Conditions. Nothing more was required. Whether this is the correct analysis remains undecided, but it is one which is undoubtedly open on the pursuers' averments.

[35] The pursuers have now made clear averments that Groundshire were acting as agents for the defenders at the time when they (Groundshire) requested that the permit be seen as covering the treatment works. These averments are sufficient to merit a proof before answer. It is not disputed that, at the material time, Groundshire were the sub-contractors who had been asked by the Acies Group, who were the defenders' civil and structural engineers, to carry out the treatment works. If the defenders had not themselves obtained a permit, and had not asked LK Consult to obtain it, they must have assumed that someone would have to do it. The pursuers aver that Groundshire had actual or implied authority from the defenders. The defenders presumably knew that Groundshire would require a permit to encroach on the pursuers' mining interests. The pursuers aver that it was established custom and practice for Groundshire to obtain permits for the work as being the

specialists in mine workings; meaning presumably that, in any event, they had ostensible authority. They are entitled to a proof to establish this case.

[36] The pursuers have accepted that the subjective intention of the writers of the emails is irrelevant and little further requires to be said in that regard. That is not to say that the evidence of the composers would be entirely irrelevant in the establishment of context. The legal or other skills of the writers may be important, as might their level of previous experience in, respectively, applying for and issuing retrospective permits.

[37] The pursuers' *esto* case is irrelevant. Condition 7 relates to the situation where there has been a change in the method, design or specification of the works from that contained in the application and relative permit. There was no such change. Carrying out additional work (ie work not covered by the permit) is not a change in the method, design or specification of the works. The works described in the permit were exploratory bore holes and there was no change in the way in which that work was executed. Equally, carrying out additional works does not amount to a failure to comply with an existing permission in terms of condition 12. Groundshire carried out the works in the permits in accordance with the terms of these permits. The averments relative to the *esto* case should be excluded from probation.

[38] It is not necessary to deal at any length with the commercial judge's reference to trespass. It was, as the defenders put it, an "*obiter* throwaway". "Trespass" as a legal concept tends to be a reference to persons, animals or possibly things temporarily going onto another person's land without lawful authority. Where what is involved is, as here, a permanent intrusion of a thing, the more appropriate term is "encroachment" (see generally Reid: *"Possession" in Stair Memorial Encyclopaedia* Vol 18, paras 175 and 180). Whichever term is correct, the case has not been pled on either basis.

[39] The court should: allow the reclaiming motion; recall the commercial judge's interlocutor of 12 April 2018; exclude from probation the averments in the fourth article of condescendence from "*Esto* ..." to the end of the article; repel the pursuers' fourth plea-in-law; and *quoad ultra* allow a proof before answer on the averments of the pursuers and defenders. The position between the defenders and the third parties remains "on hold" (see Minute of Proceedings 2 February 2018).

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6 March 2019

[40] I am in complete agreement with the reasoning of your Lordship in the chair, and (apart from the brief observation below) there is nothing I can usefully add. I agree that the Reclaiming Motion should be allowed and that the pursuers should be allowed a proof before answer, except for the pursuers' and reclaimers' *esto* case in their fourth article of condescendence, which should be excluded from probation, and their fourth plea-in-law, which should be repelled.

[41] I would only observe that on the basis of the pursuers' pleadings at the time of the debate before the commercial judge, and the arguments which the pursuers advanced at that time, I think it is likely that I would have disposed of the case in broadly the same way as the commercial judge did. The pursuers' pleadings at that time were far from satisfactory, and such averments as there were as to agency were in my view irrelevant and lacking in specification. Since the commercial judge's interlocutor of 12 April 2018 the pursuers have amended to cure this deficiency, and I consider that they now meet the test in *Jamieson* v *Jamieson* 1952 SC (HL) 44. The argument advanced on behalf of the pursuers at debate before the commercial judge that the writer of the emails could give evidence of his subjective intention was misconceived (see paragraphs [21], [26] & [36} above), and the commercial judge was correct to reject it (at paragraph [76] of his opinion). I also agree that the commercial judge cannot be criticized for his passing reference to trespass in paragraph [84] of his opinion – this was clearly a throwaway remark, and did not form part of his reasoning.

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[42] The ultimate issue in this case is whether the defender has undertaken a contractual indemnity in favour of the pursuer in respect of any liability for claims, losses or damages at a site at Townsend Place, Kirkcaldy ("the Site"). The pursuer contends that the defender undertook such an indemnity, and concludes for a declarator to that effect; the defender contends that it did not undertake any such indemnity. The defender has in addition brought a number of third parties into the action on the basis that, if the defender is liable to the pursuer to make payment under the claimed indemnity, it is entitled to damages for the

negligence of one or more of the third parties. These include, as the first third party, LK Consult Ltd, a company that was appointed by the defender to act as its specialist mining engineer in relation to a development at the Site, and Groundshire Ltd, a company that was appointed by the defender as a specialist contractor at the Site.

[43] The reclaiming motion follows a debate in the Commercial Court, and is concerned with whether the pursuer's averments relating to the alleged contractual indemnity disclose a relevant case. The Commercial Judge held that they did not, and he accordingly dismissed the action. The pursuer has reclaimed against that decision on a number of grounds, which I discuss subsequently. Before I do so, however, I will set out the facts of the parties' relationship as averred by the pursuer and discuss the context in which the dispute arises.

**The background to the parties' dispute**

[44] In any question relating to the existence or terms or interpretation of a contract, the context is invariably important. Contracts are concluded not for their own sake but to achieve particular objectives in a legal and commercial context, and determining what those objectives are, and hence the scope of the parties' agreement, must inevitably be determined in the light of that context. This point is perhaps self-evident; in almost any field, from history to current affairs to economics to science, the effective presentation of a narrative or argument will invariably require that it should be placed in its proper factual and intellectual context. In a case such as the present, relating to whether a particular contractual obligation has been undertaken, that context can be said to exist at two distinct levels. The first is the general context: what the respective parties are engaged in, and the commercial and economic nature of those activities. The second level relates to the commercial dealings of the parties themselves in connection with the transaction under

consideration. This takes account of the particular activities and undertakings that the parties appear to have intended, considered objectively, and the whole of the correspondence or other dealings between the parties. In relation to correspondence and other dealings, it is obvious that the actions of the parties' agents must be taken into account, especially if those agents are persons such as specialist consultants or contractors who can be expected to have a detailed knowledge of the commercial and technical background.

*The general context*

[45] The general context is that the defender is the company responsible for the promotion of a housing development on the Site, an area in Townsend Place, Kirkcaldy, that was formerly the site of a printing works. The Site lies above old shallow mine workings. The pursuer was established by the Coal Industry Act 1994 in order to take over property and obligations that formerly belonged to the British Coal Corporation and to assume certain functions and responsibilities that were formerly those of the British Coal Corporation. Among the latter were important responsibilities found in the Coal Mining Subsidence Act 1991 to provide remedial works and compensation in respect of damage occasioned by subsidence caused by mining operations. Those responsibilities were transferred to the pursuer by section 43 of the 1994 Act.

[46] Section 1 of the 1991 Act defines subsidence damage as any damage to land, or to buildings, structures or works on land, caused by the withdrawal of support from land in connection with lawful coal-mining operations. Section 2 of the Act, supplemented by further provisions, obliges the pursuer to take remedial action in respect of subsidence damage to any property; the remedial action may involve the execution of remedial works, the making of compensatory payments in respect of the cost of remedial works executed by

some other person, or the making of a payment in respect of the depreciation in value of the property that has been damaged by mining subsidence. This scheme has a long and complex history, which can be found in commentaries on the 1991 Act, such as that in Current Law Statutes Annotated. The 1991 Act itself was enacted following the detailed report of the Waddilove Committee (in 1984), and is intended to provide a fair and comprehensive system of redress for subsidence damage; before the enactment of the 1991 Act there had been long-standing dissatisfaction with the availability of redress for such damage. The present system is obviously of great importance in areas of the country that have historically been centres of coal mining. Among those is the Fife coalfield.

[47] In view of the relatively stringent nature of its statutory responsibilities for subsidence damage under the 1991 Act, it is perhaps not surprising that, when development is proposed in an area that has been the subject of past coal mining operations, the pursuer is concerned to ensure that proper steps are taken to protect against such damage. In respect of past mining operations, the 1994 Act makes the pursuer the proprietor of the workings, including any remaining coal deposits and the voids that result from the working of those deposits. In the present case, for example, it was known that shallow deposits in the area of Kirkcaldy around the Site had been worked by the "pillar and stall" method, in which when coal was removed pillars of coal were left standing to support the overlying strata. The voids around the pillars, where coal had been removed, were the pursuer's property. For these reasons permission was required to carry out both investigation and treatment works in respect of the mine workings. Investigation works would generally take the form of bores, with a number of boreholes being used across the site. Treatment would take the form of grouting: pouring concrete into the voids to prevent the overlying strata from subsiding.

*The particular context: the parties' dealings*

[48] Against the foregoing general background, the parties' particular dealings and correspondence appear from the pleadings and relative productions. As I have already noted, the defender promoted a housing development on the Site, at Townsend Place, Kirkcaldy, in an area that was known to be affected by old mine workings at a shallow level. The defender had engaged a specialist mining engineer, LK Consult Ltd, part of the LK Group, and it was decided that exploratory boreholes were required to investigate the ground conditions at the Site. Consequently, on 7 December 2010 LK, acting on behalf of the defender, applied to the pursuer for permission to enter or disturb the pursuer's mining interests through the investigation of the shallow mine workings at the Site. The application was made on the pursuer's standard form, "Application for permission to enter or disturb Coal Authority mining interests". The application was for the sinking of three boreholes at the Site on locations indicated on a plan. It was specifically noted that there were no proposals for treatment at that stage.

[49] Appended to the application were the pursuer's standard Terms and Conditions for Entering or Disturbing Coal Authority Mining Interests. These began with the following provision:

> "Before permission can be given to enter or disturb Coal Authority mining interests, each applicant must agree with the following terms and conditions in support of their application and return a signed copy to the Coal Authority along with the original application and supporting documentation".

Two specific terms are relevant to the present dispute. These are as follows:

> "7) Should it be found necessary to significantly change the method of treatment, design or specification of the works from that contained in the application to the Authority, the prior permission of the Authority must be obtained before proceeding (such permission not to be unreasonably withheld).

…

12) The Applicant shall, for a period of 12 years from the date of completion of the works, indemnify the Authority against liability for claims, losses or damages, including those made under the Coal Mining Subsidence Act 1991 and claims by the Applicant, whether arising as a result of any failure by the Applicant or the Applicant's contractors, to comply with the requirements of this permission, or as a result of any act, failure, inadequacy, omission, negligence or default by the Applicant or the Applicant's contractors in designing or carrying out the work".

The critical question for present purposes is whether the second of these provisions, condition 12, has been incorporated into subsequent dealings between the pursuer and the defender relating to treatment works at the Site.

[50] The pursuer, on 9 December 2010, granted permission to the defender in the following terms:

> "This certificate hereby grants the above named Applicant permission to carry out *Investigation of Shallow Mine Workings, 3 Boreholes* within the Authority's mining interests at the identified site location for the period of 12 months from the effective date shown below….".

The relevant permit was given the reference number 5728. Following the drilling of those three boreholes the defender decided that further investigatory work was required, in the form of 16 additional boreholes at the Site. The pursuer's averments on this subject are as follows:

> "On 11 April 2011…, the pursuer agreed with the defender's engineering contractor, LK Consult Limited, to retrospectively extend the December 2010 Permission. The April 2011 permission granted the defender retrospective permission to carry out works described as "*Investigation of [Shallow] Mine Workings by 16 additional boreholes*" within the pursuer's mining interests at the Site for a period of 12 months from 11 April 2011".

The relative permission, which forms a production, is given the permit reference number 5728.1.

[51] The pleadings do not make any express averments about the works that were authorized by the foregoing permission, but a report bearing the date 31 May 2011 on the

exploratory drilling works was prepared by Groundshire and forms a production. This states that the drilling works were carried out in May and June 2011. The report further states that evidence of mine workings was found at two of the additional 16 boreholes, and that the area around those boreholes would require treatment by drilling and grouting (paragraph 6). The pursuer then avers, under the heading "Extension & Treatment Works", that on 25 May 2012 it agreed to extend retrospectively the April 2011 permission to cover treatment works that had been carried out at the Site. The agreement in question, which is fundamental to the pursuer's case, is said to have been reached in the course of email correspondence. That correspondence is as follows.

[52] On 20 December 2011 an email was sent by Leigh Sharpe, the pursuer's Licensing & Permissions Manager, to Ellen Dempster of Groundshire. The subject was stated as being "Permit Extension 5728.1 – Permission Certificate". The email was in the following terms:

> "Please find attached the relevant extension Certificate for the additional SI [site investigation] carried out by yourselves at Townsend Place, Kirkcaldy. If you could forward the completion information as discussed on CD that would be greatly appreciated. Please note that we require also the initial work undertaken under the permit by Raeburn Drilling and assuming you have this could you ask the indemnifier Pegasus Fire Protection Co Ltd for permission to release it to us".

The extension certificate referred to in the email was the certificate 5728.1, granted with effect from 11 April 2011, relating to the sinking of 16 additional boreholes. The "initial work" referred to was the work carried out under the original permission dated 9 December 2010. "Raeburn" was the contractor who carried out the initial drilling. The defender is referred to in the email as "the indemnifier", which is an obvious indication that the pursuer was concerned with its right of indemnity from the person ultimately responsible for the investigation works at the Site.

[53] On 16 January 2012 Ellen Dempster of Groundshire sent a further email to Leigh Sharpe, once again stating the subject as "Permit Extension 5728.1 – Permission Certificate". The email read:

> "Further to our recent telephone conversation, I have sent our two completion reports, for the exploratory drilling and the treatment works, on CD by post. Please find attached a copy of Raeburn's borehole logs and location plan. Could you send me an email confirming that the extension covers the treatment works as well".

Mr Sharpe replied on the same day, stating

> "When I receive the discs we'll review and issue a permit to cover the treatment, this may be referred to as 5728.2".

The next material item in the correspondence was on 25 May, when Mr Sharpe emailed Groundshire

> "Thank you for providing us both with the SI report and the treatment completion report for the stabilization works at Townsend Place. I can confirm that we are satisfied with the information provided such that the Permit (our ref. 5728) can now be closed out. The information you provided will be passed to our surveyors so that the database can reflect the treatment undertaken. The permit file has now been updated to reflect the closure and receipt of all particulars from yourselves".

Ellen Dempster on behalf of Groundshire acknowledged the foregoing email by a further email dated 28 May.

**Whether the defender undertook an indemnity in favour of the pursuer**

*The pursuer's argument*

[54] The pursuer contends ultimately that the email of 25 May 2012 had the effect that the permission granted in April 2011 was retrospectively extended to cover the treatment works that had been carried out by then at the Site. That retrospective extension of the April 2011 permission is said to have been obtained for the defender by its works contractor and agent, Groundshire. The treatment works had not been authorized in advance, and it is said by the

pursuer that this only became apparent to them when they received the email from Groundshire dated 16 January 2012. Completion reports for both the exploratory and treatment works were sent to the pursuer by post at approximately the same time as that email. The pursuer contends that the only purpose of submitting those reports was to obtain retrospective authorization of the treatment works; no other purpose was served by sending that document, given that authorization had not been obtained in advance. Thereafter the pursuer had stated by the email dated 16 January 2012 that after reviewing the discs a permit would be issued to cover the works. In the light of that, it is contended, the email of 25 May 2012 could only reasonably be construed as retrospective authorization of those works, on the same terms and conditions as previous authorizations. That would include the indemnity contained in condition 12 of the pursuer's Terms and Conditions for Entering or Disturbing Coal Authority Mining Interests. A signed copy of those Terms and Conditions had, of course, been included with the original application for permission to enter or disturb Coal Authority mining interests at the Site made on 7 December 2010: see paragraphs [48] and [49] above.

[55] Nevertheless, at this stage it is unnecessary to determine whether the foregoing arguments are ultimately well-founded. The debate before the Commercial Judge had taken place on the defender's plea to the relevancy of the pursuer's case, and all that was required at this stage was for the court to be satisfied that a proof before answer should be allowed on the pursuer's averments.

*The Commercial Judge's decision*

[56] The Commercial Judge rejected the foregoing argument and held that the pursuer's averments were irrelevant. He held that the email of 25 May 2012 did not on a sound

construction have the meaning advanced by the pursuer, namely that it amounted to an agreement to extend the April 2011 permit to cover the treatment works. No reference had been made in that email to the permission granted in April 2011. Furthermore, the reference number in the April 2011 permission was 5728.1, whereas in the email of 25 May 2012 the only reference was to a permission with a number 5728. Consequently these were separate permissions. The Commercial Judge proceeded explicitly on the basis of what he described as the "ordinary and natural meaning of the words used" in the email of 25 May, and he held that such a construction was not affected by the context. Any extension should have been made by means of a formal permit. In the present case different numbers had been used: the number "5278.2" had been referred to in the second email of 16 January, but no such number was used in the email of 25 May.

*Construction of the parties' dealings between December 2011 and May 2012*

[57] In my opinion the Commercial Judge's construction of the parties' dealings must be rejected. In the first place, it should be noted that the debate before the Commercial Judge and the present reclaiming motion are concerned only with the relevancy of the pursuer's averments. It is not necessary to express any concluded view on the construction of the emails that passed between the parties between January and May 2012, nor on the ultimate legal effect of the parties' dealings during that period. The material question is only whether, if the pursuer succeeds in proving its averments, the court might reasonably conclude that an agreement was concluded between the parties which included the indemnity contained in condition 12 of the pursuer's Terms and Conditions for Entering or Disturbing Coal Authority Mining Interests.

[58] Secondly, for reasons that I have already discussed I am of opinion that it is essential that the email correspondence of January and May 2012 should be placed in its full context. Both the commercial and the legal aspects of that context are important. Equally, both the general background to the dispute and the totality of the parties' dealings in relation to works at the Site are relevant for this purpose. In relation to general background, any person who wishes to interfere with mine workings belonging to the pursuer, whether by way of investigation or by way of treatment for any defects discovered, requires to obtain the pursuer's permission for doing so. That is clear from the general scheme of the Coal Mining Subsidence Act 1991 and the responsibilities imposed on the pursuer by the Coal Industry Act 1994. It is further clear from the fact that the voids in old mine workings are the property of the pursuer. Consequently any interference with those voids requires the consent of the pursuer as property owner.

[59] In the particular circumstances of the proposed development at the Site, it is clear that the defender's specialist mining engineers, LK Group Limited and LK Consult Limited (which were obviously related companies), were aware of the existence of condition 12 as one of the pursuer's standard Terms and Conditions for Entering or Disturbing Coal Authority Mining Interests. A specialist mining engineer would be expected to be aware of the general terms on which the pursuer granted permission, and a representative of LK Group in fact signed the application made on 7 December 2010 on behalf of the defender for permission to carry out the initial investigative work at the Site. The LK companies were acting as the defender's agents in making the original application; that point was not in dispute, and is in any event evident from the terms of the application itself. An agent's knowledge within the field in which the agent is employed will ordinarily be attributed to its principal. Consequently in the present case, at least as a matter of relevancy, the

knowledge of the two LK companies must be attributed to the defender. The defender must therefore be taken to be aware of the terms of condition 12, and also the fact that it forms part of a standard set of conditions required by the pursuer when it grants authority to carry out work on old mine workings that are under the charge of the pursuer.

[60] Furthermore, the reason for the condition is obvious. Part 2 of the Coal Mining Subsidence Act 1991 (sections 2 *et seq*) imposes strict liability on the pursuer for taking remedial action in respect of subsidence damage. The pursuer therefore runs the risk of damage arising from the existing state of underground workings. Where, however, another party interferes with those workings, whether in carrying out investigations or in treating any perceived defects, further damage may result. The purpose of condition 12 is to protect the pursuer against liability for any losses caused by such interference. Consequently the existence of the condition can scarcely be said to be a surprise.

[61] It is against that background that the defender through its agents, LK, sought permission to carry out investigative works on the Site. It is averred that following the granting of the original permission for three boreholes a further permission, for 16 additional boreholes, was granted retrospectively by the pursuer on 11 April 2011. In fact the report covering the investigative works suggests that the 16 boreholes were drilled in May and June 2011, and the drilling log attached to the report suggests that they were drilled in late April and early May 2011, in which case the permission would not be retrospective. This apparent discrepancy can, however, be explained by the actual terms of the permission for the 16 boreholes (permit reference number 5728.1). This states not that the permission was granted on 11 April 2011 but that that is the effective date of the permission. In fact this permission appears to have been granted on or about 20 December 2011; an email of that date from the pursuer's Leigh Sharpe to Ellen Dempster of

Groundshire states that the relevant extension certificate was enclosed (see paragraph [52] above). The attachment is described as "Permission Extension – 5728.1.pdf. What is important for present purposes is twofold. First, the permission relating to the 16 boreholes appears to have been treated as an extension of the first permission for the three boreholes. That is apparent not merely from the terms of the email itself, but also from the number used, 5728.1. Notwithstanding the Commercial Judge's comments to the effect that the use of different numbers suggested that different permissions were granted, the use of the code "5728" in every case appears to me to suggest that the various permissions were treated as related to one another. At the very least, that is a matter that might well emerge when evidence is led. Secondly, the email of 20 December 2011 requires Groundshire to submit what appears to be comprehensive completion information. The email also requests that Groundshire ask the "indemnifier", the defender, for permission to release certain information. This appears to assume that the existence of the indemnity was treated as significant; otherwise there would be no obvious reason for using that wording.

[62] The next development was the sending of the two completion reports, which are referred to in Groundshire's email of 16 January 2012 (see paragraph [53] above). According to the terms of the email, these covered both exploratory drilling and treatment works. Both of those reports appear to be produced. The email of 16 January then continues with the important request "Could you send me an email confirming that the extension covers the treatment works as well". That is clearly a request for permission to cover the treatment works, as referred to in the second report, in addition to the exploratory drilling. It is a request made by Groundshire, who according to the defender's pleadings acted as the defender's specialist contractor in relation to its development at the Site. The pursuer avers that Groundshire acted as the defender's works contractor and agent. I discuss the

relevancy of the pursuer's averments of agency subsequently. For present purposes I assume that Groundshire was indeed acting as an agent for the defender. On that basis the request for confirmation that the extension covered the treatment works was made by an agent for the defender. The pursuer clearly treated the request in that way, because on the same date, 16 January 2012, their Mr Sharpe replied to the earlier email and indicated that when the discs were received the pursuer would issue a permit to cover the treatment. It was stated that the permit might be referred to as 5728.2. In fact no express permit with such a number was ever issued. Nevertheless, the use of the number and its similarity to the earlier numbers clearly indicates that the permit was intended to be an extension of the earlier permits.

[63] When a permission is extended, it would be usual – perhaps even normal – for the same conditions to apply as applied to the original grant of permission. There might be exceptions, but the general rule appears to me to support the pursuer's case on record, to the effect that the conditions attached to the original grant of permission, including condition 12, applied equally to a retrospective extension to cover the treatment works. That extension is said to have been effected by the pursuer's email to Ellen Dempster of Groundshire of 25 May 2012, which was acknowledged by email dated 28 May (see paragraph [53]) above). The email of 25 May is perhaps somewhat cryptic in its terms. It acknowledges receipt of both the site investigation report and the treatment completion report for the stabilization works. The writer then confirms that the information provided was satisfactory, and that the permit 5728 "can now be closed out". It is stated that the information would be passed to the pursuer's surveyors so that their database might reflect the treatment undertaken, and that the permit file had been updated to reflect the closure. That wording appears at first sight to indicate that the pursuer was satisfied with the

information provided about the whole of the works, both investigation and treatment, and would close its file.

[64] The critical issue is of course whether the foregoing emails, in particular that of 25 May 2012, read in the context of the earlier email correspondence were sufficient to import the pursuer's Terms and Conditions including condition 12 into the permission for the treatment works. In my opinion the pursuer's averments are sufficient as a matter of relevancy to permit such an inference. No doubt the emails of 16 January and 25 May do not make any express reference to the Terms and Conditions or to any indemnity. Nevertheless, it was clear from both the general background and the pursuer's earlier dealings with an agent for the defender, LK Consult Ltd, that the Terms and Conditions were a normal condition for granting permission. If that is so, those earlier dealings would support the inference that the Terms and Conditions should apply to the extension to cover the treatment works.

[65] It can of course be said that no express permit was granted for the treatment works, which was contrary to previous practice. The pursuer concedes that the use of an email rather than a formal permit is highly unsatisfactory, but contends that as a matter of relevancy the email exchange was sufficient to draw the inference that condition 12 was incorporated; it could not be said, applying the well-known test in *Jamieson* v *Jamieson*, 1952 SC (HL) 44, at the pursuer's case must necessarily fail. I agree with that submission, although in doing so I attach importance to the context provided by the parties' general dealings and the totality of the email exchanges. Finally, I do not consider the fact that permission is said to have been granted retrospectively to be fatal to the pursuer's case. The second permission, that granted with the effective date 11 April 2011, does appear to have

been granted retrospectively, and it is not uncommon to find retrospective authorization as a matter of commercial practice.

[66] One further consideration appears relevant. The defender required the pursuer's permission if its agents, whether either LK company, Groundshire or Raeburn, were to be entitled to interfere with the underground mine workings at the Site in any way. In the context of the parties' earlier dealings, it may be reasonable to conclude that the defender and its agents expected to receive the pursuer's permission for what they did by way of investigation and treatment. If permission is granted, however, the normal counterpart would be the set of Terms and Conditions that the pursuer had imposed previously (and imposed normally); that is obvious as a matter of commercial common sense. That factor may well support the inference that the pursuer seeks to draw.

[67] For the foregoing reasons I would hold that the Commercial Judge was wrong to treat the pursuer's averments relating to the application of condition 12 to the treatment works as irrelevant.

**Averments relating to agency**

[68] In addition to the question of whether the pursuer's averments relating to the undertaking of contractual indemnity by the defender are relevant, a further issue arises as to the pursuer's averments of agency. As I have already indicated, it is essential to the pursuer's case that it should establish that Groundshire was acting as the defender's agent in obtaining an extension of the earlier permissions to cover the treatment works at the Site and granting a correlative indemnity.

[69] The averments of agency may be summarized as follows. Groundshire is a mine working remediation specialist. It is averred that it is an established custom and practice for

such specialists, including Groundshire, to act on behalf of developer clients such as the defender in connection with obtaining permissions from the pursuer. The reason for this is said to be that the obtaining of such permissions involves technical knowledge and expertise which is possessed by such specialists but not in general by developers. In all correspondence and telephone conversations relating to the extension of the permission in relation to the Site, Groundshire made clear that it was acting on behalf of its client, the defender, and that it was seeking the extension in the defender's name and not in its own name. Furthermore, the extension to cover the treatment works was a retrospective extension of the April 2011 permission, which was in the name of the defender, not Groundshire. In those circumstances, it is averred, it was reasonable for the pursuer to accept Groundshire's representations that it had authority to seek and thereafter obtain the extension on behalf of its disclosed client, the defender. At no time was any suggestion made to the contrary.

[70] In my opinion the foregoing averments disclose a relevant case to the effect that Groundshire acted as an agent for the defender in conducting negotiations with the pursuer between December 2011 (at latest) and May 2012. Once again context is important. The defender is a developer, and it can be expected, and assumed for the purposes of relevancy, that a developer will make use of appropriate professionals in conducting technical negotiations. The investigation and treatment of mine workings is clearly a technical area. In these circumstances it is unsurprising that the defender would permit LK to conduct the earlier negotiations with the pursuer regarding investigation of the mine workings at the Site; LK is described as a specialist mining engineer, and the defender accepts that it appointed LK as its agent for certain purposes. Moreover, the initial application dated 1 December 2010 was undoubtedly prepared and signed by LK. Groundshire is described by

the pursuer as the defender's works contractor and agent and by the defender as its "specialist contractor" in relation to the development at the Site. It appears, therefore, that Groundshire had special expertise. It is also apparent from the correspondence that from December 2011, if not before that, Groundshire purported to carry out negotiations on behalf of the defender. In the circumstances, it would not be remarkable if a works contractor embarked on negotiations with the pursuer, especially if the expertise of the contractor related in particular to ground conditions.

**Further submissions by the parties**

[71] Three further grounds of appeal were presented by the pursuer. The first of these related to a decision by the Commercial Judge that, in considering the pursuer's primary argument that a contractual indemnity had been incorporated into the permission to carry out treatment works, it was not relevant to have regard to the intention of Mr Sharpe; Mr Sharpe had of course been the author of the email of 25 May 2012. In my opinion that is clearly correct. It is well established that contracts are construed according to objective standards and not according to the subjective intentions of the parties. If authority is needed for that proposition, it is found in *Muirhead & Turnbull* v *Dickson*, 1905, 7 F 686, in particular per LP Dunedin at 694: "But commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say"; and see also Gloag on Contract at 7-8.

[72] That has been established law for many years, and indeed I find it impossible to understand how a contract could be construed on any other basis. The fundamental feature of a contract is that there are two (or more) parties, and it is quite inconceivable that the intention of one can be given priority over the intention of the other. For this reason all

contractual disputes must normally be determined objectively. The intention of one party or its representative is accordingly irrelevant. Of course evidence can be led about the contractual context. This may extend to evidence about the parties' dealings with each other, whether through written correspondence or in the form of verbal discussions. Evidence of this nature may stray into the territory of what parties intended, but the judge deciding the case must ignore any evidence of subjective intention and construe the parties' contract, or determine whether there is a contract or contractual term, on a basis that is totally objective.

[73] The second additional ground of appeal that calls for comment was that the Commercial Judge had been in error in holding that the carrying out of the treatment works on behalf of the defender did not engage the contractual indemnity contained in the permission granted in April 2011. In particular, it was submitted that the Judge had been in error in concluding that the provision in condition 12 that "failure to comply with the requirements of this permission" did not mean that if works were carried out beyond what was permitted by the April 2011 permission the indemnity provision was engaged. The April 2011 permission had merely permitted the defender to carry out a further investigation of mine workings at the Site by drilling 16 additional boreholes. It did not authorize the treatment works. Condition 12, however, specifically related to claims arising as a result of "any failure" by the defender or its contractors "to comply with the requirements of this permission". Going beyond what was expressly permitted was a failure to comply with the requirements of the permission. Such a construction was supported, it was submitted, by condition 7 of the pursuer's Terms and Conditions, which made it clear that the prior permission of the pursuer required to be obtained before any works could proceed.

[74] In my opinion the foregoing argument must be rejected. The question turns on the construction of condition 12, read obviously in the context of the Terms and Conditions as a whole and the background circumstances already described. It is correct that condition 7 makes it clear that permission must be obtained before drilling or treatment works take place. That is obviously to be expected given the risks presented by such works to the stability of overlying strata, especially in the light of the pursuer's strict liability for damage caused by subsidence. It is also important, however, to have regard to the purpose of condition 12 – its function in the parties' contractual relationship. This involves looking at the substance of the condition rather than niceties of wording or strained interpretations of the words used. Moreover the purpose must be determined objectively. In the present case, I am of opinion that the purpose of condition 12 is clearly to provide an indemnity against damage caused by the works authorized by the permission granted by the pursuer, if such damage results from a failure to comply with the requirements of the permission or other acts, failures and the like by the applicant (the defender) or its contractors in designing or carrying out the work. Condition 12 is not designed to provide a remedy for works that lie wholly outwith the scope of the permission that has been granted by the pursuer. Indeed, the words founded on by the pursuer – "any failure… to comply with the requirements of this permission" – point clearly towards the scope of the particular permission that has been granted. Such a permission is of course contractual in nature, and the wording used is in my opinion directed towards the scope of the parties' contract, and not towards any extraneous unauthorized actings.

[75] The third additional argument for the pursuer relates to an orbiter remark by the Commercial Judge the effect that the pursuer's alternative case, rather than being a contractual case under condition 12, was rather one of trespass. The pursuer contends that

trespass forms no part of its case against the defender. In my opinion that is clearly correct; trespass, or any form of unauthorized entry to the pursuer's property, is not the basis of the pursuer's case as it is presently pled. In some cases there might conceivably be a delictual remedy for unauthorized interference with the pursuer's property, but it is unnecessary to consider that in the present circumstances. In any event, if the pursuer's primary argument is upheld at proof, any such delictual case will be immaterial.

**Conclusion**

[76] For the foregoing reasons I am of opinion that the Commercial Judge was in error in holding that the email of 25 May 2012 did not retrospectively extend the permission granted in April 2011 to cover the treatment works carried out at the Site. In my opinion that issue is relevantly pled and should proceed to proof before answer. Consequently I consider that the reclaiming motion should be allowed to that extent. I am also of opinion that the pursuer's averments relating to the agency of Groundshire are relevantly pled and should proceed to proof. Beyond these matters, I consider that the reclaiming motion should be refused.