OUTER HOUSE, COURT OF SESSION

[2017] CSOH 115

CA23/16

OPINION OF LADY WOLFFE

In the cause

THE FIFE COUNCIL

Pursuer

against

THE ROYAL AND SUN ALLIANCE INSURANCE PLC

Defender

Pursuer: Armstrong QC, Sutherland; Morton Fraser LLP
Defender: Duncan QC, Paterson; Clyde & Co

1 September 2017

Introduction

[1] The pursuer granted a planning permission for the development of an opencast coal site at North Blair Farm, Oakley, Saline, Fife ("the Site"). In its capacity as the planning authority the pursuer entered into a minute of agreement under section 75 of the Town and Country Planning (Scotland) Act 1997 ("the Agreement"). The Agreement was entered into amongst the pursuer (as the planning authority), the UK Coal Mining Limited (the party to whom the planning consent had been granted), and the owners of the Site in respect of which the planning permission was granted. UK Coal Mining transferred its interest to the Scottish Coal Company Limited ("the Company"). The planning permission granted by the

pursuer in respect of the Site ("the Planning Permission") imposed conditions *inter alia* for restoration of the Site to woodland, countryside and agricultural use, and that within one year of the cessation of coaling works, and a further five year period of aftercare (the two said obligations are collectively referred to as "the remedial works"). Non-compliance with this condition was one of the defined "defaults" under the Agreement. Also as part of these arrangements a bond was to be procured in favour of the pursuer to secure the Company's obligations under the Agreement for the remedial works on the Site after the coal operations had concluded. The defenders are the granters of the bond ("the Bond").

[2] The background is more fully set out in the opinion of the court dated 17 February 2017 following a debate heard earlier this year between the parties ("the first opinion"). (The terms of the Bond and of the Notice are set out in paragraphs 14 to 18 and paragraph 19, respectively of the first opinion. The defined terms used in the first opinion are also used in this opinion.) It suffices for present purposes to note that the pursuer called upon the defender to pay under the Bond following default of the Company's obligations under the Agreement, and in particular the Company's failure to undertake a full restoration of the Site. The particular issue that falls to be resolved at this Proof is whether, considered in the relevant factual context, the Notice has satisfied the stipulations in the Bond. At debate the defender sought dismissal and argued *inter alia* that the Notice did not comply with the requirements of the Bond. The pursuer resisted this, but in any event argued that it was necessary to construe the Notice in its factual context. I was not prepared to determine as a matter of relevancy whether the sentence relied on was adequate. As the defender disputed much of the background, a Proof was necessary.

The Evidence

[3] On the morning of the Proof, parties lodged a Joint Minute ("the Joint Minute"), which was in the following terms:

> "1. At a meeting between representatives of the pursuer and the defender on 18 May 2015, Ms Mary McLean stated on behalf of the pursuer:
>
> a. that the pursuer had a minute of a meeting which recorded that the pursuer had authorised the calling up of the Bond and whatever work was necessary to secure the restoration of the Blair House site;
>
> b. that the pursuer would provide the defender with a copy of the minutes; and
>
> c. that the pursuer was in the process of restoring two other former coal mining sites.
>
> 2. Following the meeting neither the defender (nor its solicitors) received any correspondence from the pursuer (or its solicitors) prior to the pursuer's solicitors' letter of 2 December 2015 [6/6 of process].
>
> 3. The minutes of the meeting of the Executive Committee of Fife Council dated 22 October 2013 [6/11 of process] were published on the pursuer's website on 23 October 2013 [6/12 of process]. They have been available to the public through the pursuer's website.
>
> 4. On 11, 25 and 27 April 2017, the defender's agent, Mrs Anne Kentish of Clyde & Co LLP, carried out investigations on the pursuer's website (www.fifedirect.org.uk). In the search facility, she entered "Executive Committee Minutes" and obtained 211 results. When she entered "Executive Committee Meetings" she obtained 684 results. When she entered "Blair House", there were 582 results and when she entered "Executive Committee Blair House" the website produced 643 results. Having carried out further research on the website, with some help from her associate Lauren McFarlane, Mrs Kentish discovered that as at the date of the meeting on 18 May 2015 there were 35 different Executive Committee minutes on the website dating from December 2012 to May 2015. The minutes do not have a title – rather they are published by reference to date. Seven of the minutes predating the meeting between the parties of 18 May 2015 refer to open cast mining sites. None of those minutes refers specifically to the pursuer's intentions regarding the restoration of the Blair House site."

The parties also agreed some, but not all, of the documents produced in the Joint Bundle for the court. (The documents referred to in the evidence recorded in paras [4] to [17], below, are agreed in the Joint Minute or are the subject of admissions in the pleadings.) In the light

of the Joint Minute neither party felt the need to call any witnesses. The Proof therefore proceeded with the pursuer making its submissions in relation to the productions and indicating what it wished the court to take from these, and the defender's reply to them.

Communications between the Parties in 2013

[4] Coaling on the Site ceased in November 2013 after the developer notified the defender of its intention to mothball the Site. The Company went into liquidation in April 2013. (Whether or not the liquidators were entitled to disclaim the Company's heritable property, including the Site, became the subject of prolonged litigation.) The pursuer wrote to the defender by letter dated 3 May 2013 (No 7/8 of process) as follows (omitting introductory paras) ("the First Call"):

> "Fife Council, as planning authority for the area, are in negotiations with KPMG regarding the future arrangements for the above site in terms of the formal insolvency process that now requires to be undertaken.
>
> Please accept this letter as written confirmation that **Fife Council wishes to call in the above bond in these circumstances.**
>
> I understand that all the relevant bond providers associated with the above company have already been in dialogue with each other and KPMG.
>
> I would be obliged if you could acknowledge receipt of this letter and confirm your position at the earliest possible opportunity.
>
> I presume that you may wish to meet with Fife Council's relevant officers along with Tony Friar to finalise any position statements that require to be finalised – and – to discuss the future arrangements that will now need to be put into place **to access the bond monies and effect restoration** of the site." (Emphasis added.)

The letter concluded with the offer to provide any "further information or clarification" to the defender.

[5] If there was any response, none were included in the Joint Bundle. The pursuer wrote in more formal terms on 29 May 2013 (No 7/9 of process) ("the First Notice"):

"TAKE NOTICE that The Fife Council, constituted under the Local Government etc. (Scotland) Act 1994, having their principle office at Fife House, North Street, Glenrothes, Fife (hereinafter referred to as 'the Council') DECLARE the Scottish Coal Company Limited, a company registered under the Companies Acts in Scotland (No. SC154655) and having its registered office at Castlebridge Business Park, Gartlove near Alloa, Clackmannanshire, FK10 3PZ (hereinafter referred to as 'the Company') to be in DEFAULT in their due and proper compliance with the above Agreement and conditions attached to the above consent because of its inability to comply with the restoration, reinstatement and aftercare obligations detailed in the above Planning Consent, Agreement and Bond.

The Company has been placed in liquidation. Blair Carnegie Nimmo CA of KPMG LLP, Saltire Court, 20 Castle Terrace, Edinburgh, and, Gerard Anthony Friar CA, KPMG LLP of 191 West George Street, Glasgow, have been appointed the provisional liquidators for the Company. You have already received a service copy of the court petition and interlocutors. I confirmed the position to you in my earlier letter of 3 May 2013. This Notice of Default is also being served on the provisional liquidators, the registered office of the Company, the other landowners, and, the Royal and Sun Alliance Insurance PLC, a company registered under the Companies Acts (No. 93792) and having its registered office at St Mark's Court, Chart Way, Horsham, West Sussex, England RH12 1XL (hereinafter referred to as 'the Cautioner').

Being in liquidation, the Company is no longer in a position to fulfil its due and proper compliance with the Agreement and the conditions attached to the above consent with regard to its restoration, reinstatement and aftercare obligations. Nor will it ever be able to remedy this position.

The provisional liquidators have confirmed that they cannot fulfil the Company's said obligations and no other interest has materialised to alter that position. Therefore, there is no reason for the Council to demand that the Default be remedied within a specified timescale as neither the Company, the provisional liquidators or any other party is in a position to fulfil the aforementioned obligations and liabilities. Nor will that position alter. Therefore the Council is entitled to call upon the Bond immediately.

The approved Scheme of Restoration for the above site in terms of the above Planning Consent, together with the independent compliance assessors' costing's therefor is enclosed. Given the detailed pumping position on site raising concerns of flooding and interference of nearby watercourses, the Council would be grateful if this claim could be processed quickly.

The total cost of the Scheme of Restoration has been assessed as £3,321,385. As such, the Council are now entitled to demand AND DO HEREBY DEMAND that the Cautioner pays out to the Council, the sum of £3,167,311.00 (THREE MILLION, ONE HUNDRED AND SIXTY-SEVEN THOUSAND, THREE HUNDRED AND ELEVEN POUNDS) Sterling. The full amount liable in terms of the above bond.

> Please acknowledge receipt of this Notice by return and advise whether you require any further information or documentation to properly process this claim." (Emphasis in original.)

The pursuer enclosed with the First Notice a letter dated 29 May 2013 from a company, Minerals & Resources Management Limited, commenting *inter alia* on the pooling of water on the workings on the Site (attaining a depth of 20 metres) and about associated pumping costs. In relation to the latter, it was stated:

> "Pumping is a costly item and I have therefore increased the allowance in relation to Item 8 of the bond calculation from £20,000 to £70,000 as the water will require to be cleared from the excavations before any infilling work can take place on site. Previously the water met in the operations had been cleared continuously by Scottish Resources Group until the point the company ceased their main operational works and mothballed the site back in November 2012."

It also narrated that this had the effect of increasing the calculated figure for the Bond from £3,167,310 to £3,321,385. While there is reference in the correspondence to a letter from the defender dated 28 June 2013, this was not produced in the Joint Bundle.

[6] The pursuer wrote again to the defender (No 7/10 of process) ("the Second Notice") on 12 July 2013. It also took the form of a "take Notice" letter (such as the First Notice sent on 29 May). The Second Notice narrated that the pursuer had already declared the developer to be in default (ie in the First Notice) of its obligations under the Agreement to restore the Site. It referred to the appointment of provisional liquidators to the Company (para 2), and stated that the Company was thereby unable to comply with its restoration obligations under the Agreement or in accordance with the Planning Permission (para 3). After referring to the problem of water pooling on Site as a consequence of the cessation of pumping (para 4), it declared again that the Company was in default (para 5), and recorded that the provisional liquidators had confirmed that they could not fulfil the Company's restoration obligations (para 6). At the end of that paragraph it is stated: "This position will

not change. Therefore the Council is entitled to call upon the Bond immediately." In relation to timescale for restoration by the pursuer, the next paragraph stated:

> "The approved Scheme of Restoration of the above site in terms of the above Consent, together with the independent compliance assessors, costings therefore have already been provided to the Cautioner. The enclosed letter updates that information and documentation, given the earlier Notice detailed the pumping position on site and highlighted the concerns of flooding and interference of nearby watercourses, the Council is looking for this Bond claim to be processed urgently. Any resulting increase in restoration costs arising from the Cautioner further delaying the proper processing of the Council's claim on the above bond will be recorded and the Council will look to the Cautioner for recompense. Further delay in affecting restoration will add risk and cost to the process of restoration."

[7] The Second Notice was accompanied by a further letter from Minerals & Resource Management Limited dated 5 July 2013 which referred at page 2 to certain features of the Site (inadequate fencing) said to pose a danger to children. Again, no reply from the defender is provided, so far as disclosed in the papers produced to the court.

[8] Thereafter, the communications were by letters passing between the parties' respective agents. The pursuer's agents, then Morton Fraser, wrote to the defender's agents, Simpson & Marwick, on 1 November 2013, as follows:

> "We refer to previous correspondence.
>
> We are disappointed to hear that your clients' loss adjusters have still not made contact with Mr Evans.
>
> As previously advised, we do not accept the basic proposition upon which you appear to be relying that default cannot occur within the period of cessation.
>
> As advised, our clients are seeking to carry out the works required, and have called upon the Cautioner to meet the entire Bond liability for this purpose. The Council is seeking to secure the consent of your clients to complete the restoration in an agreed, phased format, on the basis of regular instalment payments.
>
> We have explained the urgent nature of our clients' demand, which is why it is particularly disappointing that Mr Evans has not heard from the loss adjuster. Can you please confirm your clients' position by return?"

[9] Simpson & Marwick replied, by letter dated 12 November 2013, in the following terms:

> "Thank you for your letter dated 1 November 2013.
>
> Our clients' position is as stated in our letters dated 28 June 2013 and 2 August 2013. Nothing stated by you in your letters dated 7 October and 1 November causes our clients to change their view.
>
> Our clients' position is that default, as defined, has not occurred and accordingly your clients are not entitled to call on the bond.
>
> In any event your clients have, still, failed to comply with clause 3.1 of the bond.
>
> Some points arise out of your correspondence.
>
> In your letter dated 7 October 2013 and again in your letter dated 1 November 2013 you have stated that 'the council is seeking to secure the consent of your clients to complete the restoration in an agreed, phased format, on the basis of regular instalment payments.'
>
> This reference to regular instalments had not been made previously by your clients. It is not clear to us on what basis your clients would be entitled to request payments in 'regular instalment payments'. Apart from anything else this seems to us to suggest that your clients are not in fact in a position to fulfil the terms of clause 3.1 of the bond.
>
> You will know that Lord Hodge in his opinion issued in July confirmed that the liquidator is entitled to abandon the site. Lord Hodge's decision was appealed. The appeal has been heard and the Inner House's decision is awaited.
>
> If the Inner House upholds Lord Hodge's decision then, presumably, that will be fatal to any attempt by your clients to call on the bond.
>
> […]
>
> In short, our clients' position remains as stated in our letters dated 28 June and 2 August 2013. Nothing written by you causes our clients to change their position.
>
> Given this, our clients now see little point in their loss adjustor discussing matters with Mr Evans."

For completeness, I record that the letters referred to in the first paragraph, namely of 28 June and 2 August 2013, were not produced to the court.

Communications between the Parties in 2014

[10] The pursuer replied (through their agents) by letter dated 9 January 2014. So far as material, this stated:

> "We refer to your letter of 12 November.
>
> You will appreciate our clients' considerable disappointment with your clients' position. Your clients' continuing delay to agree to meet the Bond liability will only result in a further deterioration at the site.
>
> Please note the following by way of response to your letter.
>
> 1. Since the date of your letter, and as you will be aware, the Inner House has overturned Lord Hodge's decision. The Inner Houses' decision is supportive of the Council's position in seeking to call on a performance bond in a liquidation scenario.
>
> 2. We do not understand the basis on which you say that our clients have still failed to comply with clause 3.1 of the Bond.
>
>   You have already been provided with a fully priced schedule of the works required to remedy the Default.
>
>   In our letter of 1 November we explained that our clients are seeking to carry out the works required, and have called upon the Cautioner to meet the entire Bond liability for this purpose. We went on to explain that the Council is seeking to secure the consent of your clients to complete the restoration in an agreed, phased format, on the basis of regular instalment payments. We do not understand how this could be said to suggest that our clients have not or cannot comply with clause 3.1 of the Bond. It is a suggestion made in good faith and one which your clients are being asked to consider. It is a suggestion which allows for a controlled restoration of the site and has been of interest to other bond providers.
>
> 3. As previously advised, we do not accept your position that Default cannot occur during the period of temporary cessation. Our clients therefore reserve their position in this respect in full. However, 30 March is fast approaching, at which point your clients' reliance on that argument in order to avoid payment will fall away.
>
>   You have repeated in your letter of 12 November that Default, as defined, has not occurred and that our clients are not, therefore, entitled to call on the Bond. Again, we do not accept this.

If there were to be any doubt on this issue, that doubt evaporates within a matter of weeks, at the end of March.

The planning permission requires restoration of the site to be completed 'within 12 months of the practical cessation of extraction of coal on site'. Work ceased on site on 31 December 2012. Restoration was therefore required by 31 December 2013. The planning permission was not and could not be varied by the Bond. Even if your analysis were to be accepted (which it is not), a breach of the planning permission has still occurred.

4. The Council would therefore ask your clients finally to engage in a meaningful discussion regarding payment under the Bond. If your clients are at last prepared to discuss matters – as we have suggested above, on the basis of phased payments – the Council would consider accepting a reduced amount simply with a view to allowing matters to be resolved without resort to further enforcement action and litigation.

   However, this willingness to compromise will be withdrawn should further action be required, and it will certainly be withdrawn at the end of March.

5. You refer in your letter to approaches by and on behalf of Land Engineering Services Limited. For the avoidance of doubt, Fife Council has not and never has been in any meaningful dialogue with this company about Blair House. Our clients' position remains that as a consequence of the liquidation of the Scottish Coal Company Limited, and given the joint liquidators' position, a breach has occurred which will not be remedied. Circumstances have arisen which allow the Bond to be called on."

Reference was also made at the end of that letter to involving "the Regulator".

[11] After some time, the defender's agents replied by letter dated 24 March 2014:

"We refer back to your letter dated 9 January 2014.

Our clients' position has been stated clearly, and at length, in previous correspondence. Nothing in your letter dated 9 January causes our clients to change their view. You therefore have our clients' position.

There is no delay on the part of our clients. Our clients' position, as has been clearly stated in previous correspondence, is that there has been no default as defined in the Section 75 Agreement. There is no liability on the part of our clients and accordingly there can be no delay.

We have repeatedly stated our clients' position that your client has not complied with the terms of clause 3.1 of the bond. You will be aware of the terms of clause 3.1. Where is the evidence of your client's intention and ability to proceed forthwith with

any operation [to restore the site]? Where are the minutes from any meetings of your client which confirm that the site will be restored? Where is the evidence that your client is able to meet the additional costs over and above the bond money? The last 'costings' which were provided to us with your letter dated 12 July 2013 indicate that the likely costs will be £3,570,130. Where is the evidence that your clients are able to pay the sums over and above the bond money?

On the matter of the 'costings' that your client provided, and by that we mean the 'Bill of quantities' attached to John Evans' letter dated 5 July 2013 to your client, we do not consider that the 'Bill of Quantities' constitutes a proper and reasonable cost of any operation, as is required by condition 3.1.

We do not understand your reference to the 'regulator'.

In any event, to be quite clear, our clients have had, since the outset of this matter, the benefit of the advice of senior counsel. That advice has been provided on an ongoing basis. Our clients are entitled to adopt the position that they have done and continued to do."

[12] As there is reference to the cessation period, it is helpful to recall that clause 4.2 of the Bond provided for a temporary cessation of works and during which the Company was advised only to maintain the site in the condition in which it existed as at 31 December 2012. The period of cessation ended on 30 March 2014. (See para 18 of the first opinion.)

[13] After a period of time the pursuer's agents wrote to the defender on 15 December 2014. Again, the letter seeks to give formal notice of calling up under the Bond ("the Third Notice"). The letter stated:

"We act for and are instructed by the Fife Council. We refer to:

1. Restoration Bond No BN11280 entered into among The Scottish Coal Company Limited, Royal & Sun Alliance Insurance PLC and the Fife Council dated 21, 24 and 27 September 2012 (hereinafter referred to as 'the Bond');

2. Minute of Agreement under section 75 of the Town and Country Planning (Scotland) Act 1997 entered into among the Fife Council, UK Coal Mining Limited, and Peter John Auchterlonie and Bruce William Auchterlonie, dated 11, 20 and 26 February and 2 March and recorded in the General Register of Sasines for the County of Fife on 16 March all 2010 (hereinafter referred to as 'the Agreement');

3. Planning Permission issued by the Fife Council, dated 15 March 2010, under reference number 08/00607/WEIA for reclamation of derelict collier bings and the extraction of coal and fireclay by surface mining methods with supporting ancillary infrastructure at land to the north of Blair Farm, Oakley, Saline, Fife (hereinafter referred to as 'the Planning Permission').

TAKE NOTICE that the Fife Council, constituted under the Local Government etc. (Scotland) Act 1994, having their principal office at Fife House, North Street, Glenrothes, Fife (hereinafter referred to as 'The Council') DECLARE that there has been a Default (as defined in the Agreement).

In terms of the Bond, you have guaranteed to the Council the due and proper compliance with the Agreement and the conditions attached to the Planning Permission to the extent that non-compliance with the Agreement of the said conditions would constitute a Default.

The Developer is in Default because inter alia the Planning Permission requires restoration of the site to be completed within twelve months of the practical cessation of extraction of coal on site. Practical cessation occurred by 31 December 2012. Works have not resumed. Restoration was required to be completed by 31 December 2013.

In addition:

1. An order was made to wind up The Scottish Coal Company Limited on 29 April 2013:

2. Mines Restoration Limited, a company incorporated under the Companies Acts (registered number SC472554) and having its registered office at Fifth Floor, Quartermile Two, 2 Lister Square, Edinburgh, EH3 9GL acquired the Blair House open cast coal site from the liquidators of The Scottish Coal Company Limited on 21 July 2014.

3. Mines Restoration Limited have confirmed to the Council that although they will provide all co-operation to the Council in the restoration of the site and will grant such consents as are reasonably necessary, and will allow such access to the site as is reasonably necessary, for the purposes of restoring the site, that company is unable to restore the site in terms of the Planning Permission unless the bond monies in respect of the site are made available for the restoration of the site. We enclose a copy of a letter on behalf of Mines Restoration Limited to the Council dated 1 October 2014.

We enclose a Scheme of Restoration (hereinafter referred to as 'the Scheme') which has been prepared, setting out the steps that are required to restore and reinstate the site, and the proper and reasonable costs that will be incurred in doing so, including

aftercare obligations pursuant to the conditions, all in terms of the Planning Permission.

The Scheme is in two parts: the schedule marked 'Consented Restoration Scheme' sets out the steps required and the costs to be incurred in the full restoration and reinstatement of the site, including aftercare obligations, all pursuant to the conditions and all in terms of the Planning Permission. The Council considers this Scheme to be unachievable in terms of the maximum amount payable under the Bond and because of the current condition of the site. In recognition of this situation, the Council would be prepared to accept, in the alternative, the Scheme as set out in the schedule marked 'Alternative Restoration' and supporting plan. It is acknowledged that this Scheme is more expensive that the total payable under the Bond. The Council would be prepared to meet the shortfall.

The Council, given that it has Mines Restoration Limited's co-operation, and given the terms of the Agreement, is able to proceed forthwith with the alternative Scheme and demanding payment in terms of the Bond for this purpose. Reference is made to clause 3.1 of the Bond.

The Council's intention and ability to undertake the work as set out in the alternative Scheme is further demonstrated by the works undertaken in other open cast coal sites in Fife, at St Ninian's and Muir Dean.

Given the foregoing Default, and given the above, your obligation to pay in terms of the Bond is now enforceable. You are accordingly notified and called upon in terms of the Bond to pay to the Council the proper and reasonable cost of restoring and reinstating the site including aftercare obligations pursuant to the conditions. The total costs to be expended in implementing the alternative Scheme as set out above and as appended to this letter are £3,375,242.37.

You are therefore called upon to pay the Council forthwith the sum of **THREE MILLION ONE HUNDRED AND SIXTY FOUR THOUSAND THREE HUNDRED AND NINETY ONE POUNDS (£3,164,391) STERLING** being the maximum bond liability at this point in time." (Emphasis in bold in original. Emphasis by underlining added.)

[14] Included with the Third Notice was a letter from the agents for Mines Restoration Limited ("MRL") dated 1 October 2014. MRL are a wholly-owned subsidiary of a Scottish charity, one of whose purposes is the restoration of former coal mining sites in Scotland. In short, the letter from MRL's agents confirmed its ownership of the Site and its intention to co-operate with the pursuer "in the restoration of the site and will grant such consents as are

reasonably necessary, and will allow such access to the site as is reasonably necessary, for the purposes of restoring the site."

Communications between the Parties in 2015

[15] The defender's agents responded to the Third Notice by letter dated 6 January 2015. In it, they maintain the position that the defenders are "not satisfied that they have any liability" under the Bond. They stated that the Third Notice raised "some issues in respect of which [the defender] required clarification of [the pursuer's] position". In particular, in the next five unnumbered paragraphs of this letter the defender's agents raised queries about the involvement of MRL (at paras 4 to 9 of this letter). Indeed, the defender's agents went so far as to assert that "we reserve our clients' [ie the defender's] right to take whatever steps are open to them against [MRL] as proprietors of the subjects over which our clients have granted the [Bond]". (It is not clear what was envisaged by this reservation.) The letter continued, as follows:

> "We have repeatedly stated our clients' position which is that your clients have not complied with clause 3.1 of the bond. You have, yet again, **failed to provide any evidence that your clients are to proceed 'forthwith'** with any operation to restore the site as is required in terms of clause 3.1 of the bond [.]
>
> Finally, we must record that the last correspondence between our firms was when we wrote to you on 24 March 2014. Your letter dated 15 December 2014 is the first correspondence that either we or our clients have had in this matter since we last wrote to you on 24 March 2014. Despite that, and given the impending holiday season, you chose to demand a response from us by 9 January, thereby allowing us and our clients 13 working days within which to consult, discuss and consider matters. If proceedings are raised then this letter and our previous correspondence will be referred to in relation to any question of expenses. On the matter of proceedings we can confirm that we have instructions on behalf of our clients to accept service of any summons." (Emphasis added.)

[16] The pursuer's agents replied a week later, by letter dated 13 January 2015 (No 6/15 of process). They begin by expressing disappointment with the manner "in which this claim is being processed by" the defender. They then ask (in para 2):

> "May we seek clarification on your clients' position? Are they disputing that Default has occurred? Do they recognise that a cessation of coaling has occurred in terms of the above Planning Permission? Do they agree that in terms of the Planning Permission that amongst other obligations, the restoration of the site should have occurred within twelve months of the practical cessation of coaling?"

In relation to MRL they explained that:

> "The transfer of heritable interest in the site is neither within the control nor interest of the Council as Planning Authority. Any right of remedy or relief against any other party that your clients consider might be available to them arising from the current circumstance is a matter for them."

They provided more information about MRL and its charitable status and purpose (para 4).

The letter continued, as follows:

> "The letter from Mines Restoration Limited to our clients dated 1 October 2014 that was exhibited to you confirms that in the prevailing circumstance, Mines Restoration Limited are unable to restore the site in terms of the planning permission unless the bond monies in respect of the site are made available for the restoration of the site. **Mines Restoration** Limited, again as noted in their letter, **have agreed to co-operate with our clients in the restoration of the site and will grant such consents as are reasonably necessary, and will allow such access to the site as is reasonably necessary, for the purposes of restoring the site. This is evidence that our clients are able to proceed forthwith with any operation to restore the site**.
>
> As regards formal enforcement action under the principal Planning Act, this is a matter for the discretion of the Council as Planning Authority. In the circumstances, whilst there has been a Default, it would clearly be unreasonably in the circumstances for the Planning Authority to initiate enforcement action against the new owner of the site without first securing the funding and mechanism to secure the same. Enforcement action must be proportionate, fair, reasonable and in the public interest.
>
> The former owner purchased the above Bond from your clients who were aware of the position of the site and that of their client. Is it your client's position that they have no liability in terms of the Bond?
>
> Our clients do not consider it reasonable that their claim is simply dismissed by the statement that your clients do not accept that they have not been satisfied of their

liability in terms of the Bond. Your clients have been provided with sufficient information to allow them to meet their obligations.

The Council have settled three other bond claims with two other bond providers in relation to St Ninians Opencast Site by Kelty, and, Muir Dean by Crossgates. They have undertaken the necessary arrangements and monitoring of the restoration schemes, both of which are now significantly and satisfactorily advanced. Your clients have not requested any further information or clarification in this regard. What further information is required to satisfy your clients that our clients are in a position to proceed forthwith with restoration?

Your clients continue to delay to engage in any meaningful manner in relation to this matter despite correspondence from and on behalf [of] the Council providing sufficient information to advance discussions with a view to settlement of your clients' obligations under the Bond. Such behaviour is considered to be unreasonable on the part of your clients and will be founded upon." (Emphasis added.)

[17] The reply on 26 March 2015 on behalf of the defender was relatively brief:

"We refer back to your letter dated 13 January which we have considered carefully.

We regret to say that it seems to us that the correspondence between us is not moving matters on. You have not responded to the issues raised in our letter dated 6 January 2015.

We have set out repeatedly, and at length, our client's position in this matter. Our client's position remains as previously stated.

Your contention that our clients are in some way delaying matters cannot pass without comment. Our clients refute your suggestion that they are delaying matters. Such a suggestion is, in our view, wholly without foundation."

Apart from the complaint in the last paragraph of the defender's agents' letter of 6 January 2015 (quoted at para [15], above), the remainder of that letter concerned the status and involvement of MRL. It is not stated in the letter of 26 March 2015 in what respect the information provided in the intervening period by the pursuer was inadequate. The only other communication in 2015 before service of the Notice in December 2015 disclosed in the evidence was the face to face meeting in May 2015 (the terms of which are agreed in the Joint Minute and set out at para [3], above).

Submissions on behalf of the Pursuer

[18] Mr Armstrong QC, for the pursuer, began by advancing three propositions. The first was that from May 2013 until 2 December 2015, the date the Notice was served, the pursuer had consistently informed the defender that it intends to carry out the works and that it will be able to carry out the works. The second proposition was that during that period, between May 2013 and December 2015, the pursuer presented evidence to the defender of its intention and ability to undertake the restoration works. That evidence should be considered in the context of the knowledge of the parties and their representatives of the law and knowledge of the powers available to the pursuer under the Agreement. His third proposition was that the Notice, when looked at as a whole and in the relevant factual context, was adequate and it complied with the terms of clause 3.1 of the Bond.

[19] Mr Armstrong began by looking at the First Call by the pursuer under the Bond, set out in paragraph [4] above. Mr Armstrong drew several points from this letter. Fife Council were the planning authority for the area. In that capacity they regulated the land and they wished restoration of the Site. Further, they wished to call on the Bond for this purpose and to use the Bond monies to effect the restoration works to the Site. Mr Armstrong next referred to the Agreement and he noted, in particular, that paragraphs 6.8 and 8.1 together enabled the pursuer to enter onto the Site to carry out the restoration works. He stressed that the pursuer as planning authority required no further power to do so. Accordingly, the pursuer was, as planning authority, telling the defender that it wanted to restore the Site and to apply the Bond monies for that purpose. This, Mr Armstrong argued, remained the consistent position of the pursuer for the next 2½ years.

[20] Mr Armstrong referred to the First Notice from the Council to the defender (see para [5], above), which was in the form of a formal notice calling upon the defender to pay under the Bond. Mr Armstrong referred to the mention of flooding. Mr Armstrong argued that this was further evidence of the pursuer as planning authority wishing to proceed as quickly as possible with restoration, especially having regard to the problems of flooding on the Site.

[21] Mr Armstrong next referred to the Second Notice from the pursuer to the defender, which is set out in paragraph [6] above. Mr Armstrong drew attention to the pursuer's request for the Bond claim to be processed quickly in the light of the deterioration of the Site. Mr Armstrong also drew attention to the attachment enclosed with the Second Notice, being the letter referred to in paragraph [7], commenting on the risk posed, in particular to children, from a water-filled quarry being left on site. Mr Armstrong noted that these observations demonstrated the compliance by the pursuer with the monitoring function required in relation to the Site, in accordance with the planning permission.

[22] Mr Armstrong turned next to a minute of the Executive Committee of the pursuer, dated 22 October 2013 (No 6/11 of process) ("the Council Minute"). Item 284 of that minute was in the following terms:

> "284. **OPENCAST COAL INDUSTRY IN FIFE – SECOND UPDATE**
> (*Previous minute reference paragraph 237 of 2013.E.C. 182 refers)*
>
> The Committee considered a joint report by the Executive Director (Environment, Enterprise and Communities), Executive Director (Finance and Resources) and Executive Director (Corporate Services) providing an update on developments since the report considered by the Committee on 20th August with regard to settlement of the restoration bonds relating to two of the opencast sites and the continued processing of the claim for the remaining site.
>
> **Decision**

The Committee:-

(1) noted the developments that had taken place since August this year;

(2) noted that delegated powers had been used to settle claims against the two restoration bonds relating to the St. Ninians and Muir Dean Opencast Sites; and

(3) authorised the respective Executive Directors to continue to take such action as was required to secure the restoration of all the sites."

This Council Minute records the authorisation of the Executive Committee of the pursuer to have its officials take such action as is required to secure restoration of all of the opencast sites in its area. While there was no express reference in the Council Minute to the Site, Mr Armstrong argued that, as the Minute disclosed the names of the two sites where the Council's other bond claims had been settled, the third unnamed site necessarily related to the Site. Mr Armstrong again referred to the Agreement which gave the pursuer power to enter onto the Site and to restore it.

[23] In order to provide a context for the Council Minute, Mr Armstrong referred to section 50C of the Local Government (Scotland) Act 1973, which provides for inspection of minutes and other documents of local authorities. In particular, by virtue of section 50C(1)(a), generally minutes of a committee of the local authority must be available for inspection to members of the public. This was augmented by the provisions in section 23 of the Freedom of Information (Scotland) Act 2002 requiring any Scottish public authority to have a "publication scheme" relating to public information. Section 23 stipulates what a publication scheme should include. The information commissioner produced a model publication scheme, relative to these obligations under the Freedom of Information Act, and this was produced to the court. (Mr Duncan QC, senior counsel for the defender, indicated that this document was not subject to any agreement in the Joint Minute.) The final

document in this chapter of Mr Armstrong's submissions was the pursuer's own guide to information available through its council publication scheme. One of the modes of publication provided for under this scheme, was by publication to the website of the council. Mr Armstrong referred to parts of this document and highlighted the passages indicating that persons having trouble finding any documents listed might procure help either by email or by contacting the council by other means. From all this Mr Armstrong drew the proposition that minutes of the council were in the public domain and within the presumed knowledge of parties dealing with local authorities.

[24] Mr Armstrong returned to the correspondence between the parties, next referring to the first letter from the pursuer's agents to the defender's agents (see para [8], above). After several introductory paragraphs, expressing the pursuer's disappointment that the defender's loss adjusters had still not made contact, and also stating that it did not accept the defender's contention that default cannot occur within the period of cessation,

Mr Armstrong referred to the penultimate paragraph quoted. Mr Armstrong explained that the defender's then position had been that there had as yet been no default, which was one of the preconditions of any liability on the part of the pursuer to call upon the Bond. At that time, the defender also maintained the argument, which was finally rejected at the Debate, that the restoration works had to be completed first before the pursuer could call under the Bond. That, Mr Armstrong explained, posed a practical difficulty for the Council, if it had to borrow funds for this purpose. It wanted assurance that at the end it would be paid, and so it suggested payment by instalments as a practical way forward. That was the import of this letter. The defender's agents' reply to this letter is set out at paragraph [9], above.

Mr Armstrong submitted that this disclosed the defender's position was that default had not yet occurred. The basis for the defender's argument was that the developer must be allowed

a reasonable time to do the works before there could be a default and, further, that one could not take into account the time when the Site was mothballed (ie the cessation period: see para [12], above). This letter also reflected the defender's argument, only rejected at Debate, that the works had to be completed first. Mr Armstrong accepted that the final paragraph of the letter quoted raised the inference that the pursuer was not in a position to comply with the defender's interpretation of clause 3.1, requiring the pursuer first to complete the restoration works and only then could it make a claim under the Bond.

[25] Matters continued into 2014 and Mr Armstrong next turned to the letter from the pursuer's agents to the defender's agents (see para [10], above). This responded to a number of points arising from the previous correspondence. Mr Armstrong drew attention to the second numbered paragraph, which stated: "We do not understand the basis on which you say that our clients have still failed to comply with clause 3.1 of the Bond."; and to the further submission the pursuer's agents made (the remaining paras of numbered para 2). Mr Armstrong emphasised the first sentence of the last paragraph quoted, noting that the request was made and monies demanded under the Bond "for this purpose", being restoration of the Site.

[26] Towards the end of 2014, the pursuer's agents sent the Third Notice (see para [13], above). Mr Armstrong also referred to the communications made at the meeting of 18 May 2015, the terms of which were agreed in the Joint Minute, and set out above at paragraph [3]. Mr Armstrong stressed, however, that it was no part of the pursuer's case that the factual context included what the pursuer could have found, upon further inquiry. Rather, the factual context was the undisputed fact that a Council official had informed the defender at that meeting that the pursuer had a minute recording that the pursuer had authorised the calling up of the Bond and it had authorised whatever works were necessary for restoration

of the Site. This was consistent with the power the pursuer had under the Agreement and which had been referred to in the Notice. Accordingly, he accepted that there was no obligation on the defender to investigate; but there was no need to. There was no reason to doubt what the Council representative, Mary McLean, the Council solicitor, had said at the meeting or that what she had said was not true. The minute she referred to, being the Council Minute, was in the public domain. She informed the defender's representatives attending that meeting that the pursuer had the minute, that it had the requisite powers and that it had carried out similar restoration work at two other opencast sites. It was never suggested in the course of the correspondence between the parties that these facts were not true. The defender could have easily investigated these matters. These matters were in the public domain, although Mr Armstrong stressed there was no obligation on the defender to investigate.

[27] When pressed as to the relevance of the information from the Information Commissioner and about the model scheme of publication, Mr Armstrong did not concede that these were not relevant but he indicated that he placed reliance principally on the representations made at the meeting on 18 May 2015. He maintained that all of these features were part of the factual context against which the Notice fell to be construed. On the defender's approach, all of this context was to be "airbrushed out" and this could not be right. In relation to the other correspondence referred to by Mr Duncan, Mr Armstrong's position was effectively that there had never been any suggestion in any of the correspondence that MRL was not authentic, or that there was any doubt about its co-operation with the pursuer and this was now recorded in the Council Minute. MRL was referred to in two other letters. Further, there was no dispute that the Council had settled other bonds and restored two other sites. There was no suggestion that Mary McLean was

not telling the truth at that meeting. All of this, therefore, was relevant to consider as the context and was available to the reasonable recipient. The fact that the defender disputed other notices did not alter the fact that these matters were not disputed; that MRL and the Council had done the restoration work on the other two sites, and that the defender had been told this. It had been told that the pursuer wished to undertake the restoration of the Site. None of these matters was disputed. Accordingly, under reference to the case of *Hoe International Limited* v *Martha Andersen & Anr* [2017] CSIH 9, the reasonable recipient would be aware of all of this context; it could not be airbrushed out. He invited me to take these matters into account.

[28] Turning to the Notice, the critical sentence stated: "The Council confirms that it will comply with its obligations under the Bond." Mr Armstrong argued that this sentence had to be understood in the context of the defender's argument that the pursuer had first to complete the work. Further, Mr Armstrong submitted, this sentence unequivocally stated that the pursuer will do the work and that it wished access to the Bond monies in order to carry out the restoration of the Site. This, he said, was consistent with and had to be construed against the previous 2½ years of context which he had just examined under reference to the documentation. The pursuer maintained a consistent position throughout that period, that it wished the Bond monies so it could effect restoration of the Site, and it accepted it must carry out the works. The fact that there was an alternative stated in the Notice, calling on the defender itself to complete the works, albeit not insisted in for the purposes of these proceedings, underscored the pursuer's priority and intention that the restoration works had to be done.

[29] Mr Armstrong concluded by formally inviting the court to sustain the pursuer's second, third and fourth pleas-in-law and to pronounce decree of declarator and payment with expenses.

Submissions on behalf of the Defender

[30] Mr Duncan QC began by inviting me to sustain the defender's second plea-in-law, to the effect that it was under no obligation to pay out under the Bond. In any event, if the court was not with him, he noted that conclusion two of the summons sought interest at the rate of 8% and he invited the court to make the usual adjustment in the light of the *Farstad Suply AS v Enviroco Ltd* 2012 SLT 348.

[31] Mr Duncan outlined three chapters in his submissions: first, the scope of the proof and the question for the court; second, what was the correct legal question; and third, applying those legal questions to the facts properly before the court.

[32] In relation to the scope of the proof, Mr Duncan referred to the court's interlocutor of 23 March 2017 which was to allow parties a proof before answer "on the issue of whether or not the notice letter dated 2 December 2015, construed in the relevant factual context, was adequate to comply with clause 3.1 of the Bond." Accordingly, he said, it was necessary to consider what was the "relevant factual context" and what was meant by "adequate to comply". He also referred to paragraph 93 of the first opinion and he accepted that the case of *Mannai Investment Co Ltd* v *Eagle Star Life Assurance Co Ltd* [1997] AC 749 applies and that context was relevant. However, it was not enough, as he put it, for a person to call vaguely on the Bond or to give a vague impression in relation to the context. In other words, he argued, the defender would appreciate that the Bond was being called upon if and only if the words of the Notice, in their proper context, would objectively demonstrate to the

reasonable recipient of the Notice that the terms of clause 3.1 of the Bond had been complied with. As he put it, the question was: has the beneficiary availed itself of the promise that was made to it? This was how matters had been framed in *I E Contractors Ltd* v *Lloyds Bank PLC* [1990] 2 Lloyd's Rep 496 at page 500-501. That was the question in this case. Under reference to paragraph 91 of the first opinion, he argued that the court had left open the question of whether the sentence relied on was an adequate one. The argument was not foreclosed, as perhaps Mr Armstrong had suggested under reference to paragraph 90 of the first opinion. He then turned to look at Article 10 of the summons. This appeared to indicate that the sentence concerned was the evidence and that the pursuer sought to bring in additional knowledge as the context. In other words, there were two parts to the pursuer's approach.

[33] Turning to his second chapter, concerning the correct legal question, Mr Duncan referred first to the case of *Mannai*. Before turning to particular passages in that case, Mr Duncan sought to extract seven propositions as the *ratio* of that case, namely:

(1) The court takes a purposive, contextual approach;

(2) *Mannai* did not decide that in the case of a contractual notice it was enough if the context shows that the beneficiary of a contractual right wished to assert that right in some vague sense. As it happens, when looking at the circumstances of the *Mannai* case, the beneficiary did not need to state very much. The court looked at the lease to see what was needed to be said.

(3) The court determined that in a case such as this, the question was whether the reasonable recipient would construe a notice, in its context, as meeting the contractually agreed requirements for it.

(4) If notice was ambiguous or if it left the reasonable recipient in any doubt then that question fell to be answered in the negative. The beneficiary here will fail if there was any doubt or uncertainty as regards the Notice.

(5) The first contextual part in the jigsaw was, he said, to ascertain what the contractually agreed requirements said and what they meant. It was relevant to look at what Lord Hoffman said in *Mannai* and also at Lord Drummond Young's observations in the case of *South Lanarkshire Council* v *Coface SA* [2016] CSIH 15. One may need to look at the wider purpose of the agreed stipulation.

(6) In construing a contract it is the objective evidence that is relevant and is reasonably available to the recipient. The subjective evidence of motive and intention were irrelevant.

(7) Thinking of a wider purpose, the court must strip out any evidence that would subvert to the purpose of the contractual requirements. In the case of a performance bond, where the beneficiary seeks to rely on evidence that it is open to the cautioner to go and get for itself, the question for the court is, is that really consistent with their surrounding policy of a performance bond?

It was inimical to the character of a performance bond to require the grantor of the bond to avail itself of a website to ascertain further information. Mr Duncan then made reference to several passages in the speech of Lord Steyn in the case of *Mannai* (at pages 766C-F, 767D and 768A-C). Mr Duncan argued that he was not reintroducing the doctrine of strict compliance, but looking at the contractual requirements and the underlying policy of a performance bond.

[34] Mr Duncan referred to a number of other cases, namely the cases of *Hoe* in the Inner House, [2017] CSIH 9 (at paras 14, 16, 17 and 27); *South Lanarkshire Council* v *Coface SA*

[2016] CSIH 15 (at paras 9, 10 and 13), *South Lanarkshire Council* v *Aviva Insurance Limited* [2016] CSOH 83 (at paras 3, 6, 30 and 33), *East Ayrshire Council* v *Zurich Insurance PLC* [2014] CSOH 102 (at paras 7, 8, 22 and 26) and *Scrabster Harbour Trust* v *Mowlem plc* 2006 SC 469 (at para 47). I need not set out these passages at length. Most of these cases were also considered in the first opinion. The passages referred to concerned general principles of law, which are not really in dispute between the parties (eg para 18 of *Zurich*) or reiterated the attributes of, or principles to be applied to, performance bonds (eg the Inner House in *Coface* at paras 10 to 13). The import of the passages from *Hoe*, for example, are that two distinct issues may arise in relation to the giving of a contractual notice: whether the terms of the notice are sufficient to convey the necessary meaning to the recipient and whether the method of sending it is in accordance with the parties' contract. The meaning of a notice was objective. Those cases confirm, and parties accept, that the general rules are subject to the precise terms of the bond in question (*Coface* at para 14).

[35] Turning to his third chapter, applying the law to the facts, Mr Duncan posed the following question: would the Notice have made it clear to a reasonable recipient what it was that was being relied on or proffered, and whether that was reasonable evidence of the intention and ability? If the answer was "yes", the court also had to ask: had the evidence been provided by the pursuer to the defender. Turning to the terms of the Notice, did it make clear what was relied on? He noted that none of the documents founded upon by Mr Armstrong as relevant to intention and ability to proceed were dated from December 2015. The attachments related to the costs of the work. It was argued for the first time at proof, there was an obligation on the defender by virtue of the alternative. That cannot be right. Otherwise there would be a claim for damages in the action.

[36] What then, is the evidence the pursuer relied on? The Notice does not say what is being relied on. Mr Duncan maintained the position that the sentence founded upon by the pursuer was meaningless. There were no obligations imposed on the pursuer under the Bond. This is essentially the same submission as that advanced by Mr Hanretty at Debate (albeit recorded at para [90] of the first opinion *per incuriam* that there was no obligation on the pursuer "under the Agreement"). Clause 6.1 of the Bond makes it clear that the only obligant was the defender and company. It was a meaningless sentence. In any event, it was for the pursuer to show that it had a meaning and to identify what was relied on. The inescapable conclusion was that the sentence was meaningless when one brought it into its factual and legal context.

[37] Turning to consider the factual context, he argued that Mr Armstrong made no attempt to identify what evidence was before the court, or what evidence forms the factual context and which evidence was available to the reasonable recipient. He argued that the reasonable recipient would place no weight on any other prior notices that had been served. There had been a number of previous notices but these had to be stripped out from the knowledge of the reasonable recipient. None of these said anything about intention or ability. The pursuer appeared to be inviting the court to make an inference from the context, but it had not taken the court to the whole of that context. In particular, Mr Duncan noted that Mr Armstrong had made no reference to the letter from the defender's agents to the pursuer's agents (see para [15], above). Turning to that, Mr Duncan relied on the passage stating:

> "We have repeatedly stated our clients' position which is that your clients have not complied with clause 3.1 of the Bond. You have, yet again, failed to provide any evidence that your clients are able to proceed 'forthwith' with any operation to restore the site as is required in terms of clause 3.1 of the bond."

Mr Duncan argued that the court could conclude from this that the defender was not satisfied of certain matters as at that date. He went on to contend that the reasonable recipient would not look at these prior communings and that the prior notices were not relevant. In any event, they were not referred to in the Notice. The reasonable recipient would be aware that there was a dispute about the prior notices including a dispute about the intention and ability of the pursuer to carry out the restoration work. All that had been shown by way of the pursuer's proof was that serial notices had been served but none was relied on here. The reasonable recipient would ask, why was that? The reasonable recipient would know the law and would know that if the document offered contained the right information the reasonable recipient would need to pay up. It cannot be assumed that the reasonable recipient would think of the prior notices because they had failed. There was no basis for the conclusion that the reasonable recipient would have had regard to them. These have never been called upon in any court proceedings. The reasonable recipient would have expected that if they were to be relied upon they would have been referred to in the Notice. Mr Duncan accepted, in response to a question from the court, that the reasonable recipient would be aware of the facts and terms of the prior notices but his position was that the reasonable recipient would also know that these notices were disputed and not insisted on.

[38] Mr Duncan then turned to the second category of documentation relied on by the pursuer for the purposes of its proof. This was the category of lawyers' letters that had been referred to. He noted that the pursuer had looked only at one of these, namely the one set out at paragraph [8] above, but it was important to see the response to that (set out in para [9]). If it was appropriate to go to the lawyer's letters, all that the reasonable recipient would know was that there was a continuing dispute about the efficacy of those letters, not that the works had to be done or about the pursuer's ability. It was not appropriate to look

at each side's interpretation as to the dispute. The reasonable recipient would look at the Notice.

[39] Mr Duncan addressed himself to what conclusions the reasonable recipient would take from the meeting in May of 2015 (see para [3], above). In short, matters had been left on the basis: (1) that the pursuer had an undated minute authorising the calling up of the Bond to secure restoration of the Site, and (2) that that would be produced to the defender. The reasonable recipient would conclude, wherever else there was evidence of intention and ability to restore the Site, it was definitely contained in that minute. So the reasonable recipient would expect this to be proffered to it or to be referred to in the Notice. But this did not happen. A third factor in relation to the factual matrix, was what would the reasonable recipient conclude from the Notice? By this point in time there had been seven months of silence followed by a fresh Notice and no reference to the key evidential source, being the Minute of the pursuer. At a minimum, Mr Duncan argued, there would be doubt as to what was being relied on and whether things had moved on. When one looked at these factors and the uninformative statement in the Notice, the reasonable recipient was left in a position of ignorance as to the evidence relied upon.

[40] Mr Duncan then turned to consider the legal context. The reasonable recipient was taken to know the policy of performance bonds, he did not need to go scrabbling about to find out information, as might be the import of paragraph 4 of the Joint Minute (see para [3], above). There was also the possible existence of a cross-guarantor. The Notice must be construed in a way that works for the beneficiary and any guarantor. The consequences of the Notice are very serious. It crystallises and makes unimpeachable an obligation to pay. Only fraud would vitiate that payment obligation. While that was harsh, that was the legal consequence. That was the outcome of the *South Lanarkshire Council* v *Aviva Insurance*

Limited [2016] CSOH 83. That itself must create doubt in the mind of the reasonable recipient.

[41] In relation to the Council Minute and any awareness on the part of the defender, even if it was founded upon, it was not the defender's obligation, and it was entirely uninformative as regards other parties. All that it indicated was that efforts were continuing. Nothing has been said about the attribution of knowledge. This chapter of Mr Armstrong's submissions really related to no more than the upload of documents and it was suggested that the defender had an obligation to look at them. Neither of those propositions was vouched by reference to authority. The reasonable recipient is not taken to know the whole of the law. The fact that the pursuer said it would provide this information, but did not, was conclusive. Mr Duncan renewed the motion he made at the outset.

Reply on behalf of the Pursuer

[42] In reply, Mr Armstrong first addressed himself to the scope of a hearing. He invited the court to reject the defender's interpretation of the interlocutor and he referred to the last sentence of paragraph 93 of the first opinion. He also referred to paragraph 86 of the first opinion in relation to the adequacy of the Notice. Under reference to paragraphs 86 to 89, he noted that the court had rejected the doctrine of strict compliance. He argued that Mr Duncan was endeavouring to re-run the strict compliance argument, albeit presented in a slightly different fashion. Furthermore, under reference to paragraph 90 of the first opinion, the court had rejected the defender's contention that the sentence relied on was meaningless and he reminded me that the pursuer's approach was to look at that sentence *inter alia* in the context of the remainder of the Notice.

[43] Turning to some of the authorities referred to by Mr Duncan, Mr Armstrong began with the case of *Hoe* in the Inner House. He accepted that this case had not been before the court at the time of the debate but it set out the relevant legal framework that should suffice for present purposes. Under reference to paragraph 16 in that case, he accepted there were two categories of cases and he accepted that Mr Duncan had cited all the relevant passages. The task was to construe the Bond to identify what it required for the purpose of any notice and then to ask if the Notice served was sufficient. Mr Armstrong next turned to the case of *East Ayrshire Council* v *Zurich* and he invited me to distinguish that case because it was conceded in that the notice was defective. Turning next to the case of *Coface*, he noted that this had been quoted extensively in the first opinion. He stressed however that it was not part of the pursuer's case that the factual context included what the defender could have found upon inquiry. There was no need on the part of the defender. The factual context included the undisputed fact that a council official (Mary McLean) had informed the defender at the meeting in May 2015 that it had a minute recording that the pursuer had authorised the calling up and the works necessary for restoration of the Site. The defender had no basis to doubt that she was telling the truth. This was consistent with the power the pursuer had under the Agreement, which had been referred to in the Notice. The Council Minute was in the public domain and could easily have been investigated. Further, there was no suggestion in the correspondence that MRL was not authentic or that its cooperation was in doubt. This was now referred to in the Joint Minute. The fact that the defender disputed the other notices did not affect the matters that were not disputed: these matters included the cooperation of the Site owners, MRL; that the pursuer had advised the defender in May 2015 that it had done similar restoration work at two other sites and that they wished to undertake the restoration of the Site.

Discussion

Construction of the Bond Consistent with its Purpose

[44] In the course of submissions it was argued that the provisions of the Bond should be construed consistently with its purpose. While the purpose of language of *this* Bond was not further analysed or developed in submissions, it may nonetheless assist to consider more precisely the nature of the Bond and the obligations it created, so as to ascertain its purpose. The description of "performance bond" is not used *in gremio* of the Bond. In the case of *North of Scotland Bank* v *Inland Revenue* 1931 SC 149 Lord President Clyde provided the classic definition of a bond in Scots law (at p 154): "A bond in Scots law, is –broadly– neither more nor less than a written obligation to pay or perform." Bell, in his discussion of bonds in his *Commentaries*, I, page 352, also divided bonds into two types: money bonds and bonds *ad facta praestanda*. Bell defined a money bond as "an engagement, absolutely or conditionally, at a day certain or in a specified event, to pay a definite sum of money". Applying these observations, it is clear that the Bond is a money bond (as opposed to one to perform, *per* Bell's taxonomy) containing an obligation to pay a defined sum of money (ascertainable by reference to the Schedule appended to it) in a specified event (ie the default of the Company).

[45] It should also be noted that in the Bond the defender is defined as "the Cautioner". Bell defined cautionary as "an accessory obligation or engagement, as surety for another, that the principal obligant shall pay the debt or perform the act for which he is engaged, otherwise the cautioner shall pay the debt or fulfil the obligation": *Principles of the Law of Scotland* at page 245. Clause 1.2 of the Bond provides that "[the Company] has requested the [defender] and [the defender] has agreed to guarantee the performance of the obligations of

[the Company] to [the pursuer] in terms of the Conditions (as hereinafter defined)". Accordingly, consistent with the conventional trilateral character of a cautionary obligation, there are three parties to the Bond: the defender, as cautioner; the Company, as the principal obligant; and the pursuer, as the beneficiary for whose benefit the Bond was granted.

[46] The Bond is accessory to the obligations incumbent upon the Company in terms of the Agreement and the conditions in the Planning Permission. Consistent with the accessory character of a cautionary obligation, there must be default on the part of the Company (*qua* principal obligant). This is provided for in clause 2.1, in which the defender

> "guarantees to [the pursuers] the due and proper compliance with the Agreement and the conditions attached to the [Planning Permission] referred to in the Agreement to the extent that non-compliance would constitute a default within the meaning the Agreement or said conditions would constitute a Default as defined in the Agreement."

In the absence of express stipulation, it is not, generally, a defining feature of a cautionary obligation that the beneficiary must prove the measure of its loss (cf an indemnity) or that it is obliged to expend the monies recovered in a particular manner (cf some forms of insurance). Clause 2.2 of the Bond, however, provides that in the event of default of the Company the cautioner (ie the defender) will, if called upon by the pursuer,

> "pay the proper and reasonable cost, subject to Clause 4 of this Bond, **of any operation carried out in terms of the Agreement by [the pursuer] to restore and reinstate the said site** including aftercare obligations pursuant to the conditions". (Emphasis added.)

Dealing first with the reference to clause 4, that clause is concerned with limits of the Bond, including specification of the maximum figure of £3,167,311. It is important to note, however, that the defender has not undertaken a simple obligation to pay in the event of the Company's default. Having regard to the words I have highlighted in clause 2.2, the

defender has undertaken to pay the proper and reasonable cost "of any operation carried out…to restore and reinstate" the Site. The corollary of this is that, if the pursuer wishes to access the Bond monies in the event of a relevant default, it is incumbent upon it to promote the remedial works sufficient to effect the restoration of the Site. Finally, it should be noted that the Bond is self-styled as a "restoration bond". From these features of the Bond, it is clear, in my view, that the purpose for which the Bond has been granted is to fund the reasonable costs of the restoration of the Site, such restoration to be in accordance with the terms of the Agreement and the conditions appended to the Planning Permission in the event of a relevant default by the Company. The provisions of the Bond should therefore be construed consistently with that purpose.

[47] The foregoing observations are consistent with the case-law referred to by the parties. While parties referred to a number of cases, there was no real difference between them as to the general principles to be applied. The most recent binding expression of those is found in the Inner House in *Hoe*. Parties were agreed that this was a *Mannai*-type case falling within the first category identified by Lord Drummond Young in *Hoe* (at paras 16 and 27). In this first category of cases, the question to be addressed was whether the terms of the Notice were sufficient to convey the necessary information to the recipient. That question was answered by considering how the reasonable recipient would have understood the Notice (see para 28). I adopt that approach in my consideration of the evidence and parties' submissions.

[48] I turn next to consider what the Bond required in terms of the notification provisions.

What did the Bond Require in Terms of Notification to Trigger the Defender's Obligation to Pay

[49] The issue in this proof is what the Bond required in order to trigger the defender's

liability and whether the Notice conveyed the necessary information consistent with those requirements, understood from the perspective of the reasonable recipient.

[50] As I noted at paragraph 70 of the first opinion, at debate the parties approached the Bond on the footing that as a performance bond it was a species of documentary credit. This naturally influenced the arguments as to its interpretation. The arguments then presented, particularly in support of the doctrine of strict compliance, were based on English cases concerning such deeds (eg *I.E. Contractors*). In the first opinion, I rejected the contention that clause 3.1 of the Bond brought into operation the doctrine of strict compliance, chiefly because that doctrine was inapposite in respect of a clause which did not stipulate for any documentation and whose language ("evidence") otherwise pointed to extrinsic matters which the doctrine is intended to preclude: see paragraph 89 of the first opinion. (Similarly, see the observations of Lord Drummond Young at paras 14 and 15 in the Inner House case of *Coface*.) Notwithstanding this, there were shades of this argument repeated in the submissions on behalf of the defender in this proof. Even considered outwith the context of documentary credits (or performance bonds as a sub-species thereof), in my view parties did not contract for exactitude in clause 3.1. The language simply does not support that approach.

What does Clause 3.1 Require?

[51] Turning to the requirements of clause 3.1, this specifies what is required in order to trigger the defender's liability under the Bond. (Clause 3.1 is set out in full in para 17 of the first opinion.) Clause 3.1 essentially sets out what is required of a notice to trigger the defender's obligations under the Bond. These requirements correspond to the substantive obligations set out in clause 2.2.

[52] As noted in the first opinion, the parties proceeded on the basis that there were three distinct requirements for any notice served under clause 3.1:

(i) notice in writing of default,

(ii) a "full breakdown of any proper and reasonable cost of any operation carried out as referred to in Clause 2", which two items must be provided to the defender's specified address,

(iii) "together with the reasonable evidence of the intention and ability of the [pursuer] to proceed forthwith with any such operation".

Requirement (i) is obvious and requires no elaboration. It is precisely what one would expect to be shown in order to bring into play a cautioner's obligation: a relevant default on the part of the principal obligant and a call under the bond of caution. This corresponds to clause 2.1 (set out above, at para [46]). In the instant case, the principal obligant, being the Company, is in default and the pursuer has given notice of this. Requirement (i) of clause 3.1 is satisfied. In the absence of the latter part of clause 2.2, quoted above, proof of default on the part of the Company would have sufficed for the purposes of a call on a conventional bond.

[53] However, in this case the Bond contains provisions additional to those in a conventional cautionary bond, namely clause 2.2, stipulating the purpose for which the Bond monies must be applied. Clause 2.2 did not simply provide that the defender will pay out in the event of a relevant default on the part of the Company. Rather, it provided that, subject to clause 4 (which stipulated the limit of the Bond from time to time), if called upon, the defender will pay to the pursuer "the proper and reasonable cost…. of any operation carried out in terms of the Agreement by the [pursuer] to restore and reinstate the said site including aftercare obligations pursuant to the conditions." It was on the basis of this

wording that the defender argued at debate that it was under no liability until the pursuer first completed the remedial works, an argument I held in the first opinion to be ill-founded. Clause 2.2 does, however, envisage that the Bond monies are to be applied to the carrying out of the remedial works. The counterpart for this obligation is, in my view, found in the latter parts of clause 3.1, corresponding with (on the parties' analysis) requirements (ii) and (iii).

[54] Requirement (ii) of clause 3.1 refers expressly to clause 2 and it repeats the language of that clause. As noted above, clause 2.2 imposes an obligation that the Bond monies are applied for the purpose stipulated: namely, to restore and reinstate the Site in accordance with the Agreement and conditions of the Planning Permission. In order to discharge this obligation, the pursuer must produce a costed scheme of remedial works that will, if carried out, remedy the Company's default. The pursuer has supplied, and the defender has accepted, a full breakdown of the reasonable costs to effect the restoration and reinstatement of the Site. (For reasons which will become clear, it may be significant that those costs now exactly match, and do not exceed, the amount available under the Bond at the material time.) Requirement (ii) of clause 3.1 is therefore satisfied.

[55] While I am not persuaded that there is a discrete free-standing obligation (iii), as was the common approach of the parties, the important consideration is what is required to satisfy requirement (iii), and whether the sentence in the Notice relied upon by the pursuer suffices. I turn to consider the latter part of clause 2.2 of the Bond. The latter part of clause 2.2 could be seen as further delimiting the scope of the defender's obligation. Unless the Bond monies are to be expended for the Bond purpose, there is no liability on the part of the defender. Put another way, the application of the Bond monies for the Bond's purpose is another matter in respect of which the pursuer must satisfy the defender. Even if the

Company is in default, unless the pursuer can show that it will apply the Bond monies for the Bond purpose, the defender is not obliged to pay. In my view the latter part of clause 3.1, corresponding with parties' requirement (iii), is a procedural provision directed to satisfying this part of clause 2.2. The natural meaning of the phrase "reasonable evidence of the intention and ability", construed consistently with the other provisions of the Bond already noted, and with the Bond's purpose, is to satisfy the requirement in the latter part of clause 2.2 that the pursuer will apply the Bond monies for the Bond's purpose. For the purposes of any notice, clause 3.1 requires confirmation that the pursuer will expend the Bond monies to effect the remedial works of the costed scheme (accepted as satisfying requirement (ii)). Accordingly, on a proper construction of clause 3.1 of the Bond, the purpose of requirement (iii) is simply to oblige the pursuer to demonstrate to the defender that it will expend the Bond monies for the Bond's purpose, as identified above (at the end of para [46]). It must evidence its "intention and ability" to achieve the Bond's purpose. In my view, this is not a particularly onerous requirement.

[56] What, precisely, must the pursuer show to satisfy requirement (iii)? A striking feature of the case has been the defender's refusal to explain what is required, either to the pursuer or indeed to the court. So far as the evidence disclosed, the defender repeatedly rejected the sufficiency of the pursuer's repeated calls upon the Bond. Again, so far as the evidence disclosed – and I stress that not all of the correspondence was produced – the defender did not explain what those deficiencies were or, at least, it did not do so in a manner that ever enabled the pursuer to satisfy the defender's interpretation of the Bond. (Of course, this does not mean that the defender's interpretation of the Bond must be accepted as correct. So, for example, the pursuer resisted the defender's contention that the remedial works required first to be completed before it could call on the Bond.) So far as the evidence disclosed, the defender did

not respond to the pursuer's request in its letter of 9 January 2014 "finally to engage in a meaningful discussion regarding payment under the Bond" (see numbered para 4, quoted in para [10], above), nor did it respond to the numerous questions posed by the pursuer a year later (in its letter of 13 January 2015, set out at para [16], above) to clarify its position. At debate, in response to a question from the court, the position of the defender's then senior counsel, Mr Hanretty, was that it was not for the defender to tell the pursuer what was required; that was for the pursuer to work out. At the proof, the focus of Mr Duncan's submissions was on the narrow compass of what was the relevant context. He made no submission about the terms of requirement (iii). His straightforward position was that the sentence relied on was inadequate, construed in the narrow context he contended for. For his part, Mr Armstrong did not advance any submission as to what would satisfy requirement (iii). Nonetheless, the question must be addressed. What did the obligation to provide "reasonable evidence of the intention and ability [of the pursuer] to proceed forthwith with" the remedial works require?

[57] Given the pursuer's status as the planning authority, and the additional powers exercisable in relation to the Site conferred in the Agreement and the Planning Permission, requirement (iii) is unlikely to be concerned with question of the *vires* of the pursuer to instruct the restoration. Having determined to enter into the Bond, it would be surprising if the pursuer did not thereby have the power to call upon it. At the very least, calling on the defender to pay the Bond monies in order to instruct the remedial works is entirely consistent with the pursuer's role and responsibilities as the planning authority. The defender did not suggest that any special enabling resolution was required of the pursuer for *vires* purposes.

[58] While the pursuer in this case has not yet contracted (or has not produced a signed contract or missives) with a contractor, as was done in the case of *South Lanarkshire Council* v *Aviva Insurance Limited*, in my view that is not a requirement of the latter part of clause 3.1 of the Bond. Had parties wished to require this (or any specified documents, such as the Council Minute), they could have done so in clear language. Mr Duncan did not contend that production of a contract with a contractor was necessary. In my view, Mr Duncan was right to refrain from advancing such an argument. What suffices for one case does not become a requirement in another. In any event, the defender has accepted the pursuer's fully-costed scheme, which has been produced by reputable professionals. Further, given the position of resistance adopted by the defender, as disclosed in the parties' communings over a period of some two years, in my view the pursuer cannot be faulted for not entering into a binding contract employing a contractor to effect the remedial works until it is clear that it will receive the Bond monies.

[59] The phrase "intention and ability" most likely relates to the seriousness of purpose of the pursuer to carry through any scheme of remedial works and to the financial resources or wherewithal of the pursuer to do so. I return to the significance of the cost of the scheme appended to the Notice matching, and not exceeding, the maximum of the Bond monies. It is in my view highly significant that, in contrast to the schemes proposed as part of the earlier calls upon the Bond, the cost of the scheme now accepted by the defender as compliant is within the applicable maximum amount of the Bond. Accordingly, there can now be no doubt about the pursuer's "ability" to see the scheme of remedial works through to completion, given that the scheme the defender has accepted for the remedial works is within the limit of Bond monies.

[60] "Ability" may convey another shade of meaning, in the sense of not just an affordable scheme (ie either one within the applicable limit of the Bond monies or one where there was concern about the pursuer's ability to fund any shortfall between those monies and the cost of the scheme proposed), but one capable of effecting the requisite restoration of the Site. In considering that matter, requirement (iii) is, in my view, more closely linked to requirement (ii) than parties appeared to allow. Even if requirement (iii) is a discrete requirement, it is important to consider the totality of what the pursuer has produced with the Notice. To satisfy requirement (ii), the pursuer has produced a fully costed and detailed scheme, together with plans of the Site. The defender has accepted that these are reasonable costs for a scheme capable of effecting the restoration of the Site, assuming this scheme is carried out. Having accepted it, there can be no doubt that the pursuer's scheme (appended to the Notice) is practically and financially feasible as a means to achieve restoration of the Site consistent with the obligations in the Agreement and the Planning Permission. In short, the pursuer's scheme is "able" to effect the required restoration. If the scheme's remedial works are completed, the pursuer will have remedied the Company's default of its obligations under the Agreement and the Planning Permission in respect of the restoration of the Site. This, after all, is the fundamental purpose of the Bond. In substance, requirement (iii) required confirmation that the pursuer will apply the Bond monies for the scheme of remediation works proposed and capable of effecting the required restoration of the Site. All that remains is for the pursuer to satisfy the defender of its "intention" to proceed forthwith with those works.

The Sentence Relied Upon by the Pursuer Construed in the Context of the Notice

[61] The pursuer relies on the sentence at the top of page 2 of the Notice, in which it is stated that the pursuer "will comply with its obligations under the Bond". Mr Duncan did not express himself in quite the same way as his predecessor did at debate, but he adhered to the submission that the sentence relied on was meaningless. Is the sentence relied upon sufficient to satisfy requirement (iii), as I have analysed it, or such part of requirement (iii) that has not already been met by the presentation and acceptance of a scheme able to effect the required restoration (as just discussed in the preceding paragraph)? In answering that question, it is appropriate to consider that sentence in the context of the Notice, as well as to construe it (and, of course, the whole terms of the Notice) in the relevant factual context. Parties differed sharply as to what constituted the relevant factual context, but neither party addressed itself in submissions to the sentence relied upon or to its place within the Notice. It is nonetheless helpful to do so.

[62] The defender's submission, made at debate and maintained at proof, focused on this sentence in isolation from the remainder of the Notice. In my view, this is not the correct approach. At the very least, the sentence requires to be read in the context of the remainder of the Notice together with the other material provided with the Notice (referred to in para 19 of the first opinion.) The pursuer has provided, and the defender has accepted, a fully-costed scheme ("a full breakdown of any proper and reasonable costs") of the remedial works that will suffice to remedy the Company's default of its obligations under the Agreement and the Planning Permission in respect of the Site.

[63] It is in my view significant that the Notice made express reference to the Agreement and the Planning Permission. These references put beyond question that when serving the Notice the pursuer had in contemplation its position as the planning authority and the

additional powers available to it under the Agreement and the Planning Permission, and the application of these powers to achieve restoration of the Site. (For the relevant terms of the Agreement and the Planning Permission, see paras 6 to 13 of the first opinion.)

[64] After the salutation, the Notice contains several subject lines referring *inter alia* to the Planning Permission, the Company, and "default and calling up notice re" the Bond. In the body of the Notice it referred specifically to the Bond, the Agreement and the Planning Permission. The Notice also referred to, and enclosed copies of, the notice of breach served on the Company and the liquidator's response to that. Having set out these matters as a form of preamble, the Notice then contains three paragraphs, as follows. The first begins with the formulation "TAKE NOTICE…" declaring that the Company is in default. The following sentence states that the pursuer "has notified [the defender] of the Default" and it calls upon the defender "to confirm that [it] will make payment of £3,124,840.55 in terms of the Bond". This obviously corresponds to requirement (i) of clause 3.1. The next paragraph explains that there is attached a "full cost breakdown of the restoration operations **to be carried out** to restore the site (including aftercare obligations) in terms of the Planning Permission ("the scheme") along with an explanation of the scheme and (ii) a contour plan of the scheme" (emphasis added). This is obviously directed to requirement (ii) of clause 3.1. The words I have highlighted in bold may also be directed toward satisfaction of the third requirement, confirming the pursuer's intention of carrying out the works. The third paragraph that follows contains the sentence relied upon by the pursuer, that the pursuer "confirms that it will comply with its obligations under the Bond". Having regard to the structure of the Notice just described, and knowing the terms of clause 3.1 of the Bond, the reasonable recipient is bound to understand, at the very least, that this sentence is directed toward satisfying requirement (iii) of clause 3.1. This understanding of the place of this sentence within the

overall structure of the Notice, and that it is directed to requirement (iii), is reinforced by the next two paragraphs that follow it. The first of these states in terms that the defender's "obligation to pay in terms of the Bond is **now** enforceable". (Emphasis added.) In other words, the paragraphs immediately preceding it are understood to have satisfied the three requirements of clause 3.1 of the Bond. The next paragraph also proceeds on the basis that the three requirements have just been satisfied, and it invokes an alternative call upon the defender itself to undertake the restoration works.

[65] Turning to the meaning of the sentence, in my view, the defender's contention that there was no obligation on the part of the pursuer under the Bond is not correct. As noted above, the Bond is a three-party bond. The pursuer was one of the parties to it. As explained above, in order to access the Bond monies, it was incumbent upon the pursuer to provide reasonable evidence of its intention and ability to proceed with the remedial works, in effect to confirm that it would expend the Bond monies for the Bond's purpose. The only substantive obligation the pursuer had under the Bond was that in clause 2.2, to apply the Bond monies on any restoration scheme accepted by the defender. This is directed to satisfaction of requirement (iii), concerning the pursuer's "ability and intention". The reasonable recipient would understand that the pursuer intends to effect the remedial works, which it has stated in the preceding paragraph of the Notice are "to be carried out". If "ability" is a discrete requirement – and I stress that no submission was made that this was so – then "ability" is in any event essentially satisfied by the submission of a scheme of remediation works capable of effecting restoration of the Site so as to remedy the Company's default. Furthermore, as already noted, in the previous paragraph of the Notice the pursuer had already referred to the scheme "to be carried out".

[66] In my view, the reasonable recipient of the Notice, reading this sentence in the context of the rest of the Notice, and who is aware of the terms of the documents referred to in it (including the adequacy of the scheme proposed and its affordability (because within the Bond limits)), would understand that this sentence was directed to satisfaction of requirement (iii) of clause 3.1 and would accept its meaning as sufficiently clear to satisfy that requirement. In the light of this conclusion, it is not strictly necessary to consider the sufficiency of the Notice viewed in the context of the remaining evidence (on the broad approach Mr Armstrong contended for) or so much of it as might be permitted on the defender's approach (on the narrow approach Mr Duncan contended for). Out of deference to parties' submissions, it is appropriate that I express my views.

The Notice Construed in a Narrow Context

[67] Mr Duncan urged the court to disregard evidence that was inconsistent with the purpose of the Bond. This appeared to include the documentary materials concerning model publication schemes for local authorities (see his interjection recorded at para [23], above), and any matter caught by his submission that the defender could not be required actively to look for information to satisfy itself of certain matters (which is the presumed relevance of para 4 of the Joint Minute). He also discouraged reference to what he described as the "lawyers' letters" or to what was stated in any of the pursuer's prior notices or calls. He did not suggest it was not relevant to consider as part of the relevant context the matters covered in the Joint Minute or, at least, in paragraph 1 of it, relating to the meeting between the parties in May 2015.

[68] In my view, the documentary materials concerning publication schemes for local authorities are of little relevance. The Information Commissioner materials were not agreed

and, strictly, these have not been proved in evidence. This chapter of materials might have been relevant to what knowledge of certain acts or decisions of the pursuer could permissibly be imputed to the defenders, on the basis of publication to, and presumed knowledge of, its published minutes, including the Council Minute. Parties were agreed that the defender did not have to search for materials, but neither party made any submission as regards the attribution of knowledge to corporate persons or whether, on the material agreed, knowledge of the contents of the Council Minute were or were not attributable to the defender. However, it is not necessary to determine that issue. In the first place, I do not regard clause 2.2 or requirement (iii) of clause 3.1 to be directed to *vires* issues. Neither party suggested that they were. Even if they were, the substance of what was recorded in the Council Minute was already communicated by senior officials of the pursuer to a representative of the defender. Indeed, this was done at the last communings between the parties preceding the Notice, being the meeting in May 2015 (see para 1 of the Joint Minute, set out at para [3], above), at which the pursuer advised the defender that it had authorised the calling up of the Bond and whatever remediation works were necessary, and that it was in the process of restoring two other former coal mining sites. Accordingly, the defender had actual knowledge of whatever might have been gleaned from the Council Minute, had knowledge of it been imputed to the defender. I do not regard the defender's non-receipt of the Minute, as promised at the meeting, as in any way destructive of its actual knowledge of these matters. Nor do I accept that the pursuer's failure to supply the Council Minute would have affected the reasonable recipient's reading or understanding of the Notice. Certainly, the Notice was not expressed to be conditional on any matter or further documentation.

[69] How does the Notice fall to be construed against this context, if the relevant background were restricted to the substance of what was communicated by the pursuer to the defender at the meeting? On a proper construction clause 2.2 of the Bond, as I have construed it above, all that is essentially required is confirmation that the pursuer will apply the Bond monies for the Bond's purpose. It does so for the purpose of clause 3.1, by supplying reasonable evidence of its intention and ability to proceed forthwith. As I have already noted, neither party made any submissions as to what was required. It was not suggested that this imposed some formal requirement and that a representation by the pursuer in relation to its own intention and ability (assuming it to be clear) was necessarily insufficient (eg as not capable of constituting reasonable evidence). In my view, the representations made at the meeting in May 2015 powerfully reinforce the import of the sentence in the Notice relied on. The fact that by the time of the meeting in May 2015 the pursuer had experience in restoration of open cast coal sites provides additional support for its "ability" to effect the works.

[70] Even on the narrow focus contended for by Mr Duncan, disregarding the prior Notices and the lawyer's letters, in my view the import of the Notice and the sentence founded upon, construed in that context, was sufficient to comply with requirement (iii) of clause 3.1 of the Bond and that the reasonable recipient would have understood and accepted it as such.

The Notice Construed in the Broad Context

[71] What then of the broader focus Mr Armstrong contends for? I have set out the evidence concerning the written communications between the parties (at paras [4] to [17}, above) and the face to face meeting in May 2015 (at para [3]). I have already explained that I

do not accept that the material relating to publication schemes for local authorities referred to by Mr Armstrong in his submissions (recorded at para [23], above) is relevant. I have recorded above the passages of the letters Mr Armstrong referred to. Mr Duncan resists reference to these, but also contends that what Mr Armstrong had regard to was not complete. It is helpful to look at the totality of those letters and notices, to note what was communicated, the various concerns raised by the defender and the further information the pursuer supplied to allay those concerns. In particular, in relation to the prolonged communings between the parties, these disclose that the defender resisted the pursuer's repeated calls upon it to pay the Bond monies for a variety of reasons advanced over a prolonged period of time, including the following:

1. *Prematurity*: so far as the evidence showed, the defender's first ground for refusal was that the call on the Bond was premature, on the basis that there could be no default during the cessation period and that this had not expired or that the Company should be allowed a reasonable period of time to remedy its default: the argument is first recorded in the third paragraph of the letter quoted in para [8], above, and is repeated in the defender's letter, quoted in para [9], above;
2. *The bill of quantities was inadequate*: that the bill of quantities (produced in 2013) was inadequate: see the letter of 24 March 2014, at paragraph [11], above;
3. *Doubts about funding any shortfall*: that the cost of the scheme then proposed (as at March 2014, in the amount of £3,570,130) exceeded the amount of monies then available under the Bond, and there was no evidence as to how the pursuer would fund the shortfall (of c £400,000): see the letter of 24 March 2014, in paragraph [11] above. Further, the pursuer's suggestion (in the letter set out at para [8], above) of carrying out the remedial works in "an agreed, phased format,

on the basis of regular instalment payments", was met with the response that the pursuer was not entitled to this under the Bond and, further, it led the defender "to suggest" that the pursuer was not in a position to fulfil the terms of clause 3.1: see paragraph [9].

4. *MRL*: that the defender had concerns as to whether the pursuer could proceed "forthwith" with the remedial works. See paragraph [15], above. The basis for this concern appears to have arisen from MRL's acquisition of the Site.
5. *Deficiencies in the earlier notices*: that one or more of the earlier notices was deficient.
6. *Prematurity (no 2)*: For completeness I should record that although it did not feature in the extensive correspondence exhibited to the court, by the time these proceedings were raised the defender advanced a further prematurity argument, namely, that in any event, the pursuer first required to carry out the remedial works before it could call on the Bond or the defender could become liable under the Bond.

[72] The pursuer's response to these matters included the following:

1. *Prematurity*: The pursuer did not accept this argument (see paras [8] and [10], above). It noted that extraction of coal ceased on Site on 31 December 2012 and that, as restoration was required within 12 months of cessation, the Company was in breach from 31 December 2013. In any event, the date of practical cessation of 30 March 2014 was (as at January 2014 (see para [10])) fast approaching. In the circumstances the pursuer called upon the defender "to engage in a meaningful discussion regarding payment under the Bond". The

pursuer went so far as to offer to accept a reduced amount, as a means of resolving matters without resort to litigation.

2. *Inadequacy of the bill of quantities:* After this criticism, the pursuer produced a fully costed scheme which it appended to the Third Notice dated 15 December 2014. The pursuer explained in the Third Notice that the scheme was in two parts. The scheme proposed in the first part, which totalled £4,622,688.93, was accepted to be unachievable in terms of the maximum amount payable under the Bond and the then current condition of the Site. The pursuer therefore proposed the second part of the scheme, which it referred to as the alternative scheme, and which totalled £3,375,242.37. The pursuer accepted that while this figure was more expensive than the total payable under the Bond, the pursuer confirmed that it "would be prepared to meet the shortfall". At the time, this would have amounted to about £200,000.

3. *Funding any shortfall*: as just noted, at the time that the pursuer proposed its alternative scheme, appended to the Third Notice, it confirmed that it would meet any shortfall. So far as the evidence disclosed, the defender never addressed that position. The defender did not reject that scheme. It did not appear to have renewed any query about the ability of the pursuer to fund any deficit between the Bond monies and any scheme promoted. In any event, what is clear is that the scheme proposed and appended to the Third Notice was thereafter reworked to achieve further cost savings, principally in relation to the reduction of certain earthworks. See, eg, item 1.08 of the scheme appended to the Notice and the substantial reduction by about 1 million cubic metres in the volume of the overburden to be excavated. Accordingly, there is now no

shortfall between the Bond monies and that scheme, and there can be no question of the financial resources or wherewithal of the pursuer. In any event, as the defender has accepted the scheme appended to the Notice, there is no doubt about the financial viability of the scheme as a means to effect the Bond's purpose, the restoration of the Site. The defender has accepted that the scheme produced complies with requirement (ii) of clause 3.1;

4. *MRL*: as noted above, the defender's basis for resisting the Third Notice was by reason of the involvement of MRL. In the defender's letter in reply to the Third Notice, set out at paragraph [15], the defender set out at length over some five paragraphs various concerns and queries regarding MRL. MRL's acquisition of the Site invited the question of whether the pursuer was ready to proceed "forthwith". However, there was no comment on either parts of the scheme then proposed. In reply, the pursuer proceeded to supply a large amount of information about MRL, which it did by its agents' letter of 13 January 2015: see paragraph [16], above. In that letter, it is confirmed that MRL will cooperate with the pursuer's restoration of the Site and will grant such consents and allow such access to the Site as may be reasonably necessary. It is then stated that "this is evidence that our clients are able to proceed forthwith with any operation to restore the site". The pursuer's agents went on to explain that the purser had already settled three other bond claims in relation to two other opencast coal sites, "both of which are now significantly and satisfactorily advanced." The pursuer's agents noted that no further information or clarification of this had been sought and they asked what more the defender might be required to satisfy the defender that the pursuer was in a position to proceed forthwith. So far as

the evidence discloses, the defender never responded to this or identified what further information it required.

5. *Deficiency of the earlier notices*: The pursuer did not accept that any of the earlier notices was deficient. However, these became moot in the light of the defender's evolving bases for resisting the repeated calls on the Bond by the pursuer.
6. *Prematurity (no 2)*: I rejected this interpretation of the Bond advanced by the defender at the debate.

[73] I have set out the communings between the parties in such detail because it discloses the numerous and evolving bases on which the defender sought to resist the pursuer's claim under the Bond. These bases of resistance presented the pursuer with a moving target, as it were. The prematurity argument was raised first, but fell by the wayside come 31 March 2014. By this point in time the defender deployed other arguments (eg concerning MRL or the pursuer's ability to finance any scheme whose cost exceeded the Bond monies). The information the pursuer supplied in relation to MRL removed any residual doubt arising from MRL's recent acquisition and ownership of the Site. MRL were not going to be an impediment to, or cause delay in the commencement of, the remedial works on Site. The pursuer produced information to the defender demonstrating that the current owners of the Site, MRL, are ready and willing to co-operate. Indeed, this is wholly consistent with MRL's charitable purposes. MRL pose no impediment to the works. In the course of these communings, the pursuer also addressed the risk posed of the defender continuing to doubt the ability of the pursuer to complete a scheme whose costs exceed the Bond monies. Given the defender's refusal with the pursuer's (not unreasonable) plea to engage in a meaningful dialogue, and the uncertainty that that created, particularly as regards the scheme in two parts presented with the Third Notice in December 2014, the pursuer produced the

reworked scheme appended to the Notice and which disclosed further savings. The scheme accompanying the Notice had the twin advantages of achieving a restoration consistent with the Agreement and the Planning Permission, and to do so within the limits of the Bond monies. There was not an undue delay while this scheme was produced, which was the imputation of Mr Duncan's observation that this came out of the blue. The only impediment upon the pursuer being able to proceed "forthwith" was not presented by MRL, as the defender surmised, but it was the uncertainty created by the varying positions adopted by the defender over an extended period of time. Having regard to the cost of the scheme appended to the Notice, there could be no remaining doubt regarding the pursuer's financial wherewithal affecting its ability to carry out that scheme.

[74] Mr Duncan argued that in the Notice the pursuer did not refer to or rely on the earlier Notices. In my view, this was not necessary. The communings between the parties (or their agents) disclose an extended dialogue, which continued for as long as it did because of the evolution of the defender's position and the accumulation of reasons as to why it had no liability under the Bond. In respect of this dialogue, which records the articulation of the defender's concerns over time and the information the pursuer provided to meet those concerns as they emerged, in my view, the reasonable recipient would have regard to the outcome of this dialogue. This does not mean that the reasonable recipient would have regard to the minutiae of those communings. Accordingly, there is no need to incorporate these by reference in the Notice, as Mr Duncan appeared to suggest was necessary. Rather, in my view, the reasonable recipient would be aware of the concerns raised by the defender (set out in sub-paragraphs 1 to 4 of para [71], above), and of the pursuer's replies (as summarised in sub-paragraphs 1 to 4 of para [72], above). From these matters, the reasonable recipient would in my view be aware of, and take into account, the fact that by

the time the Notice was served, none of these questions or concerns raised by the defender had been left unanswered. Indeed, references in the Notice to the prior notices or calls might have been unproductive, as raising anew the issue of the asserted deficiencies of those prior notices or calls and the pursuer's reliance on them.

[75] Mr Duncan allowed that the reasonable recipient would be aware of the repeated calls upon the Bond. I agree. In my view, the reasonable recipient would (as Mr Duncan concedes) take into account as part of the relevant context the fact of the repeated calls by the pursuer and the defender's repeated rejection, on various bases, of those calls. I do not accept Mr Duncan's suggestion that the reasonable recipient would also proceed on the basis that these prior notices and calls were not insisted in. The evidence does not support this. At the very least, the reasonable recipient would infer from those communings what Mr Armstrong articulated as his first principle (see para [18], above). The pursuer's dogged persistence in the face of the defender's resistance is eloquent of its intention to proceed. The reasonable recipient would also have regard to the matters referred to in the two preceding paragraphs and would accept as part of that context that all concerns as regards the pursuer's ability had been allayed. In my view, the reasonable recipient reading the sentence in the Notice, and in this wider context (which is not as wide as Mr Armstrong contended for) would understand that the pursuer was addressing, and fairly construed in that context, had satisfied requirement (iii) of clause 3.1.

Decision

[76] It follows that the pursuer's case succeeds and I shall grant the orders sought. I shall put the case out By Order to discuss the precise terms of the interlocutor, and to deal with any ancillary matters, and any motion for expenses that may be made.