OUTER HOUSE, COURT OF SESSION

[2018] CSOH 36

CA87/17

OPINION OF LORD BANNATYNE

In the cause

THE COAL AUTHORITY

Pursuer

against

PEGASUS FIRE PROTECTION COMPANY LIMITED

Defender

Pursuer: Lindsay QC; DLA Piper Scotland LLP
Defender: MacColl QC; Davidson Chalmers LLP

12 April 2018

Introduction

[1] This matter came before me as a debate in the commercial court at the instance of the defender.

[2] The issue for determination by the court was: whether or not the defender is obliged to indemnify the pursuer, under and in terms of condition 12 of the pursuer's terms and conditions, in respect of all costs incurred by the pursuer in carrying out remedial action in respect of subsidence damage at the site (where the defender carried out work) in performance of its statutory duties under section 2 of the Coal Mining Subsidence Act 1991?

Background

[3] The parties' respective positions as set out in their pleadings are, in short, these:

[4] The pursuer avers that the defender is liable to indemnify it because the defender carried out its work at the site under and in terms of the December 2010 permission, April 2011 permission and the extension; all of which were subject to the pursuer's terms and conditions.

[5] These terms and conditions included condition 12 which imposed an obligation upon the defender to indemnify the pursuer for a period of 12 years against liability for claims, losses or damages arising as a result of any failure by the defender to comply with the requirements of the permissions or as a result of any act, failure, inadequacy, omission, negligence or default by the defender in designing or carrying out the work.

[6] The pursuer avers that the cost it has incurred under section 2 of the 1991 Act were caused by the defender's failure to identify a mine-related risk to structures at the site and therefore these costs fall within the scope of the indemnity created by condition 12.

[7] The defender denies any liability to indemnify the pursuer because it avers that the extension, which related to the treatment works relied upon by the pursuer in its pleadings, was not a retrospective extension of the April 2011 permission as averred by the pursuer and therefore the treatment works are not subject to the pursuer's terms and conditions.

[8] The defender further avers that the indemnity granted by the defender to the pursuer extended only to the works covered by the December 2010 permission and the April 2011 permission.

[9] The defender's position in short is that the pursuer's primary case as averred is irrelevant.

[10] The pursuer also avers an alternative case that it is entitled to an indemnity based on the defender's "unauthorised failure to comply with the terms of the April 2011 permission". The defender's position is that this case is also irrelevant.

Submissions on behalf of the defender

[11] The defender's argument at debate was this: the action is irrelevant on three grounds:

- The pursuer predicates its primary case against the defender, in short, on the basis that certain documents founded upon by it, and, in particular, the email from Leigh Sharpe of 25 May 2012, gives rise to an obligation of indemnity on the part of the defender. The email of 25 May 2012, however, does not fall to be construed as giving rise to any indemnity on the part of the defender.
- The pursuer's alternative claim is that it is entitled to indemnity from the defender as a result of a breach of the permission of April 2011. This case is also irrelevant.
- Finally, the pursuer gives no proper notice of the demolition and remedial works which it suggests may be required, or, flowing from this, the reasons why they are required or their cost. The pursuer's case is accordingly lacking in specification in that regard.

[12] Turning to his first argument Mr MacColl submitted that the background to the 25 May email was of some importance. The material averments regarding the background to the email were these:

> "In application made by the Defender to the Pursuer dated 7 December 2010, the Defender sought permission to enter or disturb the Pursuer's mining interests through investigation of shallow mine workings at the Site. A map of the Site

provided by Fife Council as an attachment to its e-mail correspondence dated 9 February 2016 is produced.

By way of a permit issued by the Pursuer dated 9 December 2010 (hereinafter referred to as the '**December 2010 Permission**') the Pursuer granted to the Defender permission to enter or disturb the Pursuer's mining interests by carrying out works described as '*Investigation of Shallow Mine Workings, 3 boreholes*' within the Pursuer's mining interests at the Site. The December 2010 permission was issued by the Pursuer to the Defender, by way of correspondence dated 9 December 2010 and was in force for a period of 12 months from 9 December 2010. Copies of the December 2010 Permission and the application forms for the December 2010 Permission dated 1 and 7 December 2010 are produced.

April 2011 Permission

On 11 April 2011 (hereinafter referred to as the '**April 2011 Permission**'), the Pursuer agreed with the Defender's engineering contractor, LK Consult Limited, to retrospectively extend the December 2010 Permission. The April 2011 Permission granted the Defender retrospective permission to carry out works described as '*Investigation of Shall Mine Workings by 16 additional boreholes*' within the Pursuer's mining interests at the Site for a period of 12 months from 11 April 2011. A copy of the April 2011 Permission is produced." (see: article 4 of condescendence at pages 8 and 9).

[13] The application for the December 2010 Permission was pursuer's production number 5/1 of process, the December 2010 Permission was pursuer's production number 5/2 of process and carried a Permit Reference Number 5728, the April 2011 Permission was pursuer's production number 5/3 of process and carried a Permit Reference Number 5728.1.

[14] Mr MacColl observed that the application, no 5/1 of process, was made formally on behalf of the defender. The application was made on the basis that the defender accepted certain conditions set out in the application form. Condition 12, the indemnity obligation, was one of the conditions set out in the form. Thereafter a formal permission was granted (no 5/2 of process).

[15] In respect to the April 2011 Permission again there was a formal permission which granted "retrospective permission to carry out the investigation of shallow mine workings by 16 additional boreholes …"

[16] In particular he noted that the April 2011 permission was not a retrospective extension of another permission.

[17] Against that background he turned to look at the meat of the pursuer's primary case which was contained at page 9 of the closed record and was in the following terms:

> "On 25 May 2012 the Pursuer agreed to retrospectively extend the April 2011 Permission to cover the treatment works that had been carried out at the Site (hereinafter referred to as the 'Extension'). A copy of the e-mail correspondence relative to the Extension dated 25 May 2012 is produced. The e-mail's confirmation that Permit 5728 could 'now be closed out' and that the permit file had been 'updated' to reflect the 'closure and receipt of all particulars' received from the defender makes clear that the April 2011 Permission was retrospectively extended to cover the treatment works that had been carried out at the Site."

[18] The said email's whole terms are these:

> "*Thank you for providing us both with the SI report and the treatment completion report for the stabilisation works at Townsend Place. I can confirm that we are satisfied with the information provided such that the Permit (our ref. 5728) can now be closed out. The information you provided will be passed to our surveyors so that the database can reflect the treatment undertaken. The permit file has now been updated to reflect the closure and receipt of all particulars from yourselves.*
>
> *We thank you for your patience in awaiting our response. If you have any questions please don't hesitate in contacting me.*"

[19] The first point Mr MacColl made in respect to this passage of the pleadings was this: the April 2011 Permission which the pursuer contended was "retrospectively extended" had a reference number 5728.1. There is no reference to that permission in the email, rather what is referred to is "Permit 5728", the December 2010 Permission. The April 2011 Permission makes no reference to permit 5728 and does not say that it is a retrospective permission to extend permission 5728.

[20] Moreover, the email of 25 May cannot be read as a retrospective extension of the permission of 11 April 2011. It is no more than an email noting that an SI report and treatment completion report has been provided to the pursuer by Groundshire Ltd; that the pursuer is satisfied by the information provided by Groundshire Ltd; and that the pursuer's

permit 5728 is now closed. It does not state that any extension of any existing permit or permission is being granted or, that any new permission is being granted. It is not a permit from the pursuer, examples of which are 5/2 and 5/3 of process.

[21] Beyond that, the email, which was sent on behalf of the pursuer to Groundshire, is not and cannot be read as the grant or extension of a contractual indemnity by the defender in respect of works that have taken place in the period up to 25 May 2012.

[22] In expansion of that position he said this: the contractual indemnity which had been granted by the defender to the pursuer extended only to the works covered by the permission of 9 December 2010 ("investigation of shallow mine workings, 3 boreholes") and the permission of 11 April 2011 ("investigation of shallow mine workings by 16 additional boreholes"). It did not extend to the wider matters upon which the pursuer now advanced its action. He submitted that there is nothing produced by the pursuer that would amount to any bargain between the pursuer and defender that the indemnity which the defender previously agreed to provide should be extended to cover treatment works, in respect of which no permit had ever been issued by the pursuer.

[23] Mr MacColl then moved on to make certain submissions regarding background materials which were founded upon by the pursuer as being materials, which if read with the email of 25 May, gave it the meaning contended for on behalf of the pursuer.

[24] His position regarding these various documents was this: there is nothing in the background materials leading up to the email of 25 May which suggests that the email of 25 May 2012 should be read as imposing a binding indemnity obligation upon the defender in respect of the "treatment works". The pursuer founds upon the following: (a) the application of 1 and 7 December 2010; (b) the permit of 9 December 2010; (c) the permit of 11 April 2011; (d) an email dated 16 January 2012 from Groundshire; and (e) the email of

25 May 2012. The first three of these documents he submitted show that the pursuer has a formal process with an applicant formally signing up to an indemnity obligation and being granted a formal permit for works. This, he argued, plainly does not assist the pursuer in its attempt to assert that a later email, which had no accompanying formal permit, should be regarded as somehow imposing an extended indemnity obligation. The email of 16 January 2012 is also of no assistance to the pursuer.

[25] In the email of 16 January 2012, Groundshire writes to the pursuer stating:

> "Further to our recent telephone conversation (about which the pursuer makes no averments), I have sent our two completion reports, for the exploratory drilling and the treatment works, on CD by post. Please find attached a copy of Raeburn's borehole logs and location plan. Could you send me an email confirming that the extension covers the treatment work as well."

[26] He then observed that no email is produced or founded upon by the pursuer stating that the extension covers the treatment works.

[27] He then turned to deal with certain averments which were made in terms of a minute of amendment which was allowed to be received and in terms of which the pleadings were amended on the morning of the debate. In terms of that minute of amendment the pursuer sought to found upon a further email from the pursuer dated 16 January 2012. Mr MacColl's position regarding this was: it does not assist the pursuer. It states: "… When I receive the disks we'll review and issue a permit to cover the treatment, this may be referred to as 5728.2". Thus he submitted, it is plain that any extension of the prior permit would be by way of a further formal permit. No such document has been produced by the pursuer. Indeed, the pursuer does not offer to prove that any such document exists.

[28] All that happens following the said email of 16 January 2012, is that some four months later, the email of 25 May is sent. There is no reference in that email to permission 5728.2 which is referred to in the email of 16 January 2012.

[29] Mr MacColl concluded his submissions by noting that the correspondence upon which the defender relied was all with Groundshire. There was nothing in the averments that Groundshire was the agent of the defender in respect to the matter of the grant or extension of a contractual indemnity by the defender. There are not even any averments that the defender was aware of the content of this correspondence.

[30] The pursuer is required to show that the defender agreed to a contractual obligation which imposes upon it an obligation of indemnity in respect of the treatment works. In these circumstances there were no averments which could impose such an obligation on the defender.

[31] For these reasons the pursuer's principal case is irrelevant.

[32] The pursuer also advanced a secondary alternative case in terms of which it is contended that the defender has failed to comply with the permission of April 2011.

[33] The core of the pursuer's alternative case is in article 4, page 10 of the closed record:

> "*Esto* the April 2011 Permission was not retrospectively extended to cover the treatment works that had been carried out at the Site for the reasons averred by the defender (which is denied), the treatment works were an unauthorised failure to comply with the terms of the April 2011 Permission."

[34] Mr MacColl's response to this alternative case was a short one: the foundation of this alternative case is a *non sequitur*.

[35] He argued that the carrying out of treatment works, the activity identified by the pursuer in its pleadings at article 4, does not amount to a failure to comply with the April 2011 permission. Notably, the pursuer does not offer to prove that the defender did

not carry out the "investigation of shallow mine workings by 16 additional boreholes" which is the permitted activity under the April 2011 permission.

[36] For this reason, the pursuer's alternative case is also irrelevant.

[37] The pursuer's third argument was a short one of specification. Mr MacColl submitted there was no proper notice of the demolition and remedial works, which the pursuer suggests may be required. He submitted that in order for proper advice to be given to the defender, there needed to be a basis averred for the pursuer's valuation of the claim together with a valuation of that claim.

[38] The defender's specification argument only came into play if the court were against it in respect of the relevancy argument. Mr MacColl accepted that it would not be appropriate to dismiss the pursuer's action in terms of this argument. Rather, what he sought was an order from the court that the pursuer should provide further specification of its position.

The reply on behalf of the pursuer

[39] Mr Lindsay's position in summary regarding the first argument advanced by Mr MacColl was this: the pursuer's averments that the email of 25 May 2012 is a retrospective extension of the permission of 11 April 2011 are relevant and a proof before answer should be allowed in respect of them.

[40] Mr Lindsay began by saying that it was important to understand that what was not being dealt with in this case was a statutory scheme for indemnity. The issues before the court were matters of contract. The pursuer was not required to grant permission in a particular form. What was important in considering the issues before the court was substance not form.

[41] He described the defender's position as being wholly lacking in merit. The email of 25 May 2011 clearly extended the April 2011 permission to cover the treatment works that had been carried out at the site.

[42] In elaboration of this position he submitted: the email confirms that permit 5728 could "now be closed out" and that the permit file had been "updated" to reflect the "closure and receipt of all particulars" received from Groundshire, on behalf of the defender. The foregoing makes clear that the April 2011 permission was retrospectively extended to cover the treatment works that had been carried out at the site. There is no other reasonable interpretation which can be placed upon these expressions. In its pleadings, in its note of argument and in the oral submissions advanced, the defender had not provided any alternative interpretation of these key expressions.

[43] Mr Lindsay then turned to the context in which the email of 25 May 2012 was sent. It was his position that this context was of some importance in relation to the issue of construction. It was sent in response to the submission of an SI report and a treatment report for the stabilisation works by Groundshire on behalf of the defender. These reports made clear that additional works, which were not covered by the April 2011 permission, had been carried out. These additional unauthorised works were the treatment works which form the subject matter of the present action. He submitted this: the sole purpose of submitting these reports was to obtain retrospective authorisation of the treatment works. There was no other purpose or reason for submitting them to the pursuer at that stage of the development.

[44] Again Mr Lindsay stressed that in its pleadings, note of argument and oral submissions, the defender had not averred any alternative explanation for the submission of those reports. The defender's failure to do so he submitted is significant and highlights that,

in reality, there is no real dispute that the foregoing is why the reports were submitted to the pursuer.

[45] In addition, the email of 28 May 2012 from Ellen Dempster, in reply to the email of 25 May 2012, demonstrates that there was a consensus between Groundshire, on behalf of the defender, and the pursuer that the April 2011 permission had been retrospectively extended to cover the treatment works. The email of 28 May 2012 thanks the pursuer and does not seek any clarification of what had been granted by the pursuer. There was no need to do so as both parties understood that the April 2011 permission had been retrospectively extended.

[46] In answer to the argument advanced by Mr MacColl that none of this correspondence could bind the defender in respect to an indemnity in respect of the treatment works he made a number of points:

- The defender signed the standard terms and conditions of the pursuer, when it made its initial application.
- The defender therefore knew and accepted the above conditions.
- He directed the court's attention to the numbering on the two permissions granted, namely: 5728 and 5728.1. The reference in the email of 16 January 2012 to permit 5728.2.
- This evidenced that what was happening was all part of one process.
- 5728.1 was applied for by a contractor of the defender, namely: LK Consult Ltd and no issue was taken by the defender in respect to that retrospective extension. The defender was not saying that there was any difficulty with the permission of April 2011.

- Thereafter it was averred on behalf of the pursuer that a second extension was sought by another of the defender's contractors.
- The above showed a pattern of behaviour, namely: extensions sought by various contractors of the defender and granted by the pursuer.
- The above, when taken together was enough to show Groundshire was the defender's agent. Accordingly the defender was bound by the indemnity in respect to the treatment works. It was thereafter for the defender to say that it was not bound by Groundshire. The defender made no such averment.

[47] It was Mr Lindsay's position that the issue between the parties was a matter for proof before answer. When the chain of emails was read he submitted that it was clear that Groundshire recognised that there was a problem in respect to the issue of permission regarding the "treatment works". This required to be sorted out and that was done by the email of 25 May. What had happened by the email of 25 May was that a second extension had been granted.

[48] He further said this in respect to allowing a proof before answer: Mr Sharpe will come along and explain the email 25 May and what it was intended to mean.

[49] Turning to the alternative case advanced by the pursuer it was Mr Lindsay's position that this was shown to be relevant by regard being had to the terms of condition 12 of the pursuer's terms and conditions and to the nature of the treatment works which were carried out.

[50] Condition 12 of the pursuer's terms and conditions provides:

> "The applicant shall, for a period of 12 years from the date of completion of the works, indemnify the Authority against liability for claims, losses or damages, including those made under the Coal Mining Subsidence Act 1991 and claims by the Applicant, whether arising as a result of any failure by the Applicant or the Applicant's contractors, to comply with the requirements of this permission or as a

> result of any act, failure, inadequacy, omission, negligence or default by the Applicant or the Applicant's contractors in designing or carrying out the work."

[51] The April 2011 Permission merely permitted the defender to carry out an investigation of shallow mine workings by 16 additional boreholes within the pursuer's mining interest. The April 2011 Permission did not authorise or otherwise permit the defender to carry out the treatment works.

[52] The carrying out of the treatment works was a failure by the defender to comply with the requirements of the April 2011 Permission and therefore the defender is obliged by condition 12 to indemnify the pursuers against liability for all claims, losses or damages arising as a result of this failure.

[53] Accordingly regardless of whether or not the April 2011 permission was validly retrospectively extended to cover the treatment works, the defender is required to indemnify the pursuer under and in terms of condition 12.

[54] On the third specification issue he briefly submitted that there is no merit in the submission that there is a lack of specification. The pursuer has provided adequate specification of the anticipated demolition and remedial costs in the context of an action which merely seeks declarator rather than an order for payment of a particular sum.

[55] In article 23 of condescendence the pursuer avers the remedial costs would amount to £1,090,000 and that it has already incurred costs of £21,500 in relation to site investigations, valuation fees and maintenance costs. In addition, a letter dated 26 September 2016 from the pursuer is incorporated *brevitatis causa* into the pursuer's pleadings. This letter provides a detailed breakdown of the estimated remedial costs.

[56] He submitted that these averments provided sufficient specification to enable the defender to ascertain the likely extent of its indemnity obligations and whether it is necessary and cost effective to defend this action.

Discussion

The primary relevancy argument

[57] I am persuaded that the email of 25 May 2012 does not on a sound construction have the meaning contended for by the pursuer.

[58] The pursuer maintains that on a sound construction it amounts to the pursuer agreeing to "retrospectively extend the April 2011 Permission to cover the treatment works".

[59] Nowhere in that email is there any reference to the April 2011 permission. The Permit Reference Number of that permission is 5728.1. The only reference in the email to a permit is to 5728 (the December 2010 permission).

[60] 5728.1 is a separate permission from 5728. It grants "retrospective permission to carry out the investigation of shallow mine workings by 16 additional boreholes". I observe that in particular it does not retrospectively extend the December 2011 Permission. On a sound construction it is an entirely separate permission from 5728.

[61] Moreover, I believe that Mr MacColl is correct in characterising the email of 25 May in this way: as an email which merely notes that an SI report and treatment completion report has been provided to the pursuer by Groundshire Ltd and that the pursuer is satisfied by information provided by Groundshire Ltd and that the pursuer's permit 5728 is now closed.

[62] On the ordinary and natural meaning of the words used in the email of 25 May no extension of any existing permit or permission is granted. It does not state that any extension of any existing permit is being granted.

[63] The pursuer's case is not assisted by reference to context. All of the arguments advanced by Mr MacColl in relation to this matter in my view have considerable force.

[64] In particular it seems to me that the terms of the email added by minute of amendment tend to show that the pursuer's construction is not correct. I agree with Mr MacColl that on a true construction of that document any extension was to be by way of the issuing of a formal permit "5278.2", as happened in respect to the earlier original application, no 5/2 of process, and in respect of the April 2011 retrospective extension, no 5/3 of process. On the pursuer's averments no such document has been issued. I observe that in addition, in the 25 May 2012 email, there is no reference to a permit with a reference number 5278.2

[65] Moreover, there is nothing in the email of 25 May 2012 when taken together with the other correspondence founded upon by the pursuer which could amount to an agreement between the pursuer and defender that the indemnity which the defender had previously agreed to provide should be extended to cover the treatment works where no permit relative to those works has been issued by the pursuer.

[66] Further, it is noteworthy that the email of 25 May 2012 which is principally founded upon by the defender is to Groundshire. The other emails which are founded upon by the pursuer are also to or from Groundshire. Such correspondence cannot be read as the grant or an extension of a contractual indemnity by the defender to cover the treatment works. There is no correspondence with the defender founded upon by the pursuer. The defender is not copied in with respect to any of the emails founded upon. There is nothing in this correspondence, or in the background thereto, from which it could be argued that Groundshire was acting as agent for the defender in respect to a contractual obligation which imposes upon the defender an obligation to indemnify in respect of the treatment works.

[67] It does not follow as asserted by Mr Lindsay that because Groundshire was a contractor working on the site for the defender that it was an agent for the defender in respect of a grant or extension of a contractual indemnity. I believe this argument is clearly wrong in law. The employing of a contractor, of itself, does not authorise them to act as agents for the employer in relation to third parties.

[68] Mr Lindsay argued that it was for the defender to aver that Groundshire was not its agent. I do not believe that is correct. It is for the pursuer to aver that Groundshire was acting as an agent for the defender and to aver the basis for that assertion. It does not do so.

[69] Mr Lindsay sought to rely on a number of factors when taken tougher in order to show that Groundshire was the defender's agent in relation to the granting or extension of the indemnity.

[70] To begin with he relied on the defender signing the original application. It therefore had knowledge of the terms and in particular the terms of the indemnity and accepted these. That is of course correct but it does not seem to me to take the pursuer anywhere. That knowledge relates only to the granting of permissions 5728 and 5728.1. That the defender is bound by the conditions including the obligation of indemnity in relation to these permissions is not a matter of dispute.

[71] He sought to argue that permission 5728 and 5728.1 and the further extension granted in respect to the treatments works were connected. They were all part of one process. I do not believe that is correct for the reason which I have earlier given, namely: 5728.1 is not an extension of 5728. It makes no reference to permission 5728. It appears to be an entirely separate permission from 5728. I am not persuaded this is a single process. If it was why are 5728.1 and the extension, which the pursuer maintains is granted relative to the treatment works not said to be extensions of permission 5728.

[72] He then argued that 5728.1 was granted on the basis of an application by other contractors of the defender and the defender was not saying that there was any difficulty with that permission. I do not think that this takes the pursuer anywhere. It does not follow because that permission has not been challenged that the defender is not entitled to argue that no permission was granted for the treatment works and that the defender's indemnity was not extended to cover the treatment works. It is also noteworthy that the two contractors are not the same and that the LK group is referred to in the defender's original application as their consultants and there is no reference to Groundshire in the original application. Mr Lindsay then reminded the court of the email correspondence between the pursuer and Groundshire another contractor of the defender resulting in the email of 25 May.

[73] He then argued that having regard to all of the foregoing a pattern of extensions being applied for by contractors of the defender and being granted emerged. From this it was clear that Groundshire was acting as an agent for the defender.

[74] There is nothing in these factors individually or when taken together which points to a relationship of agency between the defender and Groundshire in respect to the granting or extending of an indemnity by the defender to cover the treatment works. The factors individually amount to nothing and when taken together do not lead to the conclusion contended for by the pursuer. No pattern of the type relied on by the pursuer emerges. What is referred to is a number of separate and individual events.

[75] In conclusion I agree with Mr MacColl that there is nothing produced by the pursuer that would amount to an agreement between it and the defender that the indemnity which, the defender accepts, it previously agreed to provide should be extended to cover the

treatment works in respect of which no permit has ever been issued by the pursuer. The pursuer's primary case is accordingly irrelevant.

[76] There is one further matter in respect to his primary argument upon which I would wish to comment. Mr Lindsay in the course of his submission said that all of the issues were properly a matter for proof before answer. He said this "Mr Sharpe (the author of the email of 25 May relied on by the pursuer) will come along and explain what the email of 25 May was intended to be" if such evidence were to be allowed, it would not advance the pursuer's case. It appeared to me that Mr Lindsay was seeking to put forward evidence of the intention of Mr Sharpe in saying what he did in the email of 25 May. That is not a relevant consideration in arriving at a true construction of the document.

[77] In respect to the pursuer's alternative case I believe it is misconceived.

[78] The pursuer's substantive case against the defender is that the treatment works were not carried out properly and caused damage through subsidence at the site.

[79] The April 2011 Permission is a permission: "to carry out investigation by 16 additional boreholes". It is not a permission to carry out "treatment works". The pursuer's substantive case is not that the pursuer has a statutory obligation to make payment which the defender is obliged to indemnify because the work in respect of the 16 boreholes was not carried out, but that the treatment works were not properly carried out.

[80] This leads to the non sequitur in the pursuer's pleadings about which Mr MacColl complains, namely: the averment that there has been a failure to comply with the terms of the April 2011 Permission. Mr MacColl is correct in arguing that the carrying out of treatment works does not amount to a failure to comply with the April 2011 Permission.

[81] There is nothing in the pleadings of the pursuer explaining why the treatment works should in any way be held to be related to the 2011 permission. I agree with Mr MacColl that in considering this point it is notable that the pursuer does not offer to prove that the defender failed to carry out the work identified in the April 2011 permission. This is an adminicle pointing away from the April 2011 permission having anything to do with the case as pled by the pursuer against the defender. The pursuer does not offer to prove that anything done in terms of the April 2011 permission gave rise to the problems upon which it bases its case.

[82] Mr Lindsay directed the court's attention to condition 12 and said that the part of the indemnity relied upon in respect to the alternative argument was: "the failure to comply with the requirements of this permission".

[83] On a sound construction, what the foregoing does not mean is this: if you carry out works beyond what is permitted in terms of the April 2011 Permission that engages the indemnity provision. There is nothing before the court to the effect that carrying out treatment works breached the contract between the parties.

[84] What, properly understood, is the pursuer's complaint as advanced in its alternative case? I believe the complaint is one of trespass in respect to the pursuer's mining interest and that it is seeking to recover damages arising from trespass. That however, does not engage the contractual indemnity.

Decision

[85] For the foregoing reasons I consider that both the pursuer's primary and alternative cases are irrelevant.

Disposal

[86] In light of the above I sustain the defender's first and fourth pleas in law and dismiss the action.

The specification issue

[87] Had I required to deal with the specification issue I would have held that sufficient specification was provided, for the reasons advanced by Mr Lindsay.