NEUTRAL CITATION No. [2019] EW Misc 14 (CC)

Case No: D00BS398

IN THE BRISTOL COUNTY COURT

2 Redcliff Street
Bristol
BS1 6GR

Date: 14/06/2019

Before :

HH JUDGE RUSSEN QC

- -

Between :

MORRIS & PERRY (GURNEY SLADE QUARRIES) LIMITED	**Claimant**
- and -	
JACQUELINE ANN HAWKINS	**Defendant**

- -
- -

Stephen Jourdan QC (instructed by **TLT LLP**) for the **Claimant**
Ewan Paton (instructed by **Lyons Davidson**) for the **Defendant**

Hearing date: 29 May 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HH JUDGE RUSSEN QC

His Honour Judge Russen QC:

Introduction

1. In this litigation an issue has arisen between neighbouring landowners over the extent of the rights enjoyed by the Claimant over the land now owned by the Defendant and, assuming the right asserted by the Claimant exists, whether or not the right has been invoked effectively through the Claimant's service of a valid notice of its proposed exercise.

2. The issue has arisen by reference to the terms of a Transfer dated 5 September 1975 ("**the Transfer**") between the parties' respective predecessors in title.

3. The Claimant is a quarrying company which owns Cockill Quarry, Merchants Hill, Binegar, Somerset ("**the Quarry**"). The Defendant owns the adjoining land (subject to the mineral rights addressed below) of the adjoining land known as Cockhill Farm which comprises a farmhouse, buildings and approximately 29½ acres ("**the Farm**"). Before the Transfer both the Quarry and the Farm were in the common ownership of Amey Roadstone Corporation Limited. It was by the terms of the Transfer that the company (the Claimant's predecessor in title of the Quarry) transferred the Farm to the Defendant's predecessor in title, a Mr Shorey, with the exception and reservation of the mineral rights, all "necessary ancillary rights" and appurtenant "liberties".

4. There is no dispute between the parties that the Claimant now enjoys the right to win and work the minerals under the Farm. The central issue between them is whether or not the Claimant enjoys the right, on notice, to enter the Farm to erect a fence, plant trees in specific locations and undertake landscaping works (together "**the Works**") in anticipation of it making an application for planning permission to work the minerals under the Farm. The Works are works that the Claimant proposes to do, rather than any it has already effected. This turns upon the true construction of the Transfer and the ancillary rights and liberties conferred by it, as set out below.

5. It is the Claimant's position that the Works are of a type which nowadays are inevitably a prerequisite to new quarrying operations and, by carrying them out, it will maximise its prospects of obtaining the necessary planning approval for such operations. The Defendant's position is that the terms of the Transfer do not permit the carrying out the Works in advance of the grant of planning permission. In addition, the Defendant takes the point (by reference to the language of the first of the notices served by the Claimant in exercise of its purported right) that the Works would not relate to working the minerals under the Farm but are instead proposed for facilitating further working of minerals at the adjoining Quarry. Although not a point taken in her Defence, she also argues that the successive notices served by the Claimant revealed that it had failed to "endeavour" to give 12 months' notice with the result that each of the shorter notices served by it were invalid.

6. The issue came before me on the Claimant's appeal from the decision of District Judge Watkins by his judgment dated 20 April 2018. An Order reflecting that judgment has yet to be drawn; it appears that the further hearing before the District Judge, for the purpose of resolving outstanding matters, did not take place (as anticipated by the final two paragraphs of his judgment) before the Claimant launched its appeal. For that reason, I shall refer below to the appeal being against the District Judge's decision.

That decision was against the Claimant on the existence of a right to carry out the Works under the terms of the Transfer (paragraphs 98 to 108 of the Judgment). It followed that he held that neither of the notices served or relied upon by the Claimant in exercise of that purported right was a valid notice (paragraph 109). Had it been material to the outcome of his decision, he would not have held the notices to be invalid by reference to the fact that each was for a shorter period than 12 months (paragraphs 90 to 97).

Procedural Background

7. The central issue identified in paragraph 4 above has arisen out of the parties' statements of case in a rather oblique way. It was paragraph 8.7 of the Claimant's Reply which first identified the point that, upon expiry of its notices, or certainly the later of them, the Claimant had a right to enter upon the Farm and carry out the Works in accordance with the "liberty" conferred by Part I, paragraph "(h)" of the Schedule to the Transfer.

8. By a Claim Form issued on 1 March 2017 the Claimant sought an injunction requiring the Defendant to remove items placed on the Farm which were obstructing the Claimant's access and to restrain her from placing further items on it that would impede such access.

9. In their original form the Particulars of Claim relied upon the Claimant's service upon the Defendant of a notice dated 28 November 2016 (and said to have been given in accordance with Part II of the Schedule to the Transfer) which was said to have been in exercise of the paragraph "(h)" right. As explained below, "(h)" is the sweep-up right in the owner of the Quarry to do all things convenient or necessary for working, obtaining, making merchantable and disposing of the minerals under the Farm. The two months' notice was expressed to take effect from 1 February 2017 in accordance with paragraph (a) of Part II. In fact, whereas that contractual right is one in support of the Claimant's mineral rights over the Farm, the November 2016 notice referred to the Works (as I have defined them above) being in support of the working, obtaining and disposal of minerals *from the Quarry*. It was no doubt for that reason that the Claimant served a further notice dated 16 March 2017 (without prejudice to the validity of the earlier one and said to be effective as from 20 May 2017) which referred to it being in support of exploiting the mineral rights *over the Farm*. That notice also relied upon the paragraph "(h)" right (and paragraph (a) of Part II of the Schedule). On 23 May 2017 the Particulars of Claim were amended to plead alternative reliance upon the March 2017 notice.

10. The Defendant responded to the Claim by a Defence and Counterclaim which denied any interference with a lawful right enjoyed by the Claimant and counterclaimed for a declaration as to the true meaning and effect of the Transfer and also for an injunction forbidding the Claimant from entering the Farm otherwise than as permitted in accordance with its terms. The Counterclaim also sought damages for trespass. Materially for present purposes, the Defence took the point that "*[T]he Claimant does not have planning permission to extract minerals from in or under the Defendant's Land – which it would need to utilise Clause 2(a) of the [Transfer]*." It referred to the language of the November 2016 notice, saying that it accurately recorded what the Works relate to (namely working the Quarry rather than the minerals under the Farm),

and said the March 2017 notice was "*a smoke screen since, as mentioned, there is no planning permission to work the minerals under the Defendant's Land*."

11. The Claimant served its Reply and Defence to Counterclaim on 21 June 2017. It was this pleading which referred to the Claimant's intention "*to apply for the necessary planning permission to enable it to work, obtain and make merchantable the minerals from the Defendant's land in due course*." It referred to landscaping works nowadays being an inevitable prerequisite to new quarrying operations and to the Claimant's intention to carry out the Works prior to making an application for planning permission "*so as to maximise the probability of planning permission being obtained*." As already noted above, the provision of the Schedule to the Transfer, Part I, paragraph (h), was identified as the basis of its right to do so.

12. The Defence and Counterclaim is dated 5 June 2017. On 8 June 2017, the Defendant applied for summary judgment against the Claimant by reference to the terms of the Transfer and for judgment on the Counterclaim with an inquiry as to damages. The witness statement in support again made the Defendant's point that it was "*plain that the proposed works do not relate to the extraction of the minerals in or under the Defendant's Land, confirmed by the lack of a relevant planning permission*." The evidence asserted that "*the real issue here is on the true construction of the [Transfer] and it is pointless to proceed to trial when it is a matter of construction that can as well be determined now ....*".

13. The summary judgment application was heard by Mr District Judge Watkins on 31 August 2017. His decision upon it was contained in his reserved judgment dated 20 April 2018 and (allowing for his rejection of the Defendant's argument over the notice period, which did not affect the outcome) it was given in terms favourable to the Defendant. I return below to his reasoning in support of the findings summarised above when addressing the parties' submissions on this appeal. The Claimant appealed against the District Judge's decision.

14. The Claimant's application for permission to appeal that decision came before me at a hearing on 18 October 2018. At that hearing, as on the appeal itself, Mr Stephen Jourdan QC represented the Claimant. He had not appeared at the hearing before the District Judge. The Defendant was represented at both the hearing before the District Judge and at the permission application by counsel other than Mr Ewan Paton who has represented her at the appeal on which I now give judgment. I granted the Claimant permission to appeal at the October hearing.

15. An earlier Order of the court had provided that, if granted, the appeal would then be heard on the same occasion as the permission application. However, before the October 2018 hearing, the Defendant applied to have the two matters severed, with directions for the later determination of the appeal if permission was granted. Her application was listed for 18 October 2018 with a shorter time estimate than the one day previously allowed for the combined permission application and, if appropriate, substantive appeal. The result of me granting permission was that the appeal was listed before me on 29 May 2019 for a one day hearing.

16. Subsequent events show that the parties' respective positions in the litigation were not fully entrenched by the time I granted permission to appeal against the Defendant's summary judgment.

17. On 1 November 2018, the Defendant filed a Respondent's Notice aimed at persuading the court to uphold the District Judge's Order on different or additional grounds. The notice was broken down into two parts. The first concerned the District Judge's rejection of the Defendant's argument that the Claimant's notices were invalid by reason of the suggested inadequacy of the notice period specified by each. The second part related to the true construction of the rights conferred upon the Claimant by the terms of the Transfer and what was said to be the restrictive approach taken by the common law to incidental powers in support of mineral rights. At the hearing of the appeal, and for the avoidance of any doubt, I granted the Defendant permission to advance its argument under the first part. The parties had in their skeleton arguments already engaged with the issue over the period of notice required. As I observed at the hearing, it is not at all obvious to me that the Defendant needed my permission under CPR 52.13, even though the first part of the Respondent's Notice referred to the "erroneous" conclusion of the District Judge. Allowing for the uncertainly created by the continuing absence of any Order recording his decision, it seems unlikely that his conclusion against the Defendant would have found reflection in a separate form of declaratory relief when it doubtless would have declared the Claimant's notices to have been invalid by reference to the absence of support for them through an underlying right. It seemed to me, therefore, that section 6 of the Respondent's Notice correctly described both parts of it as containing different or additional grounds for upholding "the order" as opposed to challenging it.

18. For its part, the Claimant decided, after securing permission to appeal, to issue an application on 16 May 2019 seeking permission to re-amend the Particulars of Claim. The purpose of this proposed re-amendment is to rely upon it service upon the Defendant of a third notice, dated 3 October 2018, without prejudice to the validity of those served in November 2016 and March 2017. The October 2018 notice gave the Defendant notice of the Claimant's intention to carry out the Works on or after 12 October 2018. By a letter of the same date, the Claimant's solicitors informed the Defendant's solicitors that the Claimant would not attempt to exercise its alleged right to do so "*until such time as the ongoing court proceedings between our respective clients have been concluded*." Unlike the earlier notices, which had each mentioned Part I(h) and Part II(a) of the Schedule to the Transfer, the third notice did not mention the paragraph "(h)" right. It stated it was given in accordance with Part II(b) of the Schedule. As appears below, Part II(b) provides for the Claimant to give one week's notice of entry upon the Farm to carry out an exploration or survey or to carry out preliminary work or tests.

19. Although the Claimant made its re-amendment application returnable at the same time as the hearing of the appeal, it quite properly did not seek to suggest that the issue of it could influence the outcome of a challenge to a decision reached in April 2018. Instead, Mr Jourdan QC indicated that the pursuit of the application will depend upon the outcome of the appeal and, if his client is successful in overturning the grant of summary judgment against it, perhaps depend also upon the reasons I give in support of that result. At the conclusion of the appeal hearing I therefore adjourned the application to re-amend.

20. I have set out the procedural background in a little detail because it helps to explain the parties' respective positions on the approach to the appeal.

21. As already noted above, it was the Defendant's position, when applying for summary judgment in June 2017, that the absence of a right in the Claimant to carry out the Works is a matter that can be determined summarily by reference to the true construction of the Transfer. The Defendant does not therefore rely upon any evidence beyond the terms of the Transfer, the first two notices served by the Claimant together with some earlier correspondence from its agents (Carter Jonas) and what is the incontrovertible fact that the Claimant has not yet secured planning permission to extract minerals from the Farm.

22. The Claimant now agrees that the existence or absence of a right to carry out the Works, prior to any grant of planning permission, is a matter that should be determined in the course of disposing of the appeal. As Mr Jourdan QC put it in his skeleton argument, "*the issue should be finally decided – against C, if DJ Watkins was right, and otherwise in C's favour*." That has not always been the Claimant's position. As appears from the District Judge's judgment, the Claimant's previous counsel had urged that the court had an incomplete picture of the factual matrix against which the Transfer fell to be construed. Ground 5 of the appeal had been that "*the learned District Judge was wrong in law or misdirected himself in holding that there was no other compelling reason why it [sic] should be disposed of at trial given that there was (or there was a reasonable prospect of) contextual evidence relevant to the proper interpretation of the Transfer that was not before the Court*." However, Mr Jourdan made it clear to me that his client did not pursue that ground of appeal.

23. However, the Claimant has not made its own summary judgment application against the Defendant and, as I have noted above, it contemplates a further amendment to its case. On any acceptance of Mr Jourdan's submissions, the court would, at this stage of the proceedings, reach the proper limit of its powers of summary determination by concluding that the current absence of planning permission does not undermine the existence of the right asserted by the Claimant, that (subject to the point which follows) either or both of the first two notices was a potentially valid and effective one, and that the evidence relied upon by the Claimant shows it has a realistic prospect of establishing that the Works fall within the rights enjoyed by it prior to the grant of any planning permission to work the minerals under the Farm. The last two would be matters for a trial.

24. On the final point about evidence, the Claimant relied before the District Judge and before me upon the witness statements of three individuals: Mr Brian Perry (the Claimant's Managing Director) Mr John Dutson (the Director of Minerals and Waste Management at Savills) and Mr James Stephen (a partner at Carter Jonas). In his statement, Mr Perry explains that the Claimant proposes to extend its quarrying operations from the Quarry to the Farm (and other land to the north of the Quarry in the ownership of the Claimant). In connection with what he refers to as "the Proposed Extension", Mr Perry refers to the Claimant having undertaken a preliminary borehole survey (in 2002), having commissioned a detailed geological assessment of the land (in June 2014) and, in the light of the encouragement provided by those, having incurred £130,000 in relocating an overhead high voltage cable in 2016 to enable the Works (or some parts of them) to proceed.

25. Mr Jourdan QC correctly submitted that, for summary judgment purposes, the facts set out in the three witness statements must be assumed to be accurate. He also made the point, which I also accept as well-founded, that there is a realistic prospect of the court

accepting the evidence of those witness at trial. That evidence includes not just statements of fact but statements of belief. Although they are not offered as those of an independent expert, Mr Dutson's views reflect his expertise in this area and his experience in quarrying and mineral extraction operations which date back to 1982.

26. So far as the Works are concerned, and as Mr Jourdan summarised them, the following points emerge from the evidence:

    i) The Claimant intends to apply for planning permission to extract minerals from the Farm and intends to do the Works as a precursor to applying for permission to extract minerals from the Farm, rather than in connection with any activities on Cockhill Quarry.

    ii) It is standard industry practice for a minerals company to undertake such landscaping works ahead of applying for planning permission (Mr Dutson's paras. 8 and 11 and Mr Stephen's para. 7). All mineral developments of the intended size do so (Mr Dutson's para. 12). The work of screening, through planting trees and creating banks, is ordinarily undertaken at least 5 years ahead of applying for planning permission in order to let the trees grow to a sufficient height (Mr Perry's para. 7).

    iii) If the Claimant does not do this, it will "*severely jeopardise the possibility of obtaining planning consent*" (per Mr Dutson's para. 16). And unless the Works are done *"…the chance of successfully obtaining planning permission is low*" (per Mr Perry's para. 34).

The Transfer

27. In the Transfer the Farm, edged in red on the plan annexed to it, is sometimes referred to as "the property". The Quarry is identified as identified as "the adjoining land shown edged blue on the said plan."

28. Clause 2(a) of the Transfer provides that there are excepted and reserved to the Transferor in fee simple:

> "*All stone, clay, sand, gravel and other mines and minerals including gas, oil and water in and under the property (hereinafter called the minerals) together with a right of entry and all necessary ancillary rights in connection with winning and working the same including those set out in the first part of the schedule hereto but SUBJECT TO the observance and performance by the Transferor of the conditions and restrictions set out in the second part of the schedule hereto*".

29. The non-exhaustive, ancillary rights in support of what I now describe as "the Clause 2(a) rights" are therefore set out Part I of the Schedule. These are described as "liberties" (again in terms which made it clear that those enumerated were not exhaustive of what might be done in aid of the Clause 2(a) rights) and they were introduced by the following language:

"*Liberties for the due and proper working and obtaining of the minerals included with the rights excepted and reserved to the Transferor by clause 2 of this Transfer to enter upon the property:-*"

30. For present purposes, the following "liberties" are potentially relevant to the Claimant's activities on the Farm at the pre-planning application stage:

> "*a) To erect such buildings, engines and machinery and to carry out such works and facilities as may be convenient for the purpose by any means of working, obtaining, processing, making, merchantable, adapting for sale, storing or disposing of any of the minerals ……..*"
>
> *"h) Generally to do all things convenient or necessary for working obtaining making merchantable and disposing of the minerals subject to the provisions contained in the Second Part of the Schedule hereto*."

31. Any exercise by the Claimant of the Clause 2(a) rights is subject to the observance of the "conditions" identified in Part II of the Schedule. Materially for present purposes, in relation to the issue over the Claimant's notices, Part II provides as follows:

> *"Conditions to be observed by the Transferor in the exercise of the rights and liberties granted to it under clause 2 of this Transfer and subject to the observance of which such rights and liberties are granted:-*
>
> *a) The Transferor shall endeavour to give to the Transferee not less than twelve months notice in writing expiring at any time of its intention to enter into and upon any part of the property for the purpose of working and obtaining the minerals or for the purpose of exercising any or all of the rights and liberties hereinbefore contained and if such notice is given shall not be required to pay compensation for loss of crops upon entry PROVIDED THAT the Transferor may give less than 12 months notice of its intention to enter as aforesaid (but not in any case less than 2 months) but in such case shall compensate the Transferee for loss of crops*
>
> *b) The Transferor shall be at liberty at any time having given one weeks prior notice in writing to enter upon the property for the purpose of making any exploration or survey or of carrying out any preliminary work or tests that may be necessary subject to the payment of reasonable compensation by the Transferor to the Transferee for any loss or damage not made good by it unless the affected land is subsequently occupied by the Transferor under the provisions of Part I hereof".*

32. The Transfer expressly addresses considerations of planning law at paragraph (e) of Part II of the Schedule in the following terms:

> *"e) The Transferor shall observe all conditions imposed by any Planning Authority in any Planning Permissions to work and remove the minerals including any*

conditions relating to the reinstatement of the property after the minerals have been worked and removed."

33. It also went on to provide, again in Part II, for the transferor to pay the current agricultural value of any land taken by it for occupation under the provisions of the Schedule and for any transfer back to the transferee to be at "*the then value of such land in the state in which it is returned.*"

34. That provision therefore addresses the position between the parties *after* a conditional grant of planning permission (and, so far as reinstatement works are concerned, the implementation of it) and does so in the form of a Part II "condition" attached to the exercise of the Clause 2(a) rights for the protection of the owner of the Farm. It would extend to compliance with any obligation to carry out prior landscaping or screening works on the Farm which the planning authority might impose as condition of permission to work the minerals under it. I note that Mr Dutson's evidence refers to the likelihood that, even if planning consent were to be granted without the Works first being undertaken, then he would expect it to be subject to a number of landscaping conditions (including the planting of trees for screening). The Transfer does not expressly address the implications of planning law, as between the parties, so far as concerns works undertaken *in anticipation* of an application for or grant of planning permission. That said, I also note that clause 3 of the Transfer provides that:

> "*The Transferee hereby covenants with the Transferor for the benefit of the said reserved mines and minerals and other rights and the said adjoining land of the Transferor edged blue on the said plan and each and every part thereof:-*
>
> *a) Not to impede or object to mining or quarrying workings or other operations by the Transferor or its Tenants or Licensees on the pieces of land hereby transferred or the said adjoining land edged blue on the said plan ……"*

35. As I observed at the hearing of the application for permission to appeal, that provision would appear to give rise to a strong argument that the Defendant would be in breach of covenant if the Claimant now made a planning application to work the minerals at the Farm (however precipitate the evidence summarised above might indicate a promising one to be) and she then lodged an objection to it being granted. Likewise, if she sought to place physical obstructions in the way of the Claimant carrying out the Works in accordance with any imposed planning condition. Mr Jourdan's skeleton argument pointed out the expansive language of "*other operations*" in clause 3(a) and the provision is mentioned in the Grounds of Appeal. But it is no part of the Claimant's argument in the present circumstances that, either by creating the obstructions which led to these proceedings for injunctive relief or by the very act of defending these proceedings in the face of the Claimant's evidence about the purpose of the Works, she is in breach of clause 3. The Claimant recognises the need first to establish its right to carry such operations by reference to other provisions of the Transfer.

The District Judge's Judgment

36. In urging me to uphold the decision of District Judge Watkins, so far as the absence of a right to carry out the Works was concerned, Mr Paton made the preliminary submission that "*the District Judge did not say much, but he said it all*". He said the judge was wholly entitled, and right, to decide the issue of construction as he did, for the reasons he gave; and I should not decide on appeal that he was "wrong" to do so just because alternative arguments and interpretations are possible.

37. So far as the issue over the Works falling within the scope of the Clause 2(a) rights is concerned, the District Judge set out his conclusions on this (and his now unchallenged decision to determine the point summarily) at paragraphs 98 to 108 of his judgment. I believe the following to be an accurate identification of the key points in those paragraphs:

    i) the Clause 2(a) rights concern the extraction and removal of minerals from the Farm and works ancillary to those operations such as making roads and providing for drainage (he appears to have had Part I, para (c), of the Schedule in mind which is the liberty to make roads and tracks and to lay pipes) (para. 98);

    ii) although the carrying out of the Works would make the grant of planning permission more likely, there is no evidence that planning permission would be granted if they were to be carried out (para 98). Without the Works being carried out the Claimant might not obtain planning permission but - unlike any such works carried out in accordance with a planning condition imposed by the planning authority where there would be an "obvious connection" with such extraction – the Works are not "directly connected" with the extraction of minerals. Instead, "they are proposed because of the need to obtain planning permission for the works" (paras. 101-102);

    iii) the Transfer makes specific provision at Part II, para. (b) of the Schedule for the Claimant to carry out investigative works but this was a "specific exception" (paras. 99 and 106);

    iv) neither party suggested implying a term into the Transfer that would justify the Works being carried out (para. 100);

    v) the Claimant's right was to extract minerals, not to carry out works that might lead to planning permission to extract minerals (paras. 105 and 106). Adopting the Claimant's summary of its predicament (assuming the Defendant's argument to be correct) the Claimant was indeed in a "Catch 22 situation" if its inability to carry out the Works meant it was unable to obtain planning permission to extract the minerals under the Farm (para 104); and

    vi) that situation was akin to saying that the need to obtain planning permission was a condition precedent to the carrying out of any works on the Farm (with the specific exception for investigative works) but, being an obligation imposed by Parliament, that was an issue for the Claimant not the Defendant (paras. 104 and 105). It was the root of the Claimant's problem. The parties had not addressed it by the terms of the Transfer, the right to carry out the Works does not exist as

> a free-standing right and (there being no evidence as to whether the predecessors-in-title considered the point in 1975) there is no reason to imply the existence of such a right into its terms (paras. 105, 106 and 107).

38. So far as the Defendant's challenge to the validity of the Claimant's notices is concerned, the District Judge addressed this at paragraphs 94 and 95 of his judgment. Having summarised the structure of part II of the Schedule (as set out in paragraph 31 above), he said:

> "95. This is a simple issue of construction. Much is invested by the Defendant in the word "endeavour" which I read as meaning "to try hard" or "attempt to". I do not see there is an element of compulsion that the Defendant suggests. Had the parties intended there to be an absolute requirement that 12 months' notice was given, then they would have said so. Further, such a requirement would not have been consistent with the obligation to compensate for loss of crops if less than 12 months' notice was given."

39. This conclusion is challenged by the Respondent's Notice. The Defendant says that the District Judge erroneously treated the words "shall endeavour" as having no meaning. He should have concluded that each of the two-month notices were void in the absence of any evidence of such endeavour on the part of the Claimant to give twelve months' notice.

Discussion

40. Although the District Judge had (at paragraphs 62 and 63 of his judgment) summarised the Claimant's argument based upon the width of clause 2(a) and the language of the particular ancillary rights or liberties contained in paragraphs "(h)" and "(b)" of Part I, the paragraphs containing the reasoning summarised by me in paragraph 37 above did not expressly engage with specific words in the Transfer. Most of the points identified in that paragraph appear to represent conclusions rather than steps in the process of linguistic-based reasoning towards a conclusion.

41. However, in addition to saying that *a free-standing right* to carry out the Works could not be implied into the Transfer – a matter with which the Claimant did not and does not take issue – he did say (at his paragraph 106) that he came to the conclusion that the Works could only be carried out as part of the exercise of extracting minerals, and not on the basis that they might lead to planning permission being granted, "*as a matter of construction, by doing no more than giving the words of the Transfer their ordinary meaning*".

42. Although the District Judge did not say so in terms, I read that essential conclusion as resting upon the *absence* of any reference to such landscaping and screening works alongside the reference in Part II, para, (b), to "exploration or survey or carrying out any preliminary work or tests that may be necessary". The conclusion must also rest upon the judge's implicit rejection of the Claimant's argument that the Works could be regarded as the exercise of a necessary ancillary right in connection with winning the

minerals (clause 2(a)) or as something convenient or necessary for obtaining them (Part II, para. (h)) or as part of such necessary preliminary work (Part II, para. (b)). His reasoning here appears to be based upon the disconnect between the Works and process of extraction – the lack of a "direct connection" between them – and, I summarise and re-phrase, his observation that the Works cannot be regarded as sufficiently connected to the process of extraction when they are aimed at securing the planning permission necessary to embark upon that process.

43. The judge's catch-22 observation does not, I think, add materially to the reasoning (save perhaps in its assumption that the terms of the Transfer ordain that public law considerations and private contractual ones occupy entirely separate zones at the pre-planning stage) and it only holds good as a consequence if he is right to say that Amey Roadstone Corporation did not secure the right to carry out such works for that purpose.

44. The Claimant's first numbered ground of appeal is that the District Judge was wrong in law to construe the Transfer as not entitling the Claimant to carry out the Works and that he should have held that it had such a right under the Transfer by reference to clauses 2(a) and 3(a), Part I paras. (a) and/or (h) and Part II para. (b) of the Schedule. As Mr Jourdan QC clarified the position, this is in fact the Claimant's only ground of appeal and (ground 5 having gone) grounds 2 to 4 are criticisms of his reasoning which led him to that error of law. On that, his conclusion is either right or wrong (as indeed is any different conclusion reached by me).

45. Mr Jourdan correctly observed that this challenge turns exclusively on a correct interpretation of the Transfer. He referred to the observation of Lord Diplock in *Bahamas International Trust Co v Threadgold* [1974] 1 WLR 1514, at 1525, where (in explaining why a party's previous concession on the interpretation of an agreement should be ignored) he said: "…. *the construction of a written document is a question of law. It is the judge to decide for himself what the law is, not to accept it from any or even all of the parties to the suit; having so decided it is his duty to apply it to the facts of the cases*."

46. Although Mr Paton pressed his observation that the availability of alternative observations upon the language of the Transfer did not mean that the District Judge's conclusion was wrong, the Defendant's own arguments upon the concept of "winning" minerals (both in resisting the Claimant's appeal and in support of the subsequent Respondent's Notice) confirm the need to test whether or not the District Judge's own conclusion is supported by the objective meaning to be given to the language of the Transfer.

47. Both parties were agreed that this involves the iterative process of interpretation summarised in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, at [23], and again in *Wood v Capita* [2017] AC 1173, at [8] to [14]. Where the language of a document admits of more than one meaning, each must be tested against other provisions in the document and its commercial consequences. Where there is ambiguity the court is entitled to prefer the interpretation which is consistent with business common sense and to reject the other meaning(s). That exercise involves consideration of the language against all the background reasonably available to the parties at the time they contracted with each other. In *Wood v Capita*, Lord Neuberger made it clear (at [13]) that this deference to "contextualism" may in an appropriate case exceed the respect to be accorded to any literal analysis of the document (including careful parsing of words or

phrases within it) required by its bedfellow of "textualism". Although both are tools of interpretation available to the court, he gave the example a document containing language which through its informality, brevity or lack of consistency throughout the document – all, I think, scenarios producing ambiguity – where such contextualism might prevail.

48. To these uncontroversial and now well-established principles of contractual interpretation each party has sought to add its own propositions based upon the fact that the Transfer concerned a reservation of mineral rights upon the transfer of land.

49. For the Claimant, Mr Jourdan QC said that where, as here, land is transferred, and rights are "*excepted and reserved*" for the benefit of land retained by the transferor, the effect in law is that the rights are treated as granted to the transferor by the transferee: see *Durham and Sunderland Ry. v. Walker* (1842) 2 Q.B. 940. He submitted that the consequence is that, if there is a genuine ambiguity in the extent of the right, it should be interpreted contra proferentem in favour of the transferor, but *"… this presumption can only come into play if the court finds itself unable on the material before it to reach a sure conclusion on the construction of a reservation*": see *St. Edmundsbury and Ipswich Diocesan Board of Finance v. Clark (No. 2)* [1975] 1 WLR 468, 477.

50. I accept that this proposition, which was not disputed by Mr Paton, would come into play if the approach to interpretation set out in *Rainy Sky* (and subsequent authorities) still did not operate to breach the impasse over whether or not the Works were or were not permitted by the terms of the Transfer. Given the flexibility of that approach, the contra proferentem rule really can be said to be one of last resort.

51. I do so despite Mr Paton having advanced (on the basis of the Respondent's Notice) the argument that, where mining rights are concerned, the common law is restrictive in its approach to recognising rights which are ancillary to the ownership of the minerals. He referred to the decision of Sir George Mellish LJ in *Hext v Gill* (1872) 7 Ch. App. 699, 717-8, and to a passage in *Halsbury's Laws* (5th ed) Vol. 76, para, 281, for the proposition that it is necessary for the grant or reservation of such rights to spell out both fully and clearly what rights attach to such ownership. Therefore, Mr Paton submitted, any right to interfere with the use of the surface, at the pre-planning stage, has to be expressly spelled out.

52. However, it is important to note that Mellish LJ was drawing a careful distinction between temporary damage to the surface and a serious, continuous and permanent injury to it (or what he described as "the absolute power of destroying the surface"). So too the decision of the Court of Appeal in *Bishop Aukland Industrial Co-operative Society v Butterknowle Colliery Co*. [1904] 2 Ch 419, another decision relied upon by the Defendant in support of the restrictive approach of the common law, was concerned with the surface owner's right of support. In my judgment, Mr Jourdan is therefore correct to counter by saying that the restrictive approach is not of general application in the interpretation of ancillary mining rights but instead relates to the notion of surface destruction. Even in such cases, as he points out, it may be that the right of the minerals owner to destroy the surface is not spelled out but can nevertheless be implied if are very wide powers of working are conferred accompanied by provision for the payment of compensation: see *Duke of Buccleuch v Wakefield* (1869-70) L.R. 4 H.L. 377, at 408-412, and *Bishop Aukland Industrial Co-operative v Butterknowle Collier* at 436. Although those cases concerned the interpretation of statutory rights, their focus was

upon the right to destroy the surface. In the present case the Transfer does contain provision in Part II of the Schedule for the Claimant to pay the agricultural value of any surface land taken by it and for the Defendant later to reacquire it at the "as is" price.

53. The last general point of contention between the parties is whether or not the court is constrained to test the extent of the Claimant's rights as at 1975 and the date of the Transfer. That is what the orthodox approach to contractual interpretation requires and a contextual approach, directed to considering the circumstances in which the parties contracted on the terms they did, is something quite different from a revisionist one which might permit the court to be influenced by the circumstances in which they now find themselves. But Mr Jourdan QC relied upon authority which, he says, justifies the court looking at the present position to see whether or not the Claimant may carry out the Works.

54. Mr Jourdan expressed the point in his skeleton argument as follows:

> "*When a right of extracting minerals is granted, with express or implied ancillary rights, the question of what the grantee may do pursuant to those rights is not fixed by reference to the circumstances which exist at the time of the grant. Technology and legislation changes over the years, and therefore what is reasonably necessary to enable the Transferor to enjoy the rights granted by the Transfer may change over time."*

55. In support of that proposition he cited *Dand v Kingscote* (1840) 151 E.R. 370, 380, and *Besley v John* [2003] EWCA Civ 1737, at [14-15]. In the first case the rights of "wayleave" reserved in a conveyance of 1630 were not confined to the description of the way as it was in use at the time of the grant but were to be considered by reference to what "*will be reasonably sufficient to enable the coal owner to get, from time to time, all the seams of coal to a reasonable profit*." The coal owner therefore had the right to erect a steam engine, and dig a pond to supply it, in order to work the seams. In *Besley v John*, Buxton LJ considered and agreed with earlier authority supporting the court's sanction of the "modern and reasonable" way of exercising a conferred right to carry away minerals (eg. by rail and not only by the road which existed at the date of the grant). In that case, the approach justified the appellant exercising his sheep grazing rights at Merthyr Tydfil, an ancient right of common, by shepherding his sheep on a quad bike.

56. Mr Paton responded to this line of argument by saying that the present case did not involve any relevant technological change since 1975. He also said that his skeleton argument had been too generous to the Claimant in recognising that under present circumstances (i.e. the modern practices of planning authorities and, in particular, the 2015 Somerset Minerals Plan) the commercial case for the Claimant undertaking the Works might have been stronger than in years before.

57. It appears to me that the main purpose behind the Claimant's citation of the authorities permitting consideration of present-day circumstances was to lend some support to its criticism of the District Judge's observation that there was no evidence before him as to what the position in relation to planning permission would have been in 1975 (para. 107 of the judgment). Although there is some force in that criticism – the inquiry also

extends to asking what is now reasonably necessary to work the minerals – I do not regard these authorities as being of much assistance on the point I have to decide. It is clear from Mr Jourdan's proposition (in paragraph 54 above) and from the reasoning in the cases that that they are concerned with the manner of exercise or enjoyment of ancillary rights *which are established to exist* either on the express wording of the grant or by a process of necessary implication. As Buxton LJ put it in *Besley v John*, at [24], "[*T]he question is the mode of exercise of rights rather than their extent*". Evidence as to what is a modern and reasonable way of going about doing something cannot, without more, be used as a basis for a party claiming the underlying right to do that thing. So much is obvious from the need for contractual certainty (and a non-revisionist approach to interpreting contracts) which carries the potential consequence that a party may not have bargained *at all* for what it is he would now like to do.

58. In the present case, the principal question is whether or not, under the terms of the Transfer, the Claimant secured the right to carry out the Works even though it does not yet have any planning permission to extract minerals from the Farm but proposes to undertake them to significantly enhance its prospects of getting it. Did the Defendant's predecessor-in-title agree terms that would permit that?

59. There is then the subsidiary question as to whether or not the Claimant, assuming it has the right, has (by the notice of November 2016 or of March 2017) validly invoked it.

60. Having outlined the approach to the true construction of the Transfer on these two questions, I now address them in the light of the particular language used within it.

Analysis

61. In my judgment, the answer to the principal question turns upon whether or not the Works can be regarded as *reasonably necessary* for the purpose of *winning* the minerals under the Farm. If the relevant language of the Transfer supports the provisional conclusion that they can be so regarded then, before permitting it to stand, the conclusion should be tested against any other material provisions in the Transfer and also by reference to its commercial consequences.

62. I have set out the material provisions of the Transfer in paragraphs 27 to 31 above.

63. I regard the key provision in the Transfer to be clause 2(a). In addition to the right of entry, the Clause 2(a) rights are "*all necessary ancillary rights in connection with winning and working*" the minerals. They are not limited to those ancillary rights identified in Part I of the Schedule, though the last of those (at "(h)") is cast in terms of such width that they are constrained only by what is "*convenient or necessary for working [or] obtaining*" the minerals.

64. Clause 2(a) refers to "necessary" ancillary rights but I have said the issue turns upon what is *reasonably necessary* for the purpose of winning the minerals because that concept is qualified by the concept of what is "convenient or necessary" at Part I, paragraph (h). Part I, paragraph (a) also refers to carrying out such works "as may be convenient" for obtaining them. As Mr Jourdan submitted, this is an indication that "necessary" does not mean "absolutely essential". I also accept his submission that the

authorities show that, even in the absence of such Part I liberties, there would be an implied grant of such ancillary rights as were reasonably necessary for the enjoyment of the right expressly granted: see *Jones v Pritchard* [1908] 1 Ch 630, 638 and *Moncrieff v Jamieson* [2007] 1 WLR 2620 at [112]. Those were decisions on easements but the same point was recognised in the mining context by Plowman J in the *General Accident* case referred to below (at 1220E). It is therefore improbable that, by using the word "necessary" in the Transfer, the parties intended to narrow the extent of the ancillary rights which would have been conferred had they not been expressed. The *reasonable* manner of exercising the right in question was also the focus of the decisions in *Dand v Kingscote* and *Besley v John* when considering how, in modern times, that might be done.

65. Mr Jourdan noted that it was common ground at the hearing of the application for permission to appeal that "necessary" meant "reasonably necessary" and at the hearing of the appeal Mr Paton did not resist this aspect of the Claimant's argument.

66. Instead, the focus of the Defendant's argument was upon the concept of "winning" minerals. It was a central plank of Mr Paton's submissions, and a point taken in the Respondent's Notice, that "winning" minerals meant (when the term was used in conjunction with "working" them) the physical extraction of them. The fact that clause 2(a) used the phrase "in connection with" did not detract from the point that the Claimant could, he submitted, only do things that were connected to the physical process of mineral extraction. This was, he said, the "controlling mechanism" upon the Claimant's rights for which the Transfer provided; and on no possible view could the planting of trees or the fencing of them be said to be either "winning" or "working" the minerals.

67. In support of his argument Mr Paton referred to *English Clays Lovering Pochin & Co. Ltd v Plymouth Corporation* [194] 1 WLR 742 and *General Accident Fire & Life Assurance Corp. Ltd v British Gypsum Ltd* [1967] 1 WLR 1215.

68. In *English Clays*, the question, which arose in a planning context, was whether or not a smaller area of land some two miles distant from the larger area where the china clay was taken from the ground (Lee Moor) could be regarded as a "mine". This in turn depended upon whether or not "mining operations" were carried on there (the smaller piece of land, known as Marsh Mills) and that in turn rested upon whether or not the "winning or working of minerals" took place there (the relevant definition in the development order going on to refer to minerals "in or under the land"). In fact, the method of extracting china clay involved detaching the china clay and other aggregates by high pressure water jet and the resulting slurry was then pumped (with the china clay in suspension) from Lee Moor to Marsh Mills along a pipe 4 miles long. The process of treating and drying the clay (in respect of which the plaintiff contended it did not need planning permission to install more modern plant) took place at Marsh Mills. The Court of Appeal held that did not come within the activity of "winning or working" and it was better described as "treatment". It said, at 746H:

> "It is perhaps not necessary to be dogmatic on the point in this case: but our present view is that to "win" a mineral is to make it available or accessible to be removed from the land, and to "work" a mineral is (at least initially) to remove it from its position in the land: in the present case the china clay is "won" when the overburden is taken away, and worked (at least initially) when the water jets

> remove the china clay together with its mechanically associated other substances from their position in the earth or land to a situation of suspension in water."

69. In the *General Accident* case the issue was whether a right to "win" materials extended to a right to search for them. Plowman J held that it did, though on the language of the conveyance only by underground searching, so that the plaintiff failed to secure a declaration that it was entitled to dig boreholes in the surface. The judge said that any inquiry about the terminus ad quem of the process of "winning" (i.e. the issue of when it ends, as I have explained was addressed in the *English Clays* case) did not greatly assist on identifying its starting point (or terminus ad quo). Mr Paton emphasised the part of the judgment which, referring to earlier authority, talked about a coal field being won when full practicable access is given to the coal hewers "so that they may enter on the practical work of getting coal".

70. Thus, Mr Paton reasoned, the court must distinguish between two different things, in order to avoid a situation in which the Claimant may assert rights which, if not untrammelled, go beyond those permitted by its ownership of the minerals. He said "thing one" was the right to work the minerals whereas "thing two" was the right to apply for planning permission to do so. The first is a physical or mechanical process, the second an administrative one. The use of the phrase "in connection with" in identifying the Clause 2(a) did not obviate the need to identify the relevant "thing". In that regard, he referred to the decision of the Court of Appeal in *Johnson v Johnson* [1952] P 47, 51, a divorce case, on the meaning of "in connection with"; and the need for matter in question to be bound up or involved with, or related to *the principal thing*. If the Works have no "actual connection" to the process of mineral extraction then they are not permitted because "planning permission is not mineral extraction". The Works were proposed to be undertaken in a "prospective and speculative way" which meant there was an insufficient nexus between them and any actual winning and working of the minerals.

71. Mr Jourdan QC submitted that the Defendant's argument involved an unwarranted restriction upon the concept of winning the minerals. He says that the concept embraced the whole process of obtaining them. The concept includes but is not confined to the mechanical process involved in making them sufficiently accessible to be worked and, he says, the Defendant had offered no principled explanation as to why it should be so confined. As Mr Jourdan put it, if the Claimant needs regulatory permission to get to the minerals under the Farm and in order to get that permission things need to be done to the surface then those surface activities are all part of the process of winning them. In response to what I might describe as Mr Paton's "disconnect" point, he offered a two-pronged test to establish whether or not, as a matter of principle, a particular activity fell within the concept of "winning": (i) to consider the purpose for which the works are being done; and (ii) to consider the reasonable necessity of them having to be done in support of that purpose. Is the purpose that of obtaining the minerals from the Farm?

72. In my judgment, the Claimant's interpretation of the Transfer is to be preferred. The Clause 2(a) rights are wide enough to accommodate the Works being undertaken in anticipation of an application for planning permission to work the minerals under the Farm. I have reached this conclusion for three main reasons. The first two are textual ones, and the third contextual.

73. The first is the width of the language by which the Clause 2(a) rights are identified. The phrase "in connection with" is broad language which I regard as inclusive rather than exclusionary. Yet Mr Paton's argument severely limits its reach. Indeed, whereas there could, in my view, be no real doubt over the Claimant's ability to undertake the Works if the planning authority had made it a condition of any planning consent that the Claimant should do so (compare para. (e) of Part II of the Schedule) the phrase, on his argument, appears be of no significance where the Claimant is only anticipating the authority's requirements. And this despite the fact that the only type of planning permission the Claimant could and does have in mind, by reference to its own interest in the property, is one to extract the minerals on the Farm.

74. Reference to other authority on the meaning of "in connection with" in a quite different document takes one only so far, as illustrated by the point that *Johnson v Johnson* was concerned with its meaning in a statute of 1925. However, I note the "principal thing" in that case, for the purpose of testing the commissioner's statutory power to decide an application "in connection with" it, was a matrimonial cause that did not yet exist (because the application before him was one to permit a divorce petition to be brought earlier than generally allowed). The conclusion in that case, that he did have the power, involved a rejection of the argument that the sequence of events meant there was nothing on which the words could properly bite. Contrary to Mr Paton's submission, the decision indicates that, in an appropriate context, the phrase is well capable of extending to something that is linked to another thing which is only contemplated.

75. To put it another way, if the Works reflect the Claimant's intention to exploit its mineral rights, it would in my judgment be perverse to say that the phrase "in connection with" either has full meaning or no real meaning according to the stage in that process (identified by reference to the timing of a planning application to work them) at which they are carried out.

76. The second reason relates to the true meaning of "winning" minerals. Although the cases cited by Mr Paton focused upon the start point and the end point, respectively, of mechanical activities that might be embraced by the concept of winning minerals, it does not follow that the concept is limited to them. It is important to note, as Mr Jourdan QC pointed out, that in *General Accident* Plowman J said that "winning" *included* the process of obtaining access for those who were to extract the coal. He went on to say, at 1221H:

> "*And, it seems to me that as you cannot win coal or other minerals until you find them, one of the conditions necessary for working them may, without doing violence to the language, be said to be searching*."

77. I recognise the searching in that case involved sinking exploratory boreholes on the land (as was done on the Farm in 2002) but I do not consider the meaning of "winning" becomes forced by contemplating its extension to other activity aimed at unlocking its minerals potential. As Mr Jourdan also pointed out, paragraph (b) of Part II of the Schedule (which is the part containing the conditions attached to the exercise of the Clause 2(a) rights) expressly contemplates the Claimant giving one week's notice of entry upon the Farm for the purpose of making an exploration or survey ("preliminary work or tests" being separately mentioned). Doing so might not involve any

mechanical work and it is difficult to see which limb of the Clause 2(a) rights supports that activity if not that which refers to winning the minerals. I think it is fair to say that an initial exploration or survey of the Farm would be no less speculative and remote from the mechanical activity of digging out the minerals, or the overburden, than making an application for planning permission to do so. What principled basis is there for recognising a right to do the first but not the second? And, if the second does fall within the activity of winning them because it is directed to unlocking the mineral rights, why should carrying out the Works in anticipation of the application not be covered? Indeed, why should they not be regarded as "preliminary work" within the meaning of the same paragraph (b)?

78. In my judgment, the Defendant has no satisfactory answer to these questions by reference to the language of the Transfer. And her task is made no easier by being potentially hindered, at the final hurdle, by the contra proferentem rule and unassisted before then by any implied restriction against surface destruction. I consider her position to be undermined by a number of points within that language. The first is that the draftsman has, on occasion, chosen to refer to the transferor "obtaining" the minerals instead of "winning" them: see paragraphs (a) and (h) of Part I of the Schedule. This is open-textured language indicating that "winning" has no particularly restricted meaning. It is necessary to secure planning permission in order to "obtain" them. The second is that he has directed his mind to what it is necessary or convenient (or reasonably necessary, for the reason identified in paragraph 64 above) *for the purpose of* obtaining them: see the same sub-paragraphs. The District Judge did not explain what, in his view, would qualify as a "direct connection" with the extraction of minerals (para. 101 of the judgment). Mr Paton's submission about the need for there to be an "actual connection" between the Works and the process of winning or obtaining minerals would have had a more promising start if the draftsman had introduced a temporal connector with words like "in the course of". The last particular point on the language is one I have already noted above. As appears from the wording of clause 2(a) and the opening words of the Schedule, the liberties identified in Part I do not purport to be comprehensive ones. Therefore, even if the Works did not come within either paragraph (a) or (for a reason not clear to me) the sweep-up in paragraph (h), one would still come back to the inclusive language of clause 2(a) ("in connection with") when it comes to identifying ancillary mining rights.

79. The reference to the language used to define the Clause 2(a) rights brings me to my third and final reason for preferring the Claimant's interpretation of the Transfer. It involves a move away from the textual analysis to consider the overall context of the Transfer. The context was that the mineral rights in and under the Farm were granted to the Claimant's predecessor in fee simple. In support of those rights the draftsman appears to have been anxious to ensure that it enjoyed all the rights reasonably required in connection with their extraction. The only real "controlling mechanism" deployed by him (to use Mr Paton's phrase) was one which boils down to the need to show that what is proposed in exercise of those rights is reasonably necessary rather than absolutely essential. Subject to that, he has used what Mr Jourdan described as a torrential approach to drafting, which includes a non-exhaustive list of ancillary rights (including a final one in very wide terms) and interchangeable references to "obtaining" and "winning" the minerals alongside the "working" of them. He did so expressly recognising that such mining operations would likely involve the imposition of planning conditions. In such circumstances, the court really needs to ask which

particular words might *preclude* the Works now being undertaken. In my judgment, there are none.

80. That final reason provides the answer to any cautious cross-checking of my conclusion by reference to business common sense, even though I do not consider the language of the Transfer to be so uncertain as to really require it. My first impression when reading the Transfer was to wonder why the Works should *not* be permitted. The width of its language was such that grounds for a catch-22 situation, said by the District Judge to emanate from the public law angle not being adequately addressed by the terms of the Transfer, were not immediately apparent to me. Having now had the benefit of counsel's helpful competing submissions, I am satisfied that the situation does not exist. In my judgment, that conclusion does not offend commercial common sense.

81. Nor am I persuaded by the Defendant's submission that the language of the Claimant's presently pleaded notices (referring to paragraph (h) of Part I) means that it is not open to it to rely upon paragraph (a) of Part I of the Schedule. As Mr Jourdan correctly observed, the District Judge did not decide the claim against the Claimant on the basis of the notices but by reference to the terms of the Transfer. The judgment under appeal is one that was directed to the absence of any underlying right to carry out the Works regardless of the form of notice. If left undisturbed, the District Judge's conclusion would prevent the Claimant from carrying out the Works regardless of the number and form of the notices served by it.

82. In my judgment, however, his conclusion must be set aside and the Claimant will then be left to decide whether to pursue its proposed amendment of the Particulars of Claim to elaborate upon the grounds in the Transfer on which it relies.

83. As for the District Judge's rejection of the Defendant's argument that the notices served by the Claimant were invalid, in my judgment his decision was plainly correct.

84. Mr Paton submitted that the effect of this decision is to give the Claimant an *option* to decide whether to give 12 months' notice or 2 months' notice. Although he recognised that the price of opting for the shorter period would be the payment of compensation for loss of crops, this deprived the words "shall endeavour" (in relation to giving the longer period notice) of any meaning. He also said that the farm is being used as meadow so there would be no compensation for loss of any "crops".

85. Although it is somewhat tendentious to describe the terms of paragraph (a) of Part II as containing an option – the provision is a condition attached to the exercise of rights which uses language falling short of the mandatory – I agree that the Claimant is given a choice. But I do not agree that the consequence of it deciding to give less than 12 months' without any explanation of its efforts to give that longer period of notice (however convincing the Defendant might find it to be and to whatever standard the court might be expected to judge such efforts if she were not convinced) is that the shorter notice is void. Nor is it obvious to me why grass should not be considered to be a crop, for the purpose of the Claimant paying the price attached to the shorter notice period, and I understood Mr Jourdan to recognise that it was. The fact that the contracting parties identified that price to be the consequence of giving the shorter notice and, very importantly, stipulated a minimum two months' notice (unless paragraph (b) with its own potential compensation consequences is invoked) shows that the consequence cannot be that it is void.

86. As Mr Jourdan QC pointed out, the courts, when considering notice provisions, used to distinguish between "mandatory" language (where want of strict observance by a party would lead to the notice being bad) and language which was "directory" (where sufficient might have been done for the notice to be upheld): see *Dean and Chapter of Chichester Cathedral v Lennards Ltd* (1977) 35 P&CR 30, at 313. Nowadays, such classification is the end of the inquiry, not the beginning, and certainly in the legislative context the court begins by considering whether it would be consistent with the purpose of the notice provision to treat a non-compliant step as invalid: see *Natt v Osman* [2015] 1 W.L.R. 1536, at [25]. In my view, that approach is consistent with the general approach to contractual interpretation as summarised in paragraph 47 above.

87. By failing to pay sufficient regard to the fact that the Transfer expressly addressed the ability of the Claimant to give notice of less than twelve months and more than two, and by failing to recognise the crucial difference between that which is desirable (if the Claimant is able to plan well ahead) and that which is compelled, the Defendant's argument comes close to saying that the 12 month requirement is more mandatory than directory in its terms. Yet the subjective focus of the "shall endeavour" language (compared with the mandatory language applicable to the payment of any relevant compensation under the shorter notice provisions) clearly shows it cannot be read that way. As Mr Jourdan observed, it is the Defendant not the Claimant who is seeking to re-write the Transfer in this respect.

88. As the notices cannot be regarded as invalid by reference to their timing and in circumstances where the Claimant has a realistic prospect of establishing that they were a first step in the exercise of securing planning permission to extract minerals from the Farm, there is no need for me to consider the alternative question of whether or not (each of them having been relied upon in the Particulars of Claim either originally or by amendment) they should now be treated as effective given the lapse of time since service.

89. I uphold the decision of the District Judge on this aspect of the case.

Disposal

90. I therefore set aside the summary judgment against the Claimant. I invite the parties to agree upon the terms of an Order to that effect, together with consequential directions and orders for the determination of the proceedings (they should address the Claimant's adjourned application to re-amend), or to arrange a hearing for the disposal of any outstanding matters between them.