Neutral Citation Number: [2014] EWHC 39 (Ch)

Case No: HC12FO2480

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 17 January 2014

Before :

MR. RICHARD SNOWDEN QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

PEEL LAND AND PROPERTY (PORTS No.3) LIMITED	**Claimant**
- and –	
TS SHEERNESS STEEL LIMITED	**Defendant**

- -

Mr. Jonathan Seitler QC and Mr. Richard Banwell
(instructed by **Gordons**) for the **Claimant**
Mr. Kirk Reynolds QC and Mr. Greville Healey
(instructed by **McGuire Woods London LLP**) for the **Defendant**

Hearing dates: 23-25 October 2013

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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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MR. RICHARD SNOWDEN QC

RICHARD SNOWDEN QC:

Introduction

1. The issue in this case is whether the Defendant, which is the tenant of a steelworks in Sheerness, Kent, is obliged by the terms of the lease to remove three large piles containing about 30,000 tonnes of secondary slag from the site.

2. The secondary slag in question is generated as a result of the steelmaking process carried out on the site. For many years the slag was regularly removed from the site, mainly by farmers who were accustomed to taking it away for use as a base for farm tracks. However, from 2008 the environmental regulations governing the use of secondary slag were tightened and farmers were no longer able readily to use the slag as before. The result was that secondary slag began to accumulate on the site. That continued until early 2012, when steel production ceased and the previous tenant, a company called Thamesteel Limited, went into administration.

3. The Defendant is a company in the same group as Thamesteel Limited and it acquired the business and assets of that company from the administrators in mid-2012. However, steelmaking has not resumed at the site and there is no immediate prospect of it doing so. Instead, the Claimant (which is the landlord and owner of the freehold) and the Defendant have been locked in two pieces of litigation, first over various valuable items of plant and machinery which the Defendant wishes to remove from the site and sell; and secondly over the slagheaps, which have no value and which the Defendant does not wish to remove from the site and cannot sell.

4. Although the trial was scheduled to deal with questions of the appropriate remedy to be granted if I were to be of the view that the Defendant was in breach of covenant under the lease, it was agreed between the parties during the hearing that I should render my judgment on the meaning of the lease first, and only move on to consider the question of remedies at a later hearing if necessary.

The Lease

5. The lease in question (“the Lease”) relates to about 52 acres of land at Well Marsh, Sheerness, Isle of Sheppey in Kent ("the premises" or “the site”). It was entered into on 1 February 1971 between The Medway Ports Authority, the predecessors in title to the Claimant, as the lessors, and Sheerness Iron & Steel Limited, a predecessor in title to the Defendant, as the tenant. In consideration of the tenant agreeing to carry out the construction of a steelworks on the site, and agreeing to pay the rent and to abide by the covenants set out, the lessors demised the premises for a term of 125 years from 1 September 1968 at an initial rent of £22,000 per annum subject to a rent review every 21 years.

6. Clause 1 of the Lease obliged the tenant to build a fully equipped steelmaking plant and rolling mill capable of producing not less than 50,000 tons of steel products per annum. That covenant was duly complied with by 1975 and, with further additions, in time the production capacity of the steelworks on the site far exceeded the

production capacity specified under the Lease. At its peak, the steelworks was capable of producing about 850,000 tons of steel per annum.

7. Clause 2 of the Lease contained extensive covenants to be performed by the tenant. Clause 2(16) is the only provision that is said by the Claimant to require the Defendant to remove the slagheaps, but I should summarise some of the other provisions of the Lease in order that Clause 2(16) can be seen in context.

8. There was no positive covenant requiring the tenant to carry on a steelmaking business on the premises, but by clause 2(6), the tenant covenanted not to make any building erection, alterations or improvements to the premises save in connection with the use of the premises for the purposes of steel making, steel rolling and ancillary operations; and by clause 2(14) the tenant agreed not to use or occupy the premises other than for the purpose of steelmaking, steel rolling and ancillary operations or for such other purposes as might from time to time be approved by the lessors.

9. Clause 2 contained a series of further covenants concerning the use and condition of the premises. By clause 2(7), the tenant covenanted to keep the premises, the buildings, the fixtures and fittings and all additions thereto in good and substantial repair and condition, and by clauses 2(8) and 2(9) the tenant was required to take steps to ensure that the operation of the steel works and rolling mill complied with the Clean Air Act 1956 and to ensure that any effluent discharged in to the drains or sewers would not be corrosive or harmful to the drains or sewers. Clause 2(15) also contained a covenant by the tenant not to carry on any noisome, hazardous, dangerous or offensive trade or business on the premises.

10. At the time of the grant of the Lease, the site included a substantial watercourse called "the Moat" which joined several lagoons in the middle of the site to the River Medway via a sluice gate. By clause 2(10) of the Lease the tenant covenanted in the following terms:-

> "Not to discharge or allow to be discharged any solid matter from the said premises into the drains thereof into the sewers nor into the Moat nor to discharge or allow to be discharged therein any fluid of a poisonous or noxious nature…whereby the waters of any stream or river or any dock or basin may be polluted…PROVIDED THAT the Tenant shall after a water-tight wall shall have been constructed…be at liberty to drain and fill in the Moat with suitable solid matter up to the level of the remainder of the said premises at the point or points respectively where the same are contiguous and such filling in shall not constitute a breach of this clause."

I was told that the Moat was filled in during the early years of the Lease: I was not given any further detail as to precisely how that was achieved.

11. As I have indicated, clause 2(16) is central to the dispute. That clause provided as follows:-

> "2. The Tenant HEREBY FURTHER COVENANTS with the Lessors:-…..
>
> (16) Except under the provisions of Clause 2(10) hereof not to form or permit to be formed any refuse dump or rubbish heap on the said premises but to remove as frequently as is reasonably practicable all refuse and rubbish which may have accumulated on the said premises and all used tins cans boxes and containers whatsoever and generally to keep all vacant land forming part of the said premises clean and in good order."

12. Clause 2(18) contained various covenants in relation to obtaining planning permission for any operation or change of use, and by clause 2(21) the tenant covenanted to insure the buildings on the demised premises and to rebuild or reinstate them in the event of destruction or damage by an insured risk.

13. By clause 2(11), the tenant covenanted at the end or sooner determination of the term to yield up the premises so repaired and maintained amended and kept, together with all additions and improvements made thereto in the meantime and all fixtures and fittings of every kind except tenants or trade fixtures; and by clauses 2(12) and 2(13) the lessors were given various rights to enter the premises to inspect and to carry out repairs and the like if the tenant had not done so.

The witnesses

14. I heard evidence from two witnesses: Mr. Graham Whinney, who was a witness of fact for the Defendant, and Mr. Bill Penn, who was an expert witness for the Claimant.

15. Mr. Whinney is a civil engineer who is employed by the Defendant and who has been working at the site in Sheerness virtually continuously since 1975. His primary responsibility throughout that time has been in the development and maintenance of the buildings and facilities on the site. However, Mr. Whinney also had a good understanding of the steelmaking process, the generation of slag, and how such slag had been handled by the tenants of the site over the years.

16. Mr. Penn is a chartered engineer and a fellow of the Institute of Materials, Minerals and Mining. In the course of his career he has visited and reported upon numerous steel mills, and for a period he was the operations manager at a steel mill in the Republic of Ireland, with responsibility for all aspects of steelmaking including the stocking and disposal of slag. Since 2008 he has been the managing director of a consulting company that specialises in the iron and steel industries. Mr. Penn was

able to give me a clear insight into the detail of the steelmaking process and the conditions at the Sheerness site based upon a physical inspection in July 2013.

17. I should record that both witnesses gave their evidence candidly and carefully. There was a large measure of agreement between them and to the limited extent that there were differences or differences of emphasis between them, I do not think that such differences were material to the matters that I have to decide in this judgment. The relevant facts, drawn from their evidence, can be summarised as follows.

Steelmaking and slag

18. The steelworks at the Sheerness site were equipped with electric arc furnaces and ladle furnaces to turn scrap steel, mainly from crushed cars which were transported to the site, into rolled steel bars. Albeit that there must have been technological advances over the years, no-one suggested that the steelmaking process which I describe below changed in any material respects between the Lease being entered into in 1971 and steel production ceasing in 2012.

19. At the first stage of the steelmaking process, scrap steel, largely in the form of crushed cars, is melted with fluxes in a large electric arc furnace ("EAF"). This produces molten steel and primary slag which forms on the surface of the molten metal and resembles molten rock. The primary slag is formed at the rate of about 100-150 kg per tonne of molten steel and it is removed from the EAF and allowed to cool before being broken up and piled in a heap to await removal from the site.

20. Once the primary slag is removed from the surface of the molten steel, the molten steel is run out of the EAF into a smaller ladle furnace for the second (refining) stage of the process. This involves the molten steel being mixed with bagged lime and other additives such as alloys and reheated and agitated by inert argon gas being blown through the furnace. The lime acts as a flux, assists with the removal of sulphur and other impurities from the molten steel and also acts as an insulator which inhibits arcing from damaging the refractory (brickwork) lining of the ladle. The impurities which are generated at this stage collect on the surface of the molten steel.

21. When the molten steel has reached the desired temperature and uniform chemical composition, a gate is opened at the bottom of the ladle and the molten steel runs out into a tundish (a refractory-lined vessel). The gate is closed to stop the flow of molten steel just before the surface residue containing the impurities can emerge into the tundish. The molten steel is then fed from the tundish to the casting machine where it is formed into billets which are cut and placed into a cooling area to solidify, before being transported to the bar and rod mills where they are reheated and rolled, stretched and cut to the desired shapes and sizes.

22. Once the molten steel has been run out into the tundish, the ladle furnace is left containing the last remnants of molten steel, the surface layer of impurities and pieces of the refractory brickwork lining which have been eroded by the process. This mixture comprises the secondary slag and is generated at a rate of about 10-30 kg per tonne of molten steel.

23. The ladle is removed from the furnace area by a crane and inverted, tipping the secondary slag out into a designated area inside the steelmaking building. At this stage the secondary slag has a temperature of 1500/1600°c and has a similar appearance to primary slag, but as it cools over a period of 8-10 hours or so it turns into a powder. That powder is then transported to a conditioning shed where it is damped down with water until it takes on the consistency of mud, whereupon it is taken outside and left in a heap or pile to "weather" and dry out.

24. After the secondary slag has reached an appropriate condition, which may take several months, it is run under a magnet to remove any pieces of metal and then passed through a series of screens to separate out pieces with dimensions of more than 35 mm, those between 10 and 35 mm, and those of less than 10 mm in size.

Dealing with the slag at Sheerness

25. It was common ground between the parties and the witnesses that primary slag and secondary slag which are generated in the manner which I have described are not the main substance which the steelmaking process is designed to produce. It was also common ground that the handling and use of the two types of slag have, for some years, been the subject of a series of European Directives, domestic legislation and regulations on management of "waste" and environmental protection. I do not think that I need set out the complexities of those regimes from time to time: a brief outline will suffice.

26. European Directives on waste management date from 1975. Unprocessed slag from the iron and steel industry was included by the European Commission in a "list of waste" published in 2000 under the then current Waste Framework Directive 1991: see Decision 2000/532/EC.

27. Under the most recent iteration of the Waste Framework Directive (Directive 2008/98/EC), "waste" is defined in Article 3(1) as "any substance or object which the holder discards or intends or is required to discard". Subject to the overriding definition of "waste" in Article 3(1), Article 7 expressly preserves and envisages the up-dating of the Commission's list of waste in Decision 2000/532/EC.

28. There are, however, provisions in Article 5 dealing with the circumstances in which a substance or object resulting from a production process, the primary aim of which is not the production of that item, may be regarded as a "by-product" rather than as "waste". In addition, Article 6 (headed "End-of-waste status") provides that certain specified waste shall cease to be waste when it has undergone a recovery process so as to comply with various specific criteria. These criteria require the substance or object to be commonly used for specific purposes for which a market or demand exists; that the substance or object fulfils any technical requirements for that purpose; and that the use of the substance or object will not lead to overall adverse environmental or human health impacts.

29. I was told that the European Commission is currently consulting over an "End-of-waste Quality Protocol" to identify the point at which steel slag might be processed for use for various purposes and thereby cease to be classified as waste. That has not

yet had any tangible result, and in the meantime the Agency has issued a "Regulatory Position Statement" indicating how it regulates the use of steel slag.

30. Although it is common ground that primary and secondary slag have both been classified as "waste" under these relevant European and regulatory regimes in force from time to time, their essential characteristics and potential for further use have always been very different.

31. The relatively high metal content of primary slag means that it can be processed so that the metal is separated and reintroduced to the steel-making process. The remaining solid material, which is relatively stable, can also be crushed and processed for use in civil engineering road applications including the manufacture of asphalt. This has meant that primary slag has always had some resale value: Mr. Whinney told me that over the years and depending upon its waste classification, it has fetched between £5 and £9 per tonne.

32. For many years the handling and removal of primary slag from the Sheerness site was subcontracted out to a specialist firm, and the slag was removed by the sub-contractor and was processed off-site. That stopped in about 2006 when Thamesteel Limited decided to use a subsidiary to process the primary slag on-site. Although primary slag is produced in much larger quantities than secondary slag, its value and potential for re-use meant that it was often removed from the site at Sheerness within days (the precise period depending upon seasonal demand for road surfacing materials). The result is that there are no significant quantities of primary slag left on the premises.

33. Secondary slag, in contrast, is not as physically (volumetrically) stable as primary slag, and it has a high proportion of lime, silica and magnesium oxide, together with phosphorous and sulphur. When in contact with water, some of these chemicals tend to dissolve to produce a highly alkaline solution. These characteristics significantly restrict the use to which secondary slag can be put and its consequent value. In his second witness statement, Mr. Whinney's evidence was that the secondary slag produced by the steelworks on the site "to date has never had a positive resale value".

34. For many years, in spite of its unsuitability for civil engineering road-making applications, secondary slag was nevertheless capable of being used as a low impact foundation material for farm tracks. Mr. Whinney's evidence was that until 2008 farmers would be permitted by the tenant to remove secondary slag from the site at Sheerness for such use on their farms at no charge. It is readily apparent that this arrangement suited everyone: as Mr. Whinney indicated in his evidence, the tenants of the site had no need to arrange long-term storage for the secondary slag because the farmers were willing to take it off their hands for free, and its removal stopped the site from becoming congested.

35. This arrangement meant that although secondary slag was produced at a rate of about 20 tonnes per day at the height of steel production, sufficient quantities were regularly removed so that there was no large-scale accumulation of secondary slag on the premises. I was shown an aerial photograph of the site which Mr. Whinney dated as having been taken between 1977 and 1985 and which showed only a few relatively small heaps of a few hundred tonnes of secondary slag (and some refractory waste) which were weathering and awaiting final screening as described above.

36. This situation changed, however, in about 2008 when there was a tightening up of the waste and environmental regulations governing the use of secondary slag. The precise details of the changes are not material: in practical terms, however, they meant that it was no longer possible to use secondary slag as a foundation material for farm tracks as before, and the result was that secondary slag was no longer taken away from the Sheerness site by farmers. Mr. Whinney's evidence was that this had the consequence that for about 3-4 years until steel production ended in early 2012, secondary slag accumulated at the Sheerness site.

37. I heard some evidence about attempts to deal with this accumulation. Mr. Whinney's evidence was that the previous tenant, Thamesteel Limited, experimented with reheating small quantities of the secondary slag in an attempt to convert it into primary slag, but this proved costly and ineffective and was discontinued. This evidence tallied with that of Mr. Penn, who told me that although secondary slag is capable of being reused in small quantities in a ladle furnace, this is not cost-effective because it increases fuel consumption. Steelmakers are also generally resistant to using secondary slag in this way because it carries an increased risk of damage to the refractory lining of the furnace.

38. The result is that the secondary slagheaps at the site built up between 2008 and 2012 to a substantial size. They are currently estimated to contain about 30,000 tonnes of secondary slag and two of the three heaps also include pieces of refractory waste. The slagheaps have also developed a hard crust through exposure to the elements and the reaction of the lime in the slag with rainwater. This has reduced their porosity to rainwater, with the result that in heavy rain, water now runs off the surface of the slag heaps as well as permeating into them. The slagheaps are sitting on stable ground that is dressed out with primary slag, but this does not provide a waterproof base, and so rainwater which has become alkaline due to contact with the secondary slag will inevitably leach into the ground at the site.

39. There was a difference in opinion between the witnesses as to the likelihood of this causing an environmental hazard or contamination: Mr. Whinney thought that it was unlikely that this would pose an environmental threat, whereas Mr. Penn (who had tested the slag heaps and found them to be highly alkaline) thought that there was an obvious risk of contamination of the ground or watercourses. Neither of the witnesses, however, professed any expertise in environmental matters and both quite properly declined to give any view as to whether there was a particular risk to any watercourses or acquifers.

The cessation of steelmaking at Sheerness and the disputes between the parties

40. As I have indicated, Thamesteel Limited went into administration on 25 January 2012. Two partners in Mazars LLP were appointed as administrators and on 27 January 2012 they announced that steel production had ceased, that the majority of employees were being made redundant, and that only a skeleton staff were being retained.

41. After Thamesteel Limited went into administration, the Claimant commenced proceedings on 15 May 2012 seeking to establish that it was the owner of the plant and machinery on the premises. Thamesteel Limited denied that this was so and

contended that it was entitled to remove a large proportion of the 126 items in question because they consisted of removable tenant's fixtures or chattels.

42. On 7 June 2012 the Defendant acquired the business and assets (including the Lease) from the administrators of Thamesteel Limited and was substituted as the defendant in those proceedings. The Defendant is a newly formed company with a minimal share capital which is part of the same Al-Tuwairqi group of companies based in Saudi Arabia as Thamesteel Limited. It subsequently granted a fixed and floating charge over the entirety of its assets to secure all monies lent to it by Al Tuwairqi Holding Company under a facility agreement dated 26 October 2012.

43. The trial of the claim concerning the removal of plant and machinery from the premises took place in April last year. Morgan J gave judgment on 14 June 2013 ([2013] EWHC 1658 (Ch)) holding that all but one of the items in dispute did indeed constitute tenant's fixtures and that the Defendant was entitled to remove them. Morgan J gave permission to the Claimant to appeal to the Court of Appeal but in a judgment delivered on 1 August 2013 ([2013] EWHC 2689 (Ch)) he refused the Claimant an injunction preventing the Defendant from removing the items from the Site until after the appeal has been heard. Morgan J indicated that whilst some of the evidence before him as to the Defendant's intentions in relation to the steelworks was unclear, it was clear that the Defendant wanted the ability to remove and sell the trade fixtures to pay the rent and outgoings, and it contended that it would be in financial difficulties unless it could do so.

44. The instant proceedings were commenced on 22 June 2012, shortly after the sale of the business and assets to the Defendant. Mr. Seitler QC, who appeared with Mr. Banwell for the Claimant, told me that this claim was prompted by a fear that the Defendant is engaged in what he described as “asset-stripping” the site. Mr. Seitler pointed out that the Defendant is a newly-formed company with minimal share capital and no other business, and he said that the Claimant fears that when the Defendant has completed its removal of all the valuable items from the premises, it will simply abandon the premises and be placed into liquidation owing money to Al Tuwairqi Holding Company as its secured creditor, with little or no prospect of a return to unsecured creditors. Mr. Seitler indicated that this would then leave the piles of secondary slag on the site for the Claimant to deal with - something that will cost a very significant amount of money to do.

45. In that regard, only two solutions were offered in the evidence for dealing with the secondary slagheaps. The most costly option is to pay a specialist processor to take the slag away and to dispose of it at a landfill facility in accordance with Environment Agency regulations. It was estimated that this might cost in the region of £3.5 million.

46. The other alternative mentioned by Mr. Whinney is that a company known as Brett Aggregates has relatively recently developed a means to use secondary slag with cement as part of a base course material for road construction. He told me that a small quantity of secondary slag has recently been removed from the site for that purpose. But that process still does not have the result that the secondary slag has any utility or resale value to the Defendant. The Defendant will be required to pay Brett Aggregates to take the slag away at a cost which Mr. Whinney estimated could amount in total to about £750,000. There are, moreover, practical difficulties:

because the base course material has to be used within three days of manufacture, Brett Aggregates is unwilling to remove any more of the secondary slag than it might need for immediate use at any time. This means that the timescale over which the secondary slag could be removed by this method is wholly uncertain and could span several years at least.

The rival arguments

47. Mr. Seitler's main contention was that secondary slag is "refuse or rubbish" and that the piles of secondary slag fall within the meaning of the expression "refuse dump or rubbish heap" as used in clause 2(16) of the Lease. In support of that submission he suggested that the modern equivalent of the expressions "refuse" or "rubbish" in clause 2(16) is "waste"; that each of these expressions generally connoted an item or items of material of which the owner wishes to dispose because he has no further use for it; and that some assistance in understanding these concepts could be gleaned from the European legislation and jurisprudence in relation to "waste" under the Waste Framework Directive. He submitted that the Defendant has breached the covenant in the Lease by failing to remove the secondary slag from the premises as frequently as is reasonably practicable.

48. As an alternative argument, Mr. Seitler contended that the presence of the slagheaps is contrary to the Defendant's covenant in clause 2(16) to keep all vacant land forming part of the site "clean and in good order". He said that this was so because it was common ground on the evidence that the slagheaps are strongly alkaline and to some extent porous, so that there is a risk of rainwater falling onto them, becoming contaminated and leaching into the ground. He contended that even without evidence from an environmental expert as to the specific risks that this might pose, this meant that it could not be said, even on the balance of probabilities, that the site was free of potentially environmentally harmful materials, with the consequence that the site was not "in good order".

49. At this point I should mention the origins of Mr. Seitler's formulation of this alternative argument. The Claimant's Particulars of Claim did not allege that the slag heaps were an environmental hazard, but in its Defence, the Defendant volunteered a plea that they did not pose any such hazard. The Claimant did not amend its Points of Claim or deal with the matter expressly in its Reply. There matters rested until about two weeks before trial, when the Claimant served a supplemental expert report dated 9 October 2013 from a Mr. Clay who is an environmental expert, seeking to address the differences of view between the other witnesses on the environmental risks.

50. Mr. Reynolds QC, who appeared with Mr. Healey for the Defendant, objected to the late introduction of that evidence and in the end Mr. Seitler indicated that he did not seek to amend his pleaded case or call Mr. Clay to give evidence.

51. On the main issues, Mr. Reynolds disputed that there was any breach of covenant. He contended that the terms of clause 2(16) fall to be construed as they would have been understood at the time of grant of the Lease in 1971 and he objected to Mr. Seitler's submission that the words in the Lease should be construed by reference to the modern concept of "waste". He submitted that the prohibition under clause 2(16)

refers only to heaps or dumps of what he called "*bona fide* rubbish" – which he suggested was a concept exemplified by the reference to "all used tin cans boxes and containers whatsoever" in the second part of clause 2(16). Mr. Reynolds also submitted that as the Lease gave operational control of the steelmaking process on the site to the tenant, the parties to the Lease must have intended such control by the tenant to include dealing with the secondary slag which would naturally be created as a by-product of that process. He said that in accordance with industry standard practice in 1971 it would have been understood that such secondary slag would be stored in heaps in the open air prior to being recycled or reused within or outside the steelmaking process, and that such heaps could therefore not have been intended to fall within the prohibition on the formation of refuse dumps or rubbish heaps under clause 2(16).

52. As to Mr. Seitler's alternative argument, Mr. Reynolds denied that the requirement that the vacant land be kept "clean and in good order" was meant to deal with environmental concerns. He said that this provision is concerned with the general tidiness of those parts of the site which have not been built upon and which are not used in the steelmaking process; that Mr. Seitler's formulation illegitimately seeks to place the burden of disproving a breach of covenant upon the tenant; and that there was in any event no pleaded case and no clear evidence that the presence of the slagheaps on the site is an environmental hazard.

Analysis

53. Both parties referred to the well-known principles on interpretation of contracts exemplified by decisions such as ICS v West Bromwich BS [1998] 1 WLR 896, Sirius International Insurance v FAI General Insurance [2004] 1 WLR 3251, Chartbrook v Persimmon [2009] 1 AC 1101 and Rainy Sky v Kookmin Bank [2011] 1 WLR 2900. I shall not lengthen this judgment by referring to them in any detail. They indicate that the task of the court in construing a written contract such as the Lease is to ascertain objectively the meaning that the document in question would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

"Refuse" and "rubbish"

54. A conventional starting point is to consider the ordinary and natural meaning of the crucial words "refuse" and "rubbish" as used in clause 2(16) of the Lease. Without attempting a comprehensive or dictionary definition, I agree with Mr. Seitler's submission that in ordinary usage both of those words denote an item or substance which their owner intends to discard, usually because he has no further use for it. As a matter of simple linguistics, the secondary slag which cannot be put to practical reuse in steelmaking on the site or resold for profit could be regarded as "refuse" or "rubbish" on this basis.

55. Those observations as to the ordinary and natural meaning of the words used are, however, only a starting point. As is apparent from the authorities on contractual

interpretation to which I have referred, the meaning of a contractual provision does not depend not upon a semantic analysis of words in isolation. Rather, the meaning of clause 2(16) must be ascertained from the words and expressions used, set in the context of the Lease as a whole, in light of the admissible background, and having regard to the apparent commercial purpose of the clause.

56. One important and obvious part of the context in this case is that the Lease envisaged (but did not require) that steelmaking operations would be carried out by the tenant in a steelworks to be constructed on the site. Another is that although the Lease was granted for 125 years, that did not mean that the lessors had no interest in what was done on the site during the term, but was only concerned in the condition in which the site might be yielded up at the end of the term. Instead, the Lease contains a variety of covenants in favour of the lessors which I have referred to above and which are designed to ensure that activities on the site are conducted in compliance with certain requirements and that the premises will be kept in specified condition at all times throughout the term. The obvious inference is that these provisions are, among other things, designed to protect the interests of the lessors in case they might wish to sell the reversion, or if they were to forfeit the Lease and re-enter the premises with a view to re-letting the premises following a default by the tenant.

57. Clause 2(16) is one such covenant. Specifically, it seems designed to ensure that if the lessors were to re-enter the site following a default by the tenant, they should not be faced with the presence on site of items or materials that no-one would want, so that either the lessors would be forced to spend money clearing the site so that it could be re-let, or be forced to accept a reduced rent from a new tenant because the new tenant would itself have to expend monies clearing the site.

58. Examples of the type of items that were contemplated might need to be dealt with if not removed from the site are included in the express reference in clause 2(16) to "all used tins cans boxes and other containers whatsoever". I think that it must have been intended that this obligation only applies to such items when they have been emptied of whatever substance or items they once contained, or at least when such substances or items are no longer intended to be used in any steelmaking activities on site. But I do not think that clause 2(16) is limited to such items, not least because the words "all refuse and rubbish which may have accumulated on the said premises" precede and are separated from the list of "all used tins cans boxes and containers whatsoever" by the disjunctive word "and".

59. I also consider that the words "all refuse and rubbish which may have accumulated on the said premises" should not be read restrictively so as to be limited to items similar to tins, cans, boxes and containers ("*bona fide*" rubbish) as Mr. Reynolds suggested. In part that is because of the structure of clause 2(16). The requirement not to form refuse dumps or rubbish heaps and to remove refuse and rubbish from the site appears first in the order of clause 2(16) and appears to be the primary focus of the clause; that would be odd if the identified items listed in the subsequent part of the clause were actually the main focus of the clause. Moreover, the task of capturing items similar to the listed items is achieved by the addition of the word "whatsoever" at the end of the list rather than by reading the first part of the clause restrictively. If it had been intended to limit the meaning of "refuse" and "rubbish" to items similar to those listed, that could more naturally have been done by reversing the order of the clause

so as to require removal of "all used tins cans boxes containers and other similar refuse or rubbish".

60. A wider interpretation of the words "refuse" or "rubbish" also makes better sense given the purposes of clause 2(16) of the Lease. It must be borne in mind that site was intended to be used as a steelworks – a place of heavy industry rather than a piece of land to be enjoyed for its aesthetic beauty or for leisure pursuits. Whilst removing items such as general litter or all used tins, cans, boxes and containers left behind by a defaulting tenant might be tiresome and require expenditure of some money and effort, it would be surprising if that was all that the parties (and in particular the lessors) had sought to achieve by clause 2(16). In the context of an industrial site, the lessors would have a more obvious concern if there was a significant build-up on site of unwanted raw materials or industrial residues and by-products. It would be obvious that the presence of such substances would cause far greater obstruction and inconvenience than litter or containers, and would cost significantly more to deal with if the Lease was to be forfeited.

61. For several reasons I also do not accept Mr. Reynolds' submission that because secondary slag was a by-product of the steelmaking process, in 1971 the parties would have been content that the tenant should be free to deal with it in the course of its business, including by simply accumulating such material on site during the term of the Lease or until its own need for space dictated otherwise.

62. First, I cannot find any basis in the language in clause 2(16) of the Lease or reason from the surrounding facts which indicates that the parties might have been concerned to draw fine distinctions between particular types of unwanted or unusable items or materials on site, either as regards their specific physical nature or their provenance - e.g. depending upon whether they were still in the same or a similar condition as when brought on site, or whether they had been generated by the activities carried out on the site.

63. To take one example, if the tenant bought onto site a large quantity of bagged lime, which was then accidentally contaminated or otherwise spoilt so as to be rendered unusable in the steelmaking process, I would have no doubt that clause 2(16) would require the tenant to remove it from the site rather than simply leaving it in a heap indefinitely. The unusable lime would rightly be characterised as "refuse or rubbish" and would be required to be removed as soon as reasonably practicable. I see no reason why the parties to the Lease would not have intended that significant quantities of unwanted residues and by-products generated by the steelmaking and still containing similar chemicals should be characterised as "refuse" or "rubbish" in the same way.

64. Secondly, I do not think that Mr. Reynolds' submission that the parties would have envisaged that secondary slag would be reused or recycled in the steelmaking process is supported by the evidence. As I have indicated, the evidence did not suggest that secondary slag has ever been routinely recycled or reused in the steelmaking process. Nor was it suggested that secondary slag has ever had any resale value which would induce steelmakers to deal with it in the ordinary course of their business. Rather, the evidence was that the reuse of secondary slag in ladle furnaces is not regarded as satisfactory or efficient because of the risk of damage to the furnace and the increased energy requirements that such reuse would entail; and I infer that if modern

technology does not enable secondary slag to be reused in this way, the older technology available in 1971 would not have done so. Further, as I have indicated, Mr. Whinney's evidence was that, in contrast to primary slag which can be sold for profit, the secondary slag generated on the site has never had a resale value.

65. It therefore seems to me that secondary slag would have been regarded by the parties in 1971 as material which fell naturally into the regime in clause 2(16) of the Lease. As I see it, the Lease envisaged that the presence on site of small piles of secondary slag for a limited period whilst it weathered and stabilised would not infringe the covenant against the formation of dumps or heaps of such material; but that thereafter it would not be permissible for there to be an accumulation of such material on site. Instead the tenant was obliged to make arrangements for the slag to be removed "as frequently as is reasonably practicable".

66. That interpretation is also consistent with the opening words of clause 2(16) - "Except under the provisions of Clause 2(10) hereof". That indicates that it was thought that there was some activity permitted under clause 2(10) that, absent the exception, might have been thought to fall within the prohibition in clause 2(16). As set out above, by clause 2(10) the tenant covenanted not to "discharge solid matter" from the premises into the drains or into the Moat, and clause 2(10) also contained a proviso which, subject to provision of a water-tight wall, permitted the tenant to drain and fill the Moat with "suitable solid matter".

67. The use of the word "discharge" in clause 2(10) is of some significance, because one obvious sense in which it can be used is to connote the expulsion of a substance in the course of a process or operation; and the expression "discharge of solid matter" is not one that would most immediately be associated with the throwing away of empty tins and cans into a drain. I also do not think that it could reasonably be understood that the parties to the Lease contemplated that the Moat would be filled entirely by empty tins, cans, boxes and containers.

68. Instead, I think that Mr. Seitler must be right that the most obvious "solid matter" that it could be foreseen might be "discharged" from the premises would be solid residues and by-products generated by the steelmaking process itself; and that the proviso to clause 2(10) of the Lease envisaged that such material could, with appropriate safeguards, be used to fill the Moat.

69. I do not, however, accept Mr. Seitler's argument that this necessarily proves that secondary slag must be within the concept of "refuse" and "rubbish" in clause 2(16). Notwithstanding the oddity of the use of the word "discharge" or the description "solid matter" being applied to empty containers, it is at least possible that the opening words of clause 2(16) could have been inserted simply to permit the containers that are expressly mentioned in clause 2(16) being thrown into the Moat. But Mr. Seitler must be right that it is more likely that the proviso in clause 2(10) and the opening words of clause 2(16) of the Lease were intended to relate to the solid residues and by-products from the steelmaking process.

70. I should also deal finally with Mr. Seitler's argument that I could derive assistance in construing the Lease from modern jurisprudence on "waste"; and with Mr. Reynolds' counter-argument that I should construe the Lease as at the date it was entered into and by reference to the then meaning and purpose of the words used.

71. The principle that a contract is to be interpreted as at the date upon which it is made, and that words must be given the meaning that they bore at that date, is merely a presumption. It is capable of being rebutted; and the presumption is most likely to be rebutted in cases of long-term contracts. In such a case, the court will be faced with a choice between adopting a "static" meaning of the words in the contract which could not change over time; or a "mobile" meaning of the words which could change with time: see generally see *Sir Kim Lewison, The Interpretation of Contracts* (5th ed.) at para 5.15.

72. This is a case involving a long lease of 125 years. It seems to me that it might be entirely appropriate to adopt a "mobile" meaning of the words used in covenants that were intended to apply to industrial processes to be carried out on the premises and which could reasonably have been anticipated would be the subject of technological development and change over the term of the Lease.

73. The adoption of a "mobile" interpretation does not, however, mean that the court is entitled to change the scope of the contract. The approach of the court was explained by Mance LJ (as he then was) in Debenhams Retail plc v Sun Alliance and London Assurance Company Limited [2006] 1 P&CR 123. That case concerned the interpretation of a provision in a lease made in 1965 that the amount of rent was to be calculated by reference to the tenant's "turnover" which was defined to mean the gross amount of the total sales less certain specified amounts. The issue was whether this required VAT on items sold to be included in circumstances where VAT had only been introduced in 1973. Mance LJ said,

> "To speak even of objective intention in such circumstances involves some artificiality. Even if we were judicial archaeologists, we would find in the wording of the lease negotiated in 1965 no actual or buried intention regarding VAT, since it was introduced in April 1973, and the regime in force in 1965 was the different purchase tax regime. But no-one suggests that the lease cannot or should not apply in the changed circumstances. We have to promote the purposes and values which are expressed or implicit in its wording, and to reach an interpretation which applies the lease wording to the changed circumstances in the manner most consistent with them."
>
> (emphasis added)

74. Lord Mance JSC returned to this theme in the recent Scottish case of Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc [2013] 1 WLR 366. The case concerned the meaning of a deed executed in 1997 in light of an unforeseen change in accounting standards which had occurred in 2005. Lord Mance JSC indicated that,

> "…the question is how [the language of the deed] best operates in the fundamentally changed and entirely unforeseen circumstances in the light of the parties' original intentions and purposes."

75. To those authorities I would add a reference to the dictum of Chadwick LJ in Bromarin v IMD Investments Limited [1999] STC 301 (a dictum also referred to with apparent approval by Lord Mance JSC in Lloyds TSB Foundation):

> "…it is commonplace that problems of construction, in relation to commercial contracts, do arise where the circumstances which actually arise are not circumstances which the parties foresaw at the time when they made the agreement. If the parties have foreseen the circumstances which actually arise, they will normally, if properly advised, have included some provision which caters for them. What that provision may be will be a matter of negotiation in the light of an appreciation of the circumstances for which provision has to be made.
>
> It is not, to my mind, an appropriate approach to construction to hold that, where the parties contemplated event "A", and they did not contemplate event "B", their agreement must be taken as applying only in event "A" and cannot apply in event "B". The task of the court is to decide, in the light of the agreement that the parties made, what they must have been taken to have intended in relation to the event, event "B", which they did not contemplate. That is, of course, an artificial exercise, because it requires there to be attributed to the parties an intention which they did not have (as a matter of fact) because they did not appreciate the problem which needed to be addressed. But it is an exercise which the courts have been willing to undertake for as long as commercial contracts have come before them for construction. It is an exercise which requires the court to look at the whole agreement which the parties made, the words which they used and the circumstances in which they used them; and to ask what should reasonable parties be taken to have intended by the use of those words in that agreement, made in those circumstances, in relation to this event which they did not in fact foresee."

76. In the instant case, as I have endeavoured to explain above, I consider that the intention and purpose of clause 2(16) has at all times been to ensure that the site should be kept free from the accumulation of material or items for which the tenant has no use, and which would require the expenditure of money by the lessors or an incoming tenant if they were not removed. The Lease placed the responsibility for regular removal of such material or items upon the tenant. The factual situation that has arisen that may not have been foreseen in 1971 is that because of regulatory change, the tenant of the site no longer has a convenient means of procuring the free removal from the site of secondary slag, and no other practical or economically viable use can be found for it. But however it has come about, the resultant accumulation of such unwanted material on site in my view falls squarely within the original purpose and intention manifested by clause 2(16).

77. It is therefore unnecessary, and indeed I think it would be inappropriate, to construe the Lease by reference to the more modern concept of "waste" in European and domestic jurisprudence and legislation. "Waste" was a word in common use in 1971 but was not a term used by the parties in the Lease. Moreover, whilst the words "refuse" and "rubbish" will almost invariably fall within the more generic concept of "waste", it seems to me that the words "refuse" and "rubbish" are not necessarily co-extensive with "waste". It might, for example, be said that as a matter of language, industrial effluent was "waste" but would not usually be described as "refuse" or "rubbish".

78. Further, although "waste" might now have become the term of choice in certain contexts, I do not think that the parties to the Lease should be attributed either with foresight of the extremely complex regulatory regime that now exists, or with any intention to define their mutual rights and obligations under the Lease by reference to that future regime. That would, in my judgment, risk enlarging the scope of the contract in a manner which the authorities to which I have referred above would regard as impermissible.

79. Nevertheless, for the reasons that I have given, I consider that the Claimant is correct and that secondary slag falls within the scope of the covenant in clause 2(16) of the Lease. Subject to any arguments about waiver or acquiescence, it would seem to follow that the previous tenant and the Defendant were and are in breach of clause 2(16) of the Lease in not having taken any steps to remove the secondary slag from the site on a regular basis, but having formed or permitted the formation of the substantial slagheaps that now exist.

"Clean and in good order"

80. The conclusion that I have reached on the meaning of the first part of clause 2(16) of the Lease is sufficient to dispose of the case on interpretation in favour of the Claimant. But since there was full argument, I should also deal with Mr. Seitler's alternative argument based upon the covenant "generally to keep all vacant land forming part of the said premises clean and in good order" and his contention that the Defendant is in breach of this covenant because it cannot demonstrate that there is no environmental risk from the slagheaps.

81. I can state my conclusions briefly: I do not consider that this part of clause 2(16) is intended to deal with environmental hazards, or that the Claimant (on whom the burden lies) has established on the evidence that the slagheaps present such a hazard.

82. The limited purpose of this part of clause 2(16) can be deduced in part from an examination of the remainder of the Lease. In 1971 there had been for some time a number of environmental laws governing the operation of a business such as steelmaking. Though the specific restrictions were relatively few in number and complexity when contrasted with the present-day legislative and regulatory framework, the parties were mindful of the need to make provision for compliance with environmental concerns, and did so expressly in a number of other provisions of the Lease. I have mentioned clauses 2(8) and (9) by which the tenant was required to take steps to ensure that the operation of the steel works and rolling mill complied

with the Clean Air Act 1956 and to ensure that any effluent discharged in to the drains or sewers would not be corrosive or harmful to the drains or sewers; clause 2(10) which prohibited the discharge of poisonous or noxious fluids; and clause 2(15) by which the tenant agreed not to carry on any noisome, hazardous, dangerous or offensive trade or business on the premises. Against that background it would be surprising if the very short requirement to keep parts of the premises "clean and in good order" was intended to impose far-reaching environmental obligations.

83. The interpretation for which Mr. Seitler contends is also not in accordance with the ordinary meaning of the words of the Lease. An obligation to keep all vacant land "clean and in good order" most naturally suggests an obligation to keep the land free from dirt and in a tidy state. I think Mr. Reynolds was right to describe this covenant as being concerned with the appearance of the site.

84. Finally, and perhaps most importantly, I note that the obligation only extends to keeping "all vacant land forming part of the premises clean and in good order". If this clause was really meant to deal with environmental hazards, I can see no rhyme or reason why the covenant was restricted to "vacant land": there would be no reason why a covenant against the creation of environmental hazards should not apply to all of the site. Indeed one might have thought that it would be more obviously necessary and important to ensure that the covenant extended to those buildings in which the potentially hazardous steelmaking process was actually carried out.

85. I also accept Mr. Reynolds' point that Mr. Seitler's formulation of the Claimant's case wrongly placed the burden upon the tenant to prove a negative – that there were no environmental hazards on the land – when it must be for the landlord asserting a breach of covenant to prove it.

86. Finally, whilst I tend to the view that Mr. Penn's evidence about the potential for contamination of the ground beneath the slagheaps by an alkaline solution caused by rainwater permeating through or running off the heaps was more likely to be accurate than Mr. Whinney's evidence that there was no real risk of contamination, as I have indicated, neither of them had conducted any detailed tests, neither of them had studied the composition of the ground or watercourses in any detail, and neither of them professed themselves to be an environmental expert. I do not think that it would be right to place any weight on such evidence, and I therefore do not find it proven that the slagheaps present an environmental risk.

Conclusion

87. In the result, I find that the secondary slag now to be found in the heaps on the site falls within the scope of the covenant in clause 2(16) of the Lease. I will make an appropriate declaration to that effect, together with any consequential declarations as to breach of covenant as may be appropriate. I will also give any necessary directions to enable there to be an effective further hearing to consider the appropriate relief or remedy to be granted in light of such declarations. I would ask counsel to endeavour to agree a suitable order to reflect this judgment.