Neutral Citation Number: [2021] EWHC 1135 (Ch)

Case No: BL-2019-CDF-000002

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS IN WALES**
**BUSINESS LIST (ChD)**

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 4 May 2021

**Before**:

**HIS HONOUR JUDGE KEYSER QC**
**sitting as a Judge of the High Court**

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**Between:**

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| **MDW HOLDINGS LIMITED** | **Claimant** |
| **- and -** | |
| **(1) JAMES ROBERT NORVILL** | |
| **(2) JANE ROSEMARY NORVILL** | |
| **(3) STEPHEN JOHN NORVILL** | **Defendants** |

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**Andrew Ayres QC and Laurie Scher** (instructed by **Morgan LaRoche Ltd**) for the **Claimant**
**Hugh Sims QC and Jay Jagasia** (instructed by **Blake Morgan LLP**) for the **Defendants**

Hearing dates: 18, 19, 20, 21, 22, 25, 26, 28, 29 January 2021

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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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HIS HONOUR JUDGE KEYSER QC

**Covid-19 Protocol**: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 a.m. on Tuesday 4 May 2021.

## JUDGE KEYSER QC:

1. By a share purchase agreement dated 14 October 2015 (the "SPA"), the claimant, MDW Holdings Limited ("MDW"), purchased the entire share capital of G.D. Environmental Services Limited ("GDE") from the three defendants for £3,584,224. Completion of the purchase took place on the date of the SPA. For convenience, I shall refer to the three defendants respectively as James, Jane and Stephen. Jane and Stephen are James's parents.

2. In these proceedings, MDW alleges that GDE had been systematically breaching environmental law and unlawfully avoiding the costs of environmental compliance, thereby increasing its profits to levels that would not have been achieved if it had acted lawfully; and that, in consequence, MDW paid substantially more for the shares in GDE than they were worth. It claims against the defendants damages for breach of warranty, for misrepresentation and, against James alone, for deceit.

3. The trial was conducted over nine days by Cloud Video Platform. I am grateful to counsel (Mr Andrew Ayres QC and Mr Laurie Scher for the claimant, and Mr Hugh Sims QC and Mr Jay Jagasia for the defendants) for their assistance throughout and for their detailed written and oral submissions, and to the solicitors for all parties, who facilitated the use of large amounts of documents through well-prepared electronic and paper bundles.

4. This judgment will not contain a list of the persons who gave evidence at the trial or general remarks about my assessment of individual witnesses. Findings will appear in what follows. However, it is convenient at the outset to address a submission by Mr Ayres that adverse findings ought to be made against the defendants by reason of the failure of certain persons to give evidence: Jane and Stephen, the second and third defendants; two people (Frank Holmes and Andrew Charter) who worked for the selling agent that acted for the defendants in the sale of their shares and were closely involved in the pre-sale process; and John Allison, a solicitor and friend of James who advised him in the period leading to the SPA. I reject Mr Ayres's submission. As for Jane and Stephen, the fact that they are defendants or that Stephen was managing director of GDE at one stage and had some practical involvement in the business even thereafter does not mean that they had necessary or useful evidence to give, far less that I could properly infer that the reason why they did not give evidence is indicative of anything adverse to the defendants' case. Likewise, as for Mr Holmes, Mr Charter and Mr Allison, it seems to me to be entirely likely that the reason they were not adduced as witnesses is that the pleaded issues in the case did not provide any good reason for adducing them. Even if judgments on that point might differ, the case is by no means so clear as to justify drawing adverse inferences.

5. The rest of this judgment will be structured as follows.

A. Introduction and Background: paragraphs 6 – 16;

B. Regulatory Framework: paragraphs 17 – 26;

C. Narrative: paragraphs 27 – 126;

D. Expert Evidence: paragraphs 127 – 144;

E. Core Allegations of Non-Compliance: paragraphs 145 – 192;

F. The Share Purchase Agreement: paragraphs 193 – 205;

G. MDW's Pleaded Case—a Summary: paragraphs 206 – 208;

H. Liability: Breach of Warranty: paragraphs 209 – 243;

I. Liability: Misrepresentation: paragraphs 244 – 276;

J. Liability: Summary: paragraphs 277 – 279;

K. Quantum of Damages: paragraphs 280 – 294.

## A. Introduction and Background

6. In 1979 Stephen began to carry on a drain-clearing business in the name Gwent Drains. The business was carried on at premises ("the Site") at Felnex Industrial Estate, Newport. James began to work in the business in 2001.

7. In 2003 GDE was incorporated for the purpose of acquiring the business of Gwent Drains. James, Jane and Stephen were the members and directors of GDE; James held 51% of the shares, Jane 24% and Stephen 25%. The business was run for the most part by James and by Stephen, who was the managing director. In 2009 there was a falling out within the family; Stephen resigned as a director and James became the managing director, a post which he held until 2013, when he became Chief Executive Officer.

8. GDE's business grew significantly in the decade after its incorporation. In 2014 it acquired a company called Skip Solutions Limited, which operated from premises in Llanelli. References in the SPA to "the Subsidiary" are to Skip Solutions Limited but are of no importance for present purposes. The issues in these proceedings relate only to the business carried on at the Site, and I need say nothing about the operations in Llanelli.

9. The Site is in two parts. Unit 11 deals only with dry waste: this is the "Dry Side" (also referred to as the Waste Transfer Station). Units 18 and 19 deal only with wet waste; this is the "Wet Side". Although the entirety of the Site is on the same industrial estate, the Dry Side and the Wet Side are on different sides of a public highway, by which alone access may be gained from one to the other.

10. The Dry Side deals with an assortment of non-hazardous dry waste, which is typically brought to the Site in skips. The dry waste is weighed, sorted into its various kinds (for example: ferrous metals, wood, plastic, paper, fines from construction waste, hardcore), and disposed of. The gross profit to GDE from these operations consists mostly of the difference between the income generated by the removal of the dry waste from customers and the costs of collecting and disposing of the dry waste; though some of the dry waste itself generates revenue for GDE.

11. However, this case mainly concerns the Wet Side and wet waste. As at the date of the SPA, GDE dealt with broadly four kinds of wet waste, all of which were generally collected in its own tankers:

    a) Cess waste;

    b) Non-hazardous waste, such as gulley waste;

    c) Hazardous waste, such as waste from garage forecourts or interceptor tanks, which might contain oils or other contaminants;

    d) Leachate, which is the ammonia-rich liquid run-off from landfill sites.

12. Cess waste collected by GDE's own tankers from domestic or commercial tanks was not treated at the Site; GDE did not have active facilities for treatment of cess waste there and was not permitted to discharge cess waste from the Site into the public sewer. Instead it was taken by the tankers to the sewage treatment works operated by Dŵr Cymru Welsh Water ("DCWW" or "WW"), usually the works at Nash, Newport, where it would be processed. GDE's gross profit was the difference between (a) the amount it was paid to collect the waste and (b) the sum of the transport costs it incurred and the amount it paid to DCWW to discharge the waste. One of the issues in the case concerns the extent to which GDE avoided the latter cost by the improper practice of discharging cess waste directly into the public sewer via an inspection chamber on the Wet Side of the Site known as "the magic hole". GDE accepts that this was common practice from the 1980s onwards, but it says that the practice had been stopped between five and ten years before the sale of the shares in 2015. MDW's case is that the practice continued until 2015, ceasing only in the months leading up to the sale of the shares, and that GDE's financial records disclosed to MDW before purchase of the shares reflected the artificial increase in profits resulting from the improper practice.

13. The other three categories of wet waste were brought to the Wet Side in GDE's tankers and were processed there. At the material time, the treatment of leachate was a separate process from that used for other hazardous waste and non-hazardous waste; I shall consider the latter process first and for that purpose give a rudimentary description of some of the plant on the Wet Side.

14. A little after entering the Wet Side, one comes to the reception pit, which is a large pit sunk into the ground and covered at ground level by a metal grill. Non-hazardous liquids are discharged from the tankers into the reception pit, as is the "wash-out" from the tankers after they have discharged their loads, whether those loads be hazardous or non-hazardous. (There were occasions when hazardous waste would be put into the reception pit, but I do not think that was the normal practice.) Any solid materials, such as stones or aggregate or other debris, will either be caught on the grill or settle at the bottom and will in due course be taken away in skips to the Dry Side and there disposed of with other dry waste. The next relevant plant at the Wet Side is Tank A, which is sometimes referred to as the "primary settlement tank". It is a large cylindrical tank, with a capacity of 8000 gallons, lying on its side and surrounded by a low waterproof wall or bund that gives protection against catastrophic leaks. The liquid from the reception pit is pumped into Tank A. But Tank A also receives, directly from the tankers, liquid that is hazardous or potentially hazardous. Over time,

the contents of Tank A will separate: oil floats at the top; any solids sink to the bottom; the dirty water sits in the middle. The oil at the top is syphoned off and sent for processing elsewhere. The water in the middle is pumped into, Tank B, the "secondary settlement tank", which is smaller than Tank A (its capacity is 3500 gallons) but essentially similar. The separation process is repeated in Tank B, though most of the suspended oils and solids will already have been removed in Tank A. The dirty water from Tank B is pumped into a tilted plate separator, referred to as Tank H, which is the final stage in the process of separating the oil from the water. From Tank H the dirty water discharges into an underground drain through a flow meter, which ensures that the discharge from the Site does not exceed its volume limit or its flow-rate limit. The underground drain discharges directly into the public sewer, which lies just beyond the curtilage of the Site. Close to the boundary fence at Unit 18, shortly before the point of discharge into the public sewer, is an inspection hatch over an inspection chamber. This inspection chamber is the so-called magic hole, already mentioned in connection with cess waste. It is at the inspection chamber that samples of discharge are taken by GDE for its own internal records and by the regulators to ensure compliance with consents and permits.

15. In this case, the issue to which the process I have described gives rise concerns so-called tank bottom waste, which comprises the solids that settle at the bottom of Tank A and, to a lesser extent, Tank B. These so-called solids take two different forms. (1) At the very bottom of the tank there will build up over time a hard deposit, referred to sometimes as hard solids. This is material that can be and sometimes is broken up with shovels or picks. It is common ground that GDE used to extract the hard solids from the bottom of the separator tanks and take them to the Dry Side for disposal as dry waste. The defendants say, and MDW denies, that this was justified, because the hazardous materials in the separator tanks, in particular oils, had been separated off and the hard solids were therefore non-hazardous. (2) Sitting above the hard solids was a layer of sludge comprising suspended solids, which contained hazardous or potentially hazardous materials. Before the SPA, at least some of this sludge was sent to third parties such as Tradebe and Augean, who provided services for the treatment and disposal of hazardous waste. The defendants say that all of the sludge was disposed of in that way. But MDW says that GDE had been systematically avoiding the costs of disposal to third parties by taking the greater part of the sludge to the Dry Side, mixing it there with dry waste and disposing of it as dry waste. MDW says that such tank bottom sludge as was sent to third parties was used as a fig leaf to conceal the unlawful manner in which most of the sludge was being disposed of.

16. Finally, there is leachate. Before 2014 the leachate was processed simply by being passed through the separator tanks in order to remove any oil. However, in late 2012 GDE won a contract for the processing of large quantities of leachate and found it necessary to improve its plant and processes. Accordingly, new plant was designed, installed and commissioned by Hydroventuri Limited. This combined two processes: first, an aerator forced air into the liquid and increased the rate of chemical reaction; second, by a biological process active bacteria neutralised the ammonia in the leachate. (There is an issue as to whether the plant was designed to address at all contaminants other than ammonia, in particular metals. GDE understood that the aerator assisted in the breaking down of metals. However, I accept the evidence of a former employee of Hydroventuri that was not part of the aerator's function. It is probable, in my view, that the chief effect of the plant on the metal content of the

leachate was by a process of dilution.) After completion of the treatment process, the leachate was discharged into the same underground drain as the other wet waste, via the same flow meter, and thence into the public sewer just beyond the inspection chamber known as the magic hole. Again, samples for testing were taken at the inspection chamber both by GDE and by the regulators.

## B. The Regulatory Framework

17. The management and disposal of waste is highly regulated, and the operation of a waste management business such as GDE's is dependent on consents and permits from environmental regulators. GDE's primary regulator was Natural Resources Wales ("NRW") (before April 2013, the Environment Agency), which was the regulator of the waste industry. GDE was also subject to regulation by DCWW as the relevant sewerage undertaker. In their written submissions, Mr Ayres and Mr Scher provided a detailed and helpful survey of the applicable environmental law, which was not controversial, together with a shorter summary. I do not think it necessary in this judgment to do more than summarise a few of the main points.

18. The business carried on by GDE at the Site was a "regulated facility" within the terms of regulation 8 of the Environmental Permitting (England and Wales) Regulations 2010 ("the 2010 Regulations"), which until 2017 were the applicable regulations. The effect of regulation 12 of the 2010 Regulations was that GDE was prohibited from operating that regulated facility except under and to the extent authorised by an environmental permit. An environmental permit might be granted subject to such conditions as the regulator saw fit: paragraph 12 of Schedule 5 to the 2010 Regulations. The effect of regulation 38 was that contravention of the prohibition in regulation 12 was a criminal offence, as was failure to comply with a condition in an environmental permit.

19. GDE's environmental permit ("the Permit") was no. XP3833UB, which was originally granted by the Environment Agency in January 2008 and was varied and consolidated several times thereafter. For present purposes, the latest relevant iteration of the Permit was the varied and consolidated permit issued on 3 July 2012. Among the many provisions of the Permit were the following:

- Condition 2.1 provided that GDE was only authorised to carry out activities identified in schedule 1. The list of activities covered all of the operations carried on at the Site.

- Condition 2.3 provided that those authorised activities were to be operated using the techniques and in the manner described in documentation identified in schedule 1, unless otherwise agreed. Schedule 1 required compliance with a number of Improvement Conditions (ICs), including in particular IC13, IC14 and IC15.

    - IC13 required GDE to undertake a written evaluation of the effectiveness of the current treatment processes for hazardous materials at the Site, to submit the evaluation for approval, and to

implement any approved proposals for changes or improvements to the processes. I shall refer to the approved evaluation below.

- IC14 required GDE to submit for approval a waste pre-acceptance and acceptance procedure, in accordance with the requirements of the applicable sector guidance notes, and to implement the procedure when it was approved.

- IC15 required GDE to submit for approval a written proposal for the full characterisation and monitoring of the discharge to the sewer from the Site.

- Condition 2.3.3 required GDE to ensure that, when waste produced by the activities on the Site was sent to a relevant waste operation, the waste operation was provided with information concerning, among other things, the composition of the waste, any hazardous property associated with the waste, and the waste code of the waste.

- Condition 2.4.1 provided that, subject to a number of exceptions of no present relevance, hazardous waste should not be mixed either with a different category of hazardous waste or with other waste, substances or materials. (This condition reflects a prohibition in regulation 19 of the Hazardous Waste (Wales) Regulations 2005.)

- Conditions 3.3.1 and 3.3.2 obliged GDE to maintain records of continuous monitoring of discharges to the sewer from the Site.

20. The written evaluation required by condition 2.3 of the Permit and by IC13 is a document entitled "Evaluation of Treatment Processes", which GDE submitted in May 2013 and which was approved by the Environment Agency. The document identifies processes in a table with three columns: first, the waste type; second, the current arrangements for that waste; third, a comment on whether the current arrangements are in accordance with the Best Available Techniques (BAT) for Waste Treatment Reference Document. For present purposes, two rows of the table are material. The first relevant row identified two waste types by reference to the six-digit waste classification codes in the legal classification system known as List of Waste (or European Waste Catalogue): "13 05 06* - oil from oil/water separators" and "13 05 07* - oily water from oil/water separators". The second relevant row identified two further waste types: "13 07 01* - fuel oil and diesel" and "13 07 03* - other fuels (including mixtures)". The asterisk in each case highlights that each waste type is automatically considered to be hazardous waste. In respect of both pairs of waste types, the current arrangements, which were said to be in accordance with Best Available Techniques, were described in materially identical terms, which will be familiar from the description given above:

> "Waste is discharged into the primary settlement tank. Then passed through the secondary settlement screened tank. The waste then passes through to the tilt plate separator.
>
> The oil residue settles at the top of the separator tank. The oil is skimmed off the top piped into the oil storage tank.

> The oil is subsequently transported to other facilities for re-refining or blending.
>
> The treated water from the primary tank is discharged via to sewer (sic) after it has passed through a flow meter and three staged interceptor.
>
> The liquid sludge from the primary settlement tank is taken off site to a suitably authorised facility for disposal."

21. The concluding sentence in the description of the process is the locus of a factual issue as to GDE's practices concerning so-called tank bottom waste, because it is this "liquid sludge" that MDW asserts was generally not sent to a suitably authorised facility for disposal but rather mixed with dry waste and, after it had dried out, disposed of as dry waste. Such a practice (which the Norvills deny occurred) would have been a breach of the conditions of the Permit. It would also have put GDE in breach of section 33 of the Environmental Protection Act 1990 (which prohibited it from depositing controlled waste in or on any land, or knowingly causing or permitting controlled waste to be deposited in or on any land, other than in accordance with a permit) and section 34 of that Act (which obliged GDE to take all reasonable steps to prevent the unauthorised or harmful deposit, treatment or disposal of waste).

22. In order to monitor compliance with permits, GDE and all waste disposal companies were subject to periodic assessments by NRW, which resulted in Compliance Assessment Reports that were placed on a public register. The results of the assessment would be reflected in the banding allocated to the operator, ranging from Band A to Band E. The banding dictated the percentage of the annual compliance monitoring charge that the operator would be required to pay: an operator in Band A would receive a 5% discount and so would pay only 95% of the annual charge; at the other end of the scale, an operator in Band E would be required to pay 300%.

23. As I have said, GDE was also regulated by DCWW. By reason of section 118 of the Water Industry Act 1991, GDE, as the occupier of trade premises (namely, the Site) in the area of DCWW as sewerage undertaker, was permitted to discharge trade effluent from the Site into DCWW's public sewers only with DCWW's consent; if it discharged trade effluent from the Site into the public sewers without such consent, it was guilty of an offence. By reason of section 121 of the Water Industry Act 1991, DCWW was empowered to impose conditions on a consent to the discharge of trade effluent into its public sewers. Contravention of any such condition constituted a criminal offence on the part of the occupier of the trade premises.

24. GDE was granted a consent to discharge trade effluent into DCWW's public sewers in 2007. With effect from 1 January 2013, that consent was subject to conditions set out in a variation dated 5 December 2012; it has therefore been referred to as "the 2012 Consent". The conditions in the 2012 Consent included the following:

- The maximum permitted daily volume of discharge was 80 cubic metres.

- The maximum permitted rate of discharge was 2 litres per second.

- The trade effluent was to consist solely of "effluent derived from the separation of oil/water mixtures, treatment of gully/drain wastes, treatment of septic tank sludge's (sic) and the treatment of leachate."

- All components of the trade effluent were to pass through a 3-stage separator before discharge, and there were restrictions on which components could be discharged into the sewer:

    - Oil/water mixtures: the oil and water were to be separated; only the water was permitted to be discharged into the sewer.

    - Gully/drain wastes: grit and solids were to be removed prior to discharge, and sludges and oils/greases were not to be discharged into the sewer.

    - Septic tank sludge: only the water component was permitted to be discharged into the sewer, solids having first been removed by the use of flocculants.

    - Leachates: only the water component was permitted to be discharged into the sewer; sludge was not to be discharged.

- No trade effluent with a pH value of less than 6 or greater than 11 was to be discharged.

- There were limits on the permitted levels of specified substances, including the following:

    - The level of ammoniacal nitrogen (ammonia) was not to exceed 250 milligrams per litre (mg/l).

    - The level of each of the following metals was not to exceed 2.0 mg/l: copper; chromium; zinc; nickel; lead.

    - The level of sulphate was not to exceed 1000 mg/l.

    - The level of free or emulsified oil and grease was not to exceed 500 mg/l as total petroleum hydrocarbons.

- GDE was to maintain an inspection chamber or manhole in a suitable position, as well as a measuring device for measuring and recording the volume and rate of the discharge and apparatus capable of determining, measuring and recording the nature and/or composition of the trade effluent.

- GDE was to keep records of the volume, rate, nature and/or composition of the trade effluent discharged into the sewer at all times available for inspection by DCWW's officers and was to send copies of such records to DCWW on demand.

At the end of the 2012 Consent was the following text:

> "FAILURE TO COMPLY WITH CONDITIONS
>
> If in the case of any trade premises a condition of the Consent or this Direction is contravened, the occupier of the premises will be guilty of an offence and liable on conviction by a Magistrates' Court to a fine not exceeding the statutory maximum or on conviction by the Crown Court to an unlimited fine."

25. It suffices, finally, to mention GDE's obligations not to mislead the regulators. As regards NRW, by reason of regulation 38(4) of the Environmental Permitting (England and Wales) Regulations 2010, it was at all material times an offence knowingly or recklessly to make a statement that was false or misleading in a material particular where such statement was made in purported compliance with a requirement to provide information imposed by or under a provision of those regulations, or intentionally to make a false entry in a record required to be kept under an environmental permit condition. As regards DCWW, by reason of section 207(1) of the Water Industry Act 1991 it was an offence for a person, in furnishing any information under or for the purposes of any provision of the Act, knowingly or recklessly to make any statement that was false in a material particular.

26. Having described the material operations carried on by GDE at the Site and the manner in which they were regulated, I now turn to events in the years and months leading up to the SPA.

## C. Narrative

*Before 2015*

27. In late 2011 Lindsey Kelly joined GDE as Compliance Manager, a post she occupied until December 2013, when she became General Manager, answerable directly to the managing director. Shortly after joining the company, Miss Kelly entered into a personal relationship with James, which has continued until the present day.

28. In 2012 GDE was awarded the contract to process the leachate from Newport City Council's landfill sites. In view of the increased volume of leachate that would be processed at the Site, in October 2012 GDE applied to DCWW for a variation of its consent. Pursuant to that application the 2012 Consent was granted, and DCWW imposed a requirement for weekly sampling. At this stage, the levels of ammonia, metals and other contaminants in the leachate being discharged from the Site were controlled by dilution with water or with leachate with lower levels of contaminants.

29. On 26 March 2013 Miss Kelly sent an email to Andrew Doe, who was the Operations Manager, James, and Gary Gray, who was the Plant Operator with responsibility for the day-to-day operation of the leachate processing plant. She explained that she was being chased by the Environment Agency to submit sampling data for the discharge but that she was reluctant to do so because GDE had missed four weeks of sampling and such data as it had showed breaches, mainly in respect of the levels of metals and ammonia. She suggested that the high levels of metals were due to high levels in non-

leachate waste being received into the Site, and said that the Site should only be accepting wastes with metal contents within GDE's own discharge limits. The email continued:

> "If you look at the data we have consistently breached the consent for ever[y] sample we have taken.
>
> As far as I can see our only options are as follows;
>
> 1. Admit to the EA that we haven't sampled as agreed and accept the non-compliance score that they will give us. This will have an impact on the subsistence fees we annually they will be higher for this year now. This is so disappointing as both sites are operating under Band A & have been for 12 months.
>
> 2. I think the EA will stop us from accepting the leachate as we have no plan or deadlines for treatment in accordance with BAT [Best Available Techniques].
>
> 3. Start treatability studies ourselves but divert the leachate in the meantime to another facility.
>
> Any other ideas???"

30. James replied to that on 26 March 2013: "Option 1. Not an option! Is it really that hard to take a sample once a week??" James explained this in evidence as an expression of his frustration that a simple task was not being performed properly. However, it goes further than that, because it also expresses an unwillingness to make the regulator aware of non-compliant practices. The evidence as a whole leads me to the conclusion that James was prepared not only to conceal information from the regulators but to provide them with false information.

31. In fact, and inevitably, Miss Kelly did inform NRW (the successor to the Environment Agency from April 2013) that GDE had failed to take samples. On 24 April 2013 she sent an email to Mr Doe and Mr Gray, copied to James, as follows:

> "After much deliberation I managed to get the EA not to score us for sampling. However we have strict conditions now on sampling & data submission. Internal weekly sampling has to be submitted to the EA every fortnight, and external monthly samples have to be submitted on a monthly basis. Any non-submissions without valid reasoning will be scored non-compliant.
>
> Please ensure that you are taking the samples & carrying out the analysis on the internal samples correctly and in compliance with EA. If for any reason you cannot do the sample or analysis within the period please let someone know within plenty of time or have a good explanation!!!

This starts this week!"

32. Because GDE's leachate process system did not comply with Best Available Techniques, the decision was taken to install new processing plant. Accordingly GDE entered into discussions with Hydroventuri Limited, whose Process Engineer, Maryam Farhanah, was an expert in the treatment of leachate. In June 2013 GDE commissioned Hydroventuri to design an aeration system that would reduce the levels of ammonia in the leachate being discharged from the Site. In early July 2013 Hydroventuri produced a proposal, which was accompanied by a document entitled Process Design. The proposal was for a biological treatment process. The Process Design stated that the process was designed "on a 24/7 continuous basis: inflow = outflow" and set out options for a semi-automated plant or a fully automated plant. Hydroventuri's recommendation was for a fully automated system. GDE opted for the semi-automated system, with variable-speed control of the aeration pumps and stop-start control of the feed pumps linked to the level sensors in the tanks. Towards the end of July 2013, Hydroventuri was engaged to build, install and commission the system. The first part of the system, the aerator, was installed in the summer of 2013, but the biological part of the process was not ready for some time thereafter.

33. In June 2013 Mathew Roderick had joined GDE as managing director in place of James. It is MDW's case that James nevertheless remained "effectively sole manager of the business of GDE" (amended particulars of claim, paragraph 3). That is to overstate the case and to underestimate Mr Roderick's position in the running of GDE. James had stood down as managing director because his other interests, in particular the racing of speedboats, was taking up too much of his time to be compatible with the daily management of the company. MDW adduced evidence from Ian Lynass (see below) that shortly before the SPA Mr Roderick complained to him that James was micro-managing the business and was preventing him from making necessary decisions. This seems to me in part a question of emphasis and degree. I accept that Mr Roderick did not have a free hand to make strategic decisions involving significant financial investment without James's approval. Further, Mr Roderick confirmed in his evidence that James remained actively interested in all aspects of the business and that the two of them would communicate regularly by email, text message and telephone, sometimes on several occasions in one day but not at all on some days. But insofar as the suggestion is that the daily operations of the company at the Site were under James's supervision I do not accept it, save that there was certainly a period of dual control, immediately following Mr Roderick's appointment. James would visit the Site when he had time, probably on several days each month on average, and took a close interest in the company; he himself states that a purpose of his visits was to "make sure that processes were being followed". But Mr Roderick had daily charge, and I do not believe that he complained about micro-management so far as the company's daily operations were concerned.

34. I accept Mr Roderick's evidence that from the date of his appointment he had very limited contact with Jane and Stephen, speaking to them only briefly on their visits to the Site, which were few and far between.

35. The possible sale of the company was discussed with Mr Roderick in the initial discussions that led to his appointment as managing director. His remuneration package included provision for payment by the shareholders of a bonus if a sale were

achieved at a certain level; in the event, he received from the defendants a payment of £160,000 after completion of the SPA.

36. On 6 August 2013 there was a meeting at the Site for the purposes of an EPR [Environmental Permitting Regulations] Compliance Assessment by NRW. Those present included Mr Roderick and Miss Kelly for GDE, Miss Green for NRW, and representatives of DCWW. The minutes of the meeting contained in NRW's Compliance Assessment Report of the same date recorded that the installation and commissioning of the Hydroventuri system were expected to take 10 to 12 weeks, that the performance of the system would be monitored by trial samples during commissioning, and that, "WW will not take action on samples that breach consent limits while the plant is being commissioned, but once the plant is commissioned they will return to compliance testing."

37. By mid-December 2013 the mechanical commissioning of the Hydroventuri plant had been completed. The biological commissioning commenced towards the end of January 2014; it was expected to be completed within 10 weeks, but because of interruptions to the continuous operation of the system it was not in fact completed until the last week of August 2014.

38. On 13 January 2014 Mr Gray sent to Ms Green by email some sampling data, including those for 10 January. The figures for that date in respect of copper and lead were, respectively, 1.52 mg/l and 2.56 mg/l, both of which showed broadly acceptable levels. However, those figures had been deliberately falsified. On 10 January Mr Gray had sent the test results to Miss Kelly, showing figures of 3.52 mg/l for copper and 8.56 mg/l for lead, both well in excess of permitted levels. Mr Gray wrote to Miss Kelly:

> "I have not forwarded this to Rebecca yet, as the levels of copper and lead are very high for 10.1.24.
>
> I was not sure what you want me to adjust them too (sic), so if possible can you adjust and forward to Rebecca."

Miss Kelly's reply was:

> "Please change the Copper to 1.52 mg/l and Lead 2.56 and then send."

39. When confronted in cross-examination with her email exchange with Mr Gray, Miss Kelly accepted that he had provided falsified data to NRW on her instructions and that her behaviour was disgraceful. She maintained, however, that she did not often behave in that manner: "I was not in the habit of changing the figures. I might have done it once or twice, but it wasn't how I operated." (Later she said, "Maybe two or three times.") In my judgment, it is significant that Mr Gray appears to have taken it for granted that Miss Kelly would want to falsify figures in order to prevent unfavourable data coming to NRW's attention. This gives the lie to her attempt at trial to portray her behaviour on this occasion as out of character.

40. Miss Kelly would not accept responsibility for any occasion on which falsified figures were provided to the regulators, unless documentary evidence showing her to be

complicit could be produced. So, for example, on 24 January 2014 Mr Gray sent to Ms Green sampling data, showing a reading of 3.06 mg/l for lead, which was outside permitted levels but not perhaps alarmingly high. However, the actual reading was 4.06 mg/l, which was twice the permitted maximum. Miss Kelly said: "I disagree [that is, with the suggestion that she was responsible for the falsification of the figure], unless there's some evidence of me asking Gary to change the figure." She did not accept that Mr Gray would not have sent the email without her say-so. However, the email exchange earlier the same month leads to the conclusion that it is probable that either Miss Kelly instructed Mr Gray as to the specific falsehood to be communicated on this occasion or she had given him a general instruction and authority as regards what to do with inconvenient figures.

41. Miss Kelly said that she had not told James or Mr Roderick about the falsification of figures.

42. On 29 January 2014 NRW issued its EPR Compliance Assessment Report on GDE in respect of the calendar year 2013. The Report stated that GDE's Annual Environmental Report for 2013 had been received and accepted. It continued:

> "Emissions to sewer: Emissions of copper, lead and sulphate were higher than in 2012. Lead, at 3 mg/l, exceeded the Welsh Water consent limit, which is a matter for concern. Ammonia emissions were substantially reduced compared with 2012, being more than a third of the amount released to sewer in 2012. This is due to the installation of new equipment to treat landfill leachate, for which GD are to be commended.
>
> …
>
> Discharges to sewer have increased significantly compared with 2012. This is to be expected as GD are treating and discharging leachate. …
>
> After a difficult start to the year GD have demonstrated their commitment to responsible waste treatment by installing new equipment for the treatment of landfill leachate. This is new technology in this field and the installation at GD is the first in Wales for this application. GD should be congratulated for their willingness to embrace new technologies."

43. In February 2014 NRW received an anonymous telephone call concerning a practice that the caller alleged to be carried on by GDE. He said that waste from septic tanks was regularly disposed of directly into the sewer via the "magic hole", either early in the morning or last thing at night. He said that the practice was common knowledge among employees at the Site, and that he himself had twice been asked to discharge cess waste into the sewer when he was prevented from discharging the contents of the tanker he was driving at DCWW's treatment works at Nash. He also said that "Natalie" (that is, Natalie Lane), the Dry Waste Manager at the Site, had once seen the contents of a tanker being emptied into the magic hole and had reprimanded the people concerned and instructed them to stop immediately. He suggested that NRW check the relevant records for November 2013. The allegation was investigated by

Rebecca Green, NRW's officer with responsibility for the regulation of GDE since 2012. She obtained GDE's waste transfer notes ("WTNs") and consignment notes for November 2013, in order to identify each collection of cess waste and each discharge of that waste at treatment facilities. She then compared the information recorded by GDE against DCWW's automated record system, which records both the company and the tanker registration number each time a tanker driver swipes a fob at the discharge point; this gives DCWW a full and accurate record of discharges at its facility. Upon a comparison of GDE's records and DCWW's records, Ms Green found 26 instances where GDE's records showed that a collection of cess waste had been disposed of at Nash but where DCWW had no corresponding record of a discharge. Ms Green put these discrepancies to Miss Kelly. Miss Kelly explained that most of the discrepancies had occurred because the relevant tanker (reg. no. CK13 RFX) had been using the fob for a different tanker (reg. no. CN07 AKU), as the tank from the latter vehicle had been remounted onto the chassis of the former vehicle. Ms Green accepted this explanation; however, in the absence of independent evidence to corroborate the explanation, she recorded on her Compliance Assessment Report that the discrepancies had not been reconciled.

44. Substantially the same exercise was repeated by NRW in August 2014, this time by a comparison of GDE's and DCWW's records for July 2014. Again, there were discrepancies: out of 96 discharges at DCWW's various treatment works, 76 were accurately recorded in GDE's waste transfer notes, but 20 were not. Ms Kelly explained that some discrepancies were due to vehicles being on hire to DCWW and some were due to the use of the incorrect fob. In her agreed evidence, Ms Green explained the view that she had formed:

> "In my view, the discrepancies were not a deliberate attempt to mislead. I understood that the intended destination for the waste (such as Nash) was entered onto WTNs at the beginning of the process, but after the tanker had collected smaller loads of waste from various different customers, it was no longer convenient to continue to the original destination. I understood that it was sometimes more convenient to return to GDE's yard to discharge the next day."

Ms Green advised GDE on the importance of accurate record-keeping and categorised the matter under NRW's Compliance Categorisation Scheme as a Category 4 non-compliance (the lowest category, indicating that the non-compliance had no potential for environmental impact). Thus no further enforcement action was taken.

45. On 19 February 2014 Miss Kelly sent an email to James and Mr Roderick, giving them a "heads up" that DCWW was likely to be concerned about that day's split sample which, according to GDE's own analysis, showed an ammonia content of 1248 mg/l as against a permitted limit of 250 mg/l. James replied:

> "It may sound bad but I'm sure it won't be a problem. This is our first life used up. Can we get a diary entry to read that one of the pumps failed whilst testing hydro or something along those lines? We could do with a couple of samples logged at very low levels and maybe one for yesterday just a little over. This will help to build a good case?"

In cross-examination, James denied that he had been encouraging a false explanation and falsification of sample data. He said that he would have discussed the matter with Mr Gray, Miss Kelly or Mr Roderick before sending the email and would have known that there was a problem with a pump, though not the precise nature of the problem, and that there were favourable records to present to DCWW. I do not consider that a probable explanation and do not accept it. First, Miss Kelly's email was sent at 5.30 p.m. and the response was sent at 6.26 p.m., which makes it relatively unlikely, though not of course impossible, that James had spoken to Mr Gray in the meantime. Second, more importantly, the email contains no reference, even implicit, to a conversation with Mr Roderick or Miss Kelly, nor with Mr Gray. Third, the reference to the pump is not a suggestion that a certain explanation be given to DCWW; rather it is a suggestion that a diary entry be made. Fourth, if James had spoken to someone and received an explanation in terms of a pump malfunction, he would probably have ascertained what the problem was; he is unlikely to have made such a vague comment, which reads far more like a proposal that some plausible explanation be concocted. Fifth, the sentence concerning samples reads far more like a suggestion that favourable data from internal sampling (that is, not split sampling, which DCWW would be able to check) be fabricated than advice that DCWW should be told of actual data. Sixth, one of the attachments to Miss Kelly's email was a schedule of GDE's test results up to and including 19 February 2014. The schedule contains no test data for 18 February 2014 ("yesterday"), so it is highly improbable that James's mention of a sample logged for "yesterday just a little over" is a reference to a genuine sample. There was a sample for the previous day, 17 February, but it showed an ammonia level of 528 mg/l, which was more than double the permitted limit. Seventh, in the context of the evidence as a whole, I consider that there was a culture of lying to the regulators when it was convenient to do so, and that James as well as Miss Kelly was complicit in this.

46. In March 2014 GDE acquired Skip Solutions Limited. Mr Roderick and James were appointed as directors. Mr Roderick became based at the Llanelli site; he usually attended at the Site in Newport on two days in each week, and when he was not present the person with daily oversight there was Miss Kelly.

47. In April 2014 GDE's Operations Manager, Andrew Doe, left his employment in accordance with the terms of a confidential settlement agreement, after he had been subject of an internal company investigation for failure to provide to NRW details that it had requested in respect of consignment notes. And in July 2014 Stephen was re-appointed as a director of GDE.

48. By the last week of May 2014 the Hydroventuri plant was substantially operational and running continuously. Some initial problems with the pumps and with the active sludge used to reduce ammonia levels had been overcome. GDE's staff received training on the new system in the last week of July 2014, and on 28 August 2014 Hydroventuri confirmed to Miss Kelly and Mr Roderick that the commissioning had been completed. In her main witness statement, Miss Kelly confirmed: "Throughout this time we had been testing leachate and discharge in accordance with the Waste Acceptance Procedure and Consent and the discharge was within the consent limits."

49. In October 2014 test results on the leachate began to exceed limits. On 28 October Miss Kelly sent an email to GDE's Operations Manager for Wet Waste:

> "Please see attached discharge results for last week. As you can see the discharge has breached for 4 weeks plus. We both need to get involved with this and keep onto Gary [Gray].
>
> The ammonia needs to be below 250mg/l. He hasn't sampled the leachate coming in for a few weeks and tells me today that the treated leachate from the [Hydro]venturi is not below 250 mg/l, therefore we either need to treat for longer or increase the active sludge in the tank. He is sampling the leachate in today, letting me know the results of the treated leachate and the length of treatment. We can then decide whether to test the BOD and maybe increase the active sludge or add some glucose syrup to the tank."

Miss Kelly's evidence was that this showed that any problems being experienced were capable of remedy, whether by testing the incoming leachate or by increasing treatment times or by introducing additional biological matter into the treatment tank.

50. Aside from the operations of GDE, during the latter part of 2014 the defendants had been making their initial preparations for the sale of their shares. These included discussions with Mr Roderick concerning a possible management buy-out, whether in respect only of the Llanelli site or of the entire business. However, the option of a sale on the open market remained under consideration, and in December 2014 James and John Allison, a solicitor with whom he was friendly, made contact with Gambit Corporate Finance LLP ("Gambit") with a view to working out a strategy for the sale of GDE.

*Events in 2015 until the sale of the shares*

51. On 2 February 2015 Miss Kelly submitted to NRW GDE's Annual Environmental Report 2014, as required by a condition of the Permit. The Report recorded that the Site had been "operating well within its technical capabilities processing less than 14,572 tonnes of waste in total and acting as a transfer station for 1666.27 tonnes of hazardous waste." It said: "There have been no environmental incidents over the 12 months to report on." A table in the report showed that there had been breaches of some of the discharge limits. In particular: the annual average levels of copper and lead, each of which had a consent limit of 2.0 mg/l, were 3.23 mg/l and 4.58 mg/l respectively; and the annual average level of ammonia was 330 mg/l, as against a consent limit of 250 mg/l. In her covering email to Ms Green of NRW, Miss Kelly wrote: "You will note that the discharge consent has been breached[;] this is now under control since the commissioning of the plant has been completed."

52. At the beginning of 2015 Gemma Cavill took over as DCWW's Trade Effluent Officer for Newport. On 20 February 2015 she sent to Miss Kelly the Sample Analysis Report for the sample taken on 28 January, which showed results within permitted limits. On 26 February Miss Cavill sent the Sample Analysis Report for the sample taken on 12 February, which showed that the permitted level of ammonia had been exceeded; however, Miss Cavill made no adverse observation and wrote "Satisfactory" on the report.

53. It was in or around March 2015 that the defendants' focus moved clearly in the direction of a sale of their shares on the open market. On 15 March 2015 Mr Allison sent some "Initial Info Requirements" to Mr Roderick and Miss Kelly, so that, if the management buy-out did not proceed, "all our ducks [are] in line to go to market with other prospective buyers."

54. On 13 April 2015 Miss Cavill wrote to Miss Kelly to inform her that the sample taken on 12 March 2015 had shown a level of ammonia far in excess of the permitted level. The letter asked that details of the remedial action to be taken be provided within 10 working days.

55. No response had been made to that letter by 11 May 2015, when Miss Cavill again wrote to Miss Kelly after the latest samples, taken on 15 April and on 7 May, had shown levels of ammonia in excess of the permitted limit of 250 mg/l. A table showed the results of the tests for ammonia after January 2015: in February, 714 mg/l; in March, 1120 mg/l; in April, 988 mg/l; in May, 672 mg/l. The letter continued:

> "Breaches of consent can have a significant impact on the receiving sewerage system, treatment processes and the environment and Dwr Cymru Welsh Water is under a statutory duty to use its regulatory powers to minimise this impact. You will already be aware of the provisions of the Consent to Discharge Trade Effluent in that if a condition is contravened then your company will be guilty of an offence and liable on conviction by a Magistrates' Court to a fine not exceeding the statutory maximum or on conviction by the Crown Court to an unlimited fine.
>
> You are reminded that it is your duty to take all necessary steps to ensure that the trade effluent discharged from your premises complies at all times with the conditions in your trade effluent consent.
>
> Without prejudice to any additional action Dwr Cymru Welsh Water may take in respect of the consent failures, I require you to advise me in writing within 21 days, of the action you intend to take to ensure that your trade effluent discharge will comply with all the conditions of consent and in particular, the condition in respect of Ammoniacal Nitrogen.
>
> Any action plan you supply and the timescales involved in its implementation will be taken into account by Dwr Cymru Welsh Water in deciding how to proceed further with enforcement action."

56. There was a meeting between Miss Cavill and Miss Kelly on 27 May 2015, and on the following day Miss Kelly wrote to Miss Cavill with an Improvement Plan, which had clearly been agreed at the meeting:

> "As discussed during the meeting we have experienced a malfunction with one of the pumps on the aeration, causing the

> tank to run dry subsequently killing the activated sludge within the tank. The tank will be reseeded and batch treatment of the leachate shortly followed by continuous treatment once the required BOD [Biological Oxygen Demand] levels have been achieved.
>
> Weekly spot samples on the trade effluent carried out by GDE will be submitted to DCWW on a weekly basis.
>
> Monthly spot samples on the trade effluent carried out by external laboratory submitted to DCWW on a monthly basis.
>
> Follow up meeting with DCWW to discuss improvement plan and trade effluent consent levels."

The letter set out timescales for the implementation of the Improvement Plan, leading to a follow-up meeting on 8 July 2015 "to discuss improvement plan and review of limits within consent."

57. By a letter dated 2 June 2015 Miss Cavill confirmed to Miss Kelly DCWW's agreement to the Improvement Plan. The letter reiterated that contravention of a condition in a Consent to Discharge Trade Effluent was an offence, and it read in part:

> "I am pleased to advise you that the actions proposed in your letter of 28th May have been agreed between us. Your progress against the actions and time scales recorded in the plan will be monitored, and you are required to inform me of any changes or unforeseen problems.
>
> In the event that you fail to undertake the agreed actions within the specified time limits, or circumstances change for the worse, Dwr Cymru Welsh Water will have to consider what action to take in respect of the breaches of consent. This consideration will include a decision as to whether a formal caution or a prosecution is appropriate.
>
> You are reminded that it is your duty to take all necessary steps to ensure that the trade effluent discharged from your premises complies at all times with the conditions in your trade effluent consent."

58. On the same day, Miss Cavill asked Miss Kelly to send her the "raw leachate data" and "the design drawings of your activated sludge process unit". This Miss Kelly did on the following day. From this point on there was much interaction between GDE and Miss Cavill. I shall pick up this thread a little later.

59. It was at about this time, in early June 2015, that Gambit as the selling agent produced an Information Memorandum "to assist the recipient in deciding whether it wishes to proceed with a further investigation of an investment [in GDE]." (By now the likely avenue of sale was on the open market, although Mr Roderick remained interested in the possibility of a management buy-out of the Llanelli site.) The Information

Memorandum described the history and nature of GDE's business. The section on Management and Organisation showed James as Chairman of GDE and said:

> "Following the recruitment of Mathew Roderick as Managing Director, James has delegated responsibility [for] all day-to-day operational matters to Mathew."

Of Mr Roderick it said that he was "responsible for overseeing all day-to-day operational matters of the Company and development of its commercial opportunities". Miss Kelly was identified as a "key employee" and was said to be "responsible for day-to-day management of operations at the Company's Newport facility, the coordination of commercial activities and ensuring compliance with permits, accreditations and quality standards".

60. The opportunity to acquire GDE came to the attention of Mark Hazell, the majority shareholder in MDW and one of its directors. MDW carried on the business of a heavy goods and bulk haulage contractor and had previously contracted with GDE. Mr Hazell knew the Norvills personally and had been interested in the possibility of acquiring GDE some years previously. The opportunity to do so now was of interest to him. He assembled an acquisition project team to deal with all aspects of the prospective acquisition, including financial and environmental due diligence enquiries. The team included the following people: Mr Hazell's son, Oliver Hazell, who since 2018 has been the managing director of MDW; David Thomas, of Haasco Limited, which was MDW's accountant and auditor; David Jones, a finance consultant and long-standing business associate; and Ian Lynass, a friend and business associate of Mark Hazell with some twenty years' experience of executive management of substantial companies both in his native Australia and in the UK. MDW also appointed Ceri Environmental Consulting Limited, whose principal shareholder was one of its directors, Clare Walters, to carry out environmental due diligence processes.

61. In June 2015 MDW was not the only interested potential purchaser of the shares in GDE. On 15 June, following a request by an interested party, Mr Roderick sent to Gambit (copied to James) a schedule of discharge results for the year from May 2014 to May 2015. That schedule had been provided by Miss Kelly to Mr Roderick earlier that same day. A comparison with the schedule of discharge results that had been created by Mr Gray and provided by him by email to Miss Kelly on 29 May 2015 shows that the data for that date have been altered: the version provided by Mr Gray to Miss Kelly showed ammonia at 422 mg/l, copper at 2.64 mg/l, and lead at 4.12 mg/l, all well above the permitted limits; but the version provided by Miss Kelly to Mr Roderick showed those figures as 222 mg/l, 1.64 mg/l, and 1.12 mg/l respectively, all within the permitted limits. The method of alteration is the familiar one of lowering the first digit. The metadata for the version provided as an attachment by Miss Kelly to Mr Roderick show that she was the last person to modify the schedule. By itself, that is not conclusive, because the nature of her modification is not shown by the metadata. However, the sequence of events, the modus operandi and the lack of a plausible alternative explanation justify the conclusion that it was Miss Kelly who falsified the data. In cross-examination she denied any recollection of doing so and also denied that James had instructed her to falsify data.

62. On 15 June 2015 Miss Cavill informed Miss Kelly that the discharge sample taken on 10 June 2015 showed the level of ammonia to be 1610 mg/l, which as she observed was “well above the consented limit of 250 mg/l.” The email asked Miss Kelly to provide the results of GDE’s internal testing.

63. Miss Kelly replied by email on 24 June 2015, when she dealt with three points. First, she gave results of GDE’s internal sampling on 19 June, including the following: ammonia, 724 mg/l; copper, 1.52 mg/l; lead, 1.98 mg/l. Second, she said that DCWW’s latest sample, taken on 17 June, had been split, and that GDE’s tests showed an ammonia level of <401 mg/l; and she enquired what DCWW’s results had shown. Third, she offered an explanation for the poor results in the sample on 10 June: the time for batch treatment had taken longer than anticipated, and continuous treatment had not yet started.

64. The figures provided by Miss Kelly for copper and lead were false: the true figures were 3.52 mg/l for copper and 4.98 mg/l for lead, as against a permitted limit of 2 mg/l for each. The same method of falsification was used as in January 2014, namely the lowering of the first digit.

65. On 29 June 2015 Miss Kelly sent a further email to Miss Cavill, containing GDE’s results from the sample taken on 26 June 2015; these included: ammonia, 576 mg/l; copper, 1.04 mg/l; lead, 1.32 mg/l. The information in that email was false in part. GDE’s internal records show that the correct reading for copper was 3.40 mg/l and that the correct reading for lead was 4.32 mg/l.

66. Miss Cavill’s evidence, which I accept, was that she was unaware of the true figures.

67. The emails show that in late June 2015 Mr Gray was receiving advice from Maryam Farhanah, who had by then left Hydroventuri, regarding the reduction of ammonia levels in the leachate.

68. On 1 July 2015 Miss Cavill sent an email to Miss Kelly, notifying her of the test results for the sample taken on 17 June. The reading for ammonia was well within the permitted limits, but those for zinc (2.9 mg/l) and lead (4.4 mg/l – strikingly similar to GDE’s undisclosed reading on 26 June) were in excess of permitted limits. Miss Cavill said that the contravention was “of concern” and asked Miss Kelly to investigate.

69. On 2 July 2015 Miss Kelly sent GDE’s latest sampling results to Miss Cavill. Levels of lead and copper were well within limits, but the concentration of sulphate was 268 mg/l and that of ammonia was 272 mg/l. In her email Miss Kelly said: “The aeration is still not working as it should be and we are introducing more sludge on Monday [6 July].”

70. On 7 July 2015 Miss Cavill met Miss Kelly at the Site and took a sample of the activated sludge for testing to see whether it might be responsible for the high levels of ammonia. That afternoon she sent an email to Miss Kelly, which said that microscopic analysis had shown, among other things, that the “protozoan population was pretty much non-existent”, which indicated that there “[was not] much biological activity (and thus treatment) in the biomass in the tank.” Miss Kelly replied on 9 July

that the ammonia level had dropped significantly since more activated sludge had been added on 6 July and was now 96 mg/l.

71. On 14 July 2015 Miss Kelly sent to Miss Cavill test results from a sample taken on 10 July. All of the results were shown as being within permitted limits. However, the figure for lead was given as 1.64 mg/l, whereas the actual figure was 2.64 mg/l, which was in excess of the permitted level.

72. The situation continued to be monitored, both by Miss Kelly and by Miss Cavill. On 24 August 2015 Miss Cavill informed Miss Kelly that the results of a sample taken on 19 August showed levels "well above the consented limits" in respect of six different parameters; in particular: ammonia 410 mg/l; copper, 3.1 mg/l; zinc, 13.3 mg/l; lead, 76 mg/l. Miss Cavill suggested that a further meeting take place, and she asked Miss Kelly to investigate the failure and provide details of the remedial action to be taken. The email commented:

> "I am particularly concerned as Gary [Gray] did not seem to be aware that any effluent was being discharged when Tony attended site to take a sample. Tony noted that the sample was visually poor (see attached picture)."

(The sample in the photograph referred to looks revolting. However, I do not know how much less revolting an acceptable sample would have looked.) Miss Kelly asked Mr Gray to investigate, and on 27 August he reported to her:

> "Regarding the Welsh Water samples that failed from discharge, I did inform tony from Welsh Water on the day he called to site that I was not discharging any waste and that the only flow would have been from where I had been cleaning the separator, filters and pipelines/gulleys etc that lead to the interceptor. Prior to his arrival on site, if acceptable I will in future pump from the interceptor as I'm doing this so I can catch any disturbed waste before it can flow through to sewer."

Miss Kelly explained that this means that "Tony" of DCWW had not, in fact, taken a sample of discharge but rather of run-off from cleaning, which would have a greater concentration of contaminants. That explanation might indicate that the sampling results were not an indication of a failure of leachate treatment, but it does not justify the discharge of liquid with levels in excess of what was permitted.

73. On or about 3 September 2015 Miss Kelly asked Miss Cavill for an increase in the permitted level of ammonia from 250 mg/l to 400 mg/l. Miss Cavill indicated that she was prepared to consider such an increase and asked for the provision of GDE's flow data, but she gave no commitment to approve the increase sought. In the event, no such increase was ever approved.

74. On 16 September 2015 Miss Cavill sent to Miss Kelly by email the report of the test results in respect of the sample taken on 10 September. The level of ammonia was 1550 mg/l, "well above the consented limit of 250 mg/l".

75. While GDE's operations at the Site continued, discussions concerning the sale of the business had been progressing.

76. In August 2015 Mr Lynass met Mr Roderick at GDE's Llanelli site. Mr Lynass formed the view that the Llanelli site was poorly run and that its equipment was in an unsatisfactory condition, but he did not regard these matters as major obstacles to the acquisition of the business.

77. There is an issue as to what was said on this occasion. Mr Lynass's evidence was that Mr Roderick complained that, although he was notionally the managing director, he lacked the autonomy and power to make decisions, because James was micro-managing the business and was unwilling to make necessary investment into the company because of his intention to sell it. I have already commented on this evidence; see paragraph 33 above. It is probable that any comments Mr Roderick made concerned rather James's control of strategy for the company than anything about involvement with minutiae or day-to-day management. Mr Lynass's evidence was that he specifically asked Mr Roderick whether he knew of any breaches of consents or any environmental issues of which MDW should be aware, and that Mr Roderick said that he was not. Mr Roderick's evidence was that the conversation at this meeting was at a fairly general level. In his witness statement, he said: "I did not tell Ian [Lynass] that there were no breaches of consents or permits or outstanding environmental issues during these visits. The question was certainly not asked in that vein; it may have been something like, 'Are there any pending prosecutions in relation to the permits or environmental issues?', and there weren't, so I said so. There was never anything that technical asked." In his oral evidence he said that he could not recall details of the conversation.

78. Mr Lynass gave evidence that in August 2015 he also met with and spoke to James and Miss Kelly while on a visit to the Site with Ms Walters. Mr Lynass said that James had told him about the leachate treatment plant installed by Hydroventuri operated on a continuous basis and, after some initial teething problems, was working well and that DCWW and NRW were satisfied that it was now compliant. In his statement, Mr Lynass said: "James Norvill told me face-to-face that the GDE plant and equipment was in good repair and met all legal requirements. Lindsey Kelly also said to me that the plant was fully compliant with regulatory requirements and limits and operated according to the prevailing permits and licences in place."

79. Miss Kelly's evidence was that she had no recollection of meeting Mr Lynass on site before the SPA or of discussing with him any compliance issues. She thought that, if she had met with him at all before the SPA, it was in the company of Mark and Oliver Hazell at a public house in Newport. James, similarly, gave evidence that he had no recollection of meeting Mr Lynass until after the SPA or, therefore, of making any representations. He said that the plant was indeed in good working order; any issues were purely the result of operational error. He firmly denied telling any deliberate falsehoods to Mr Lynass.

80. On 5 August 2015 Gambit sent an email to Mr Roderick, setting out a schedule of information that had been requested "by an interested party" in respect of the sale of the shares and asked, "Please could you coordinate the collation of the responses/information requested?" Mr Roderick forwarded the request to Les Cronin, GDE's Financial Controller, who provided the information promptly. It appears that

the "interested party" was MDW, because on 10 August Mr Roderick sent an email attaching further information to Gambit, copying in James, and Gambit forwarded the email to Mr Lynass on the same day.

81. On 7 August 2015 solicitors acting for MDW submitted an "Initial legal due diligence request for information and documentation". Request no. 7, relating to "consents and compliance", read:

> "We require details of and copies of all documents:-
>
> 7.1 relating to, any licences and consents, concessions, etc. required or obtained by the Target [i.e. GDE] for the operation of its business;
>
> 7.2 relating to, any investigation, enquiry, prosecution or other enforcement proceedings or process by any governmental, administrative, regulatory or other body or organisation in relation to, or affecting, the Target."

82. Gambit forwarded this request to Mr Allison, James and Mr Roderick. Upon her return from a period of leave on 12 August 2015, Mr Roderick sent the request to Miss Kelly as an email attachment. With reference to request no. 7.2, he asked: "Anything you are aware of?" No written response from Miss Kelly appears in the evidence, but she accepted that she would have read Mr Roderick's email. On 12 August 2015 Mr Roderick replied to Gambit; James was copied in on the email. Mr Roderick's reply said nothing about the breaches of the 2012 Consent. James did not correct that omission. The information that was in due course provided to MDW pursuant to the request did not include any content pertaining to the communications between GDE and DCWW and NRW. In cross-examination Miss Kelly said that there were no regulatory prosecutions and that she did not consider the communications with DCWW and NRW to amount to investigations or enquiries or Miss Cavill's letter of 11 May 2015 to amount to a threat of prosecution.

83. After visiting both the Newport and Llanelli sites, on 13 August 2015 Ms Walters produced her first Environmental Due Diligence Report. The purpose of the report was stated to be "to determine environmental issues that might pose potential risks regarding environmental legislation and to identify gaps in the information required to complete this analysis." The report recorded that Ms Walters had conducted a walk-over inspection of the Site with Mr Roderick but had been unable to speak to Miss Kelly, who might have been able to provide useful information. (Miss Kelly had been on leave.) In connection with the Site, page 11 of the report said:

> "From an inspection of the NRW public register it appears that during 2014 NRW did raise issues with GD regarding incorrect completion of waste transfer notes and records and late reporting to NRW. There were also some operational issues relating to pumps within the treatment process. In early 2014 there appears to have been a breach of the discharge consent limits.

> The breach of the trade waste discharge consent should be discussed with GD to confirm how this has been addressed. WW appear to sample this discharge. It would be useful to see these documents.
>
> GD will be required to submit annual reports to NRW. These should be obtained from GD."

Ms Walters advised that GDE should be asked to confirm whether there were any relevant convictions and whether there was any pending enforcement action by NRW. Among the main issues identified by Ms Walters in her Conclusions was, "the discharge consent at Units 18A and 19 and how this is managed to stay within the discharge limits". The Conclusions section continued:

> "From a review of the information currently available Ceri Environmental has not seen anything that suggests that GD is likely to be in breach of its permit conditions to any significant extent. However, there are minor issues that may need addressing to avoid future compliance issues.
>
> It is suggested that a meeting with key GD staff such as Lindsey Kelly may resolve many of the outstanding matters and enable much of the outstanding data to be obtained."

84. On 18 August 2015 Mr Lynass sent to Gambit a list of outstanding requirements in respect of Environmental Due Diligence. These included: "Any relevant enforcement action or convictions"; "Discharge consents, monitoring data and any breaches"; "Welsh Water sampling results"; and "Any pollution incidents"; "Details of any outstanding improvement conditions".

85. On 29 September 2015 Miss Kelly and Ms Walters met at the Site. Ms Walters was impressed by Miss Kelly's knowledge of compliance matters. Her evidence regarding what was said about the current position as between GDE and DCWW was as follows (statement, paras 46-48, 50 and 61-62):

> "I asked Lindsey about the breaches of discharge consent referred to in the CAR dated 29 January 2014. She explained that there had been some historic discharge breaches before the installation of the leachate plant and then some one-off breaches after its installation caused by issues with the plant. Again, this accorded with the CAR dated 29 January 2014.
>
> Lindsey explained that the historic breaches mainly concerned ammonia and WW had agreed an increase in the discharge consent limit for ammonia and therefore there was no cause for concern over the breaches. This is recorded in my written note of that meeting: 'WW will double ammonia limit'.
>
> Lindsey also informed that she had agreed an 'Improvement Plan' with WW, which WW was happy with and was going well. I did not see a copy of the Improvement Plan, either at

> that meeting or after it, prior to completing my addendum. My understanding was that the Improvement Plan was something agreed with WW during discussions, not an actual document.
>
> …
>
> Following my conversation with Lindsey I was content that there were no ongoing breaches. However, I noted that the client should continue discussions with Welsh Water given that there was an Improvement Plan in place.
>
> …
>
> I was not aware of any ongoing breaches of the discharge consent, I had not seen a full discharge consent for Units 18 and 19, I had not seen test sample results for the chemical composition of discharges to sewer and I did not see the Improvement Plan.
>
> The Annual Environmental Performance Report for 2014 showed that the annual average for copper was in excess of the limit as was the limit for ammonia. However, Lindsey informed that WW had agreed to double the limit for ammonia and therefore I had no cause for concern in respect of the limit for ammonia. The only limit which had historically breached on an average, and potentially not dealt with, was copper. However, given the 2014 report concludes 'the discharge is now within consent limit' then this verified what Lindsey had told me that the breaches were historic and there were no ongoing breaches."

86. In cross-examination, Miss Kelly said that she could not now recall what she had said to Ms Walters about breaches and compliance.

87. On 30 September 2015 Ms Walters produced an Addendum Environmental Due Diligence Report. She recorded: "GD has confirmed that there are no relevant convictions or enforcement notices to consider. Ceri Environmental has seen no evidence of convictions or any enforcement action in any documentation." Under the heading, "Discharge consents, monitoring data and any breaches", the report stated:

> "The Unit 18A & 19 site appears to have a discharge consent from Dwr Cymru to allow discharge to sewer. Ceri Environmental has not seen a copy of the consent but has seen documents referencing the consent. Lindsey Kelly confirmed that there have been breaches of this consent and the consent is currently under review. There appears to be constructive and productive discussions ongoing between GD and Dwr Cymru regarding this matter. These discussions should be continued and concluded. This process does not give rise to concern at the moment.

> This discharge is monitored by Dwr Cymru. GD also monitor the volume of discharge as part of their permit obligations."

This point was again mentioned as one of the "main issues" identified in the Conclusions section of the Addendum Report:

> "the discharge consent at Units 18A and 19. It is understood that there have been some issues with compliance with this consent in recent years. It is understood that this is an ongoing matter of discussion with Dwr Cymru. This discussion needs to be continued and concluded and is a matter of importance."

88. On 30 September 2015 Gambit sent to Mr Lynass its Due Diligence Index and Responses. The section on Compliance/Environmental contained the following responses:

> "*Request:* Any relevant enforcement action or convictions.
>
> *Response:* N/A."
>
> "*Request:* Discharge consents, monitoring data and any breaches.
>
> *Response:* Currently reviewing consent levels as Welsh Water agree they are too low."
>
> "*Request:* Welsh Water sampling results.
>
> *Response:* As above."
>
> "*Request:* Any pollution incidents.
>
> *Response:* N/A."
>
> "*Request:* A response to 7.2 [cf. paragraph 81 above] which remains outstanding.
>
> *Response:* There are no outstanding investigations, enquiries, prosecution or enforcement actions."

89. Mr Lynass's evidence was that Ms Walters' Addendum Report had given him a reasonable level of comfort. The information provided by Miss Kelly indicated that there were no ongoing or new breaches and no test results giving any contrary indication had ever been disclosed. It therefore appeared that the so-called improvement plan had achieved the desired result. Mr Lynass also sought protection by ensuring that the SPA contained robust warranties that would ensure that MDW would have recourse if things turned out to be other than they seemed.

90. On 13 October 2015 Mr Roderick resigned as a director of GDE, having on the previous day agreed with Mr Lynass to accept a consultancy with GDE from November 2015. In the event that agreement was never implemented.

91. On 14 October 2015 the SPA was executed and MDW purchased the entire issued share capital of GDE from the defendants. I shall refer to the terms of the SPA later in this judgment.

92. Immediately upon completion of the SPA, the defendants resigned as directors of GDE and four new directors were appointed: Mark Hazell; Oliver Hazell; Mr Lynass; and Mr Lynass's wife. Mr and Mrs Lynass have since resigned as directors and returned to Australia; they are no longer involved in the company. Oliver Hazell has been the managing director of GDE since 2018.

*After the SPA*

93. On 21 October 2015 Miss Cavill sent an email to Miss Kelly, attaching a copy of the Improvement Plan and including a table showing the actual performance achieved after analysis of the sample data provided. The email recorded that GDE had not responded to the request for test results made on 16 September. It read in part:

> "The result[s] remain to be of concern due to the concentration of ammonia, which is well above the consented limit. Last time we met I know we discussed an increase in the ammonia concentration limit. Based on your current sample result I am reluctant to vary the consent as you will continue to be in breach of the requested limit of 400 mg/l. Following on from my last email on the 16th September, could you please provide details of the analysis that you have undertaken on the effluent discharged from the site.
>
> …
>
> You have previously been instructed that in the event that you fail to undertake the agreed action within the specified timescales, or that circumstances change for the worse, DCWW will have to consider what actions to take in respect of the breaches of consent. This consideration will include a decision on whether a formal caution or prosecution is appropriate."

94. Miss Kelly's evidence was that this was the first occasion on which DCWW had expressed any reluctance to increase the permitted concentration of ammonia. She also said that as she had seen the "standard paragraph" about the possibility of a formal caution or prosecution in previous emails from Miss Cavill, she was not concerned by it.

95. On 4 November 2015 Miss Cavill sent to Miss Kelly by email details of further breaches in respect of ammonia as against the permitted limit of 250 mg/l: 7 October 2015, 606 mg/l; 14 October 2015, 1510 mg/l; 21 October 2015, 1340 mg/l; 29 October 2015, 277 mg/l. Miss Cavill observed that the "severity and consistency" of the breaches were "extremely concerning" and that GDE would "need to investigate the cause of the consistent failures and provide details of any remedial action take[n] to prevent further failures."

96. Miss Cavill referred the matter to DCWW's Head of Operational Legal Services, who on 11 November 2015 wrote to GDE warning that consideration was being given to bringing a prosecution for breach of the conditions of Consent DC/S/D299. The letter was headed with the caution against self-incrimination. It contained a list of breaches in respect of levels of ammonia on dates in 2014 (February, March, April, June, October and November), and 2015 (February, March, April, May, June, July, August and September). Among other breaches recorded were levels of lead and zinc (June, August, September and October 2015) and of copper (August 2015). The letter also said:

> "I am also instructed that the Trade Effluent Officer has asked for records of the nature and/or composition of the trade effluence discharged to the sewer, but despite several requests for this data you have failed to provide it. I must remind you of the provisions contained in paragraph 17 of the Consent to Discharge. 'The occupier shall keep records of the volume, rate, nature and/or composition of the trade effluent discharged into the sewer at all times available for inspection by any authorised officer of the Undertaker and copies of such records shall be sent to the Undertaker on demand'."

97. Mr Lynass showed the letter to Miss Kelly and, as she had been managing the compliance side of the business for some time, he asked her what was going on. His evidence was that Miss Kelly told him that she had been telling Mr Roderick and James about the compliance problems "since forever" and had been working hard to address the problems.

98. On 12 November 2015 Mr Lynass met Miss Cavill to discuss the letter. She told him that she had been trying to resolve the matter with GDE for several months and that, having learned of the sale of the business, she wanted the new owners to be aware of the problem, so that they could address it. Mr Lynass indicated that discharge of leachate would be suspended. An arrangement was made for weekly samples to be provided to DCWW for external testing.

99. On 13 November 2015 DCWW's sampling technician attended at the Site. As Miss Cavill noted in an email to Mr Lynass (copied to Miss Kelly) that afternoon, he found that "GDE were discharging at the time of the visit" and took samples for testing by DCWW and GDE. Miss Cavill promised to send the results of DCWW's analysis and asked to be sent those of GDE's analysis as well as those of any samples that may have been taken before discharge recommenced. Her email said: "We have also been advised that you have received further loads this morning. Please confirm whether you are ceasing discharging trade effluent from the leachate treatment plant as indicated at yesterday's meeting, or whether this activity will continue." Miss Kelly replied:

> "Please be assured that GD Environmental Services Ltd are not accepting leachate into the facility. As discussed yesterday all leachate is being disposed of at Tradebe. I can send copies of the waste transfer notes signed by Tradebe if required.

> Please find attached analysis of split sample taken today. This sample has also been sent to an external lab for analysis. Collection will be on Monday and data available two weeks from this date.
>
> The batch treatment of leachate has dropped. This morning's reading of ammonia 592 mg/l with this afternoon reading of 560 mg/l. We will continue to treat over the weekend on the reducer pump and sample again Monday morning. Please be assured that the leachate will not be discharged until it meets the consent level, however we will notify you prior to this and every day of the levels."

100. On 16 November 2015 Mr Lynass asked Miss Kelly to provide a report on all external samples of discharge levels since January 2013.

101. On 20 November 2015 Ms Cavill sent an email to Mr Lynass and Miss Kelly, informing them of her concern that the analysis of the discharge sample taken on 13 November showed copper, zinc and lead greatly in excess of the levels permitted by the trade effluent consent: copper was 305% above the limit, lead 545% above, and zinc 2900% above. Suspended solids and sulphate were also above permitted limits. The email said that the situation could not be allowed to continue "under any circumstances" and it required GDE's immediate attention. GDE stopped taking leachate into the Site, and on Mr Lynass's instructions the sludge in the leachate treatment plant was disposed of by means of a third party.

102. GDE instructed an environmental scientist, Geoff Ellison of Ellison Environmental Services Limited, to advise in respect of the matters raised by DCWW's letter of 11 November 2015. He met with Mr Lynass on 23 November 2015, and on the following day he provided a briefing note describing itself as "an initial review of the situation, strategy to be adopted with WW, recommendations to improve the performance of the existing treatment system and recommendations for the future to enable the treatment business to continue in a sustainable and profitable way." As regards discussions with DCWW, Mr Ellison was not overly concerned by the threat of prosecution:

> "It is normal practice within the water industry for the water company to issue a letter of explanation following a breach of a TEC [trade effluent consent]. Subsequent breaches result in a threat of punitive action. It would appear in this case that there have been repeated violations of the TEC and WW have now resorted to a formal threat of prosecution. Despite the robust threat of legal action, by WW, the number of prosecutions undertaken as a result of breaches are very low and are usually associated with a discharge of trade effluent which results in severe problems at the receiving sewage treatment works (STW).
>
> As the ammonia breaches have been on-going for at least three years it can be concluded that the GDE discharge has not had a significant adverse effect on the STE regarding operational

> problems or breaches of the WW discharge from the STW. Had WW experienced problems at their STW, due to the GDE discharge, they would have instigated an investigation into possible suspects some time ago.
>
> As there does not appear to be an issue with the discharge adversely affecting the STW, it is advised the GDE try to normalise the discharge by requesting an increase in the ammonia limit to, say, 1000 mg/l."

Mr Ellison acknowledged that DCWW might have two objections to increasing the ammonia limit. The objection that increased levels of ammonia would place additional costs on DCWW for treating ammonia could be addressed by proposing the levy of a surcharge on GDE. The objection that increased levels of ammonia might cause ammonia levels at the sewage treatments works to be exceeded at times of peak loading might be addressed by an agreement to suspend discharges during critical periods. However, Mr Ellison suggested as an alternative strategy that the ammonia limits might be temporarily relaxed during the implementation of an upgrade of GDE's plant and process.

103. In early December 2015 GDE recommenced discharge of processed leachate. On 9 December Miss Kelly wrote to Miss Cavill by email: "Just to update you that we are now discharging from the site. The ammonia well below consent level[;] todays lead is 3.48 mg/l." On 12 December Miss Cavill sent an email to Mr Lynass and Miss Kelly, notifying them that the ammonia level in a sample taken on 9 December was 608 mg/l against the consent limit of 250 mg/l; results for other measured parameters were not yet available. She asked: "Can you investigate this and provide your own sample analysis results for the discharge since you have restarted the process." On 15 December Miss Kelly sent the requested results and said: "We are back to batch treatment and haven't discharged anything since last week. Once the clarifier results are within the consent we will discharge. I will notify when this is."

104. The year 2016 began with optimism. On 7 January Miss Kelly informed Mr Lynass that the results of analysis of a sample taken the previous day showed levels of contaminants very substantially below the permitted limits. Mr Lynass replied: "Fantastic[!] It has been a journey of learning but I am confident that we now have Secure and productive tomorrow's (sic)". However, on 12 January Miss Cavill notified Miss Kelly that DCWW's analysis of the sample taken on 6 January showed a lead content far in excess of the permitted limit; GDE's analysis had shown only a negligible amount of lead in the sample. The reason for the discrepancy in the results does not emerge clearly from the documents. GDE's test results at the end of January showed generally acceptable levels of contaminants, save for a high level of nickel.

105. On 29 January 2016 Miss Kelly sent to Ms Green GDE's Annual Report for 2015. Ms Green replied by email, acknowledging receipt of the Annual Report but commenting:

> "CSA [an environmental consultancy] seem to be having trouble contacting you to arrange a follow-up audit regarding the actions you agreed in August 2015.

> Please let me know if there is a problem with your MCERTS certification as I may be able to help."

(MCERTS was NRW's and the Environment Agency's Monitoring Certification Scheme for equipment, personnel and organisations to ensure compliance with regulatory standards. CSA was the authorised certification body.) Miss Kelly replied that she was trying to find a different auditor as she had not been happy with the previous one. Ms Green replied, expressing concern but offering to help. She observed: "MCERTS approval is a permit condition and to lose it could be interpreted as a permit breach."

106. On 17 March 2016 Miss Kelly sent to Mr Lynass, at his request, a schedule containing the data from sampling since October 2012.

107. On 18 March 2016 Ms Green sent an email to Mr Lynass and Miss Kelly: "Following my meeting this morning with Welsh Water to discuss your leachate treatment and recent permit and significant consent limit breaches, I will be attending your meeting with Gemma on 5th April." On receipt of that email, Mr Lynass made a telephone call to Ms Green, and after that conversation he sent the following email to Miss Kelly:

> "Can you give me a call on this please I have just spoken to Rebecca, she is not a happy woman.
>
> Was she ever advised that we have had breaches of consents since the system was installed, she is not happy that we have had breaches and again she has not been informed.
>
> She has advised that she will be in a position to inform us of NRW approach to the 'Significant Permit Breach' and wanted to let me know that NRW are significantly concerned that our Management Systems have failed
>
> She was referring to two high lead readings in November and the high ammonia levels in October and November
>
> I think we have become a target not sure why?"

108. By email on 30 March 2016, Ms Green sent to GDE a formal warning letter from NRW, alleging commission of offences under regulation 38(2) of the Environmental Permitting (England and Wales) Regulations 2010 by failing to comply with a permit condition, namely the failure to notify NRW "following the detection of a failure of equipment or techniques, resulting in the discharge to sewer of industrial effluent with the concentration of some of its constituents exceeding those set in the Discharge Consent Limits granted by Dŵr Cymru Welsh Water." The dates of the offences included 17 September 2015, 7 October 2015 and 14 October 2015, as well as several dates after the SPA. The letter said that the decision to issue a warning instead of prosecuting could change if any further relevant information came to light.

109. In his witness statement, Oliver Hazell commented that NRW were "probably unaware that the breaches that took place prior to October 2015 were deliberate breaches occurring with the full knowledge of the then owners and management." I

do not think that a witness statement is the appropriate place for a comment of that sort; however, as it happens, I agree with it.

110. On 5 April 2016 Miss Cavill and Ms Green met with Mr Lynass and Miss Kelly to discuss breaches of the discharge consents concerning metals in March 2016 and anomalous differences between the test results being returned in respect of metals by the laboratories analysing samples on behalf of DCWW and GDE respectively. The Action Plan produced after the meeting recorded:

> "It was found that GD's external lab Exova are testing for dissolved metals and Welsh Water's external lab Wessex Water are testing for total metals. This explains the anomaly of the data between GD & WW.
>
> GD to cease discharging until they can confirm the treated leachate dissolved metals are within consent.
>
> GD to carry out internal investigation and report to Welsh Water by next meeting scheduled for 29th April 2016."

111. GDE's records appear to show that the leachate treatment plant was not operational from the first week of April 2016 until mid-June 2016. However, an email from Miss Kelly to Miss Cavill on 10 May shows that a sample of treated leachate was taken on 5 May and returned good results. Miss Kelly asked for approval of proposed discharge of that treated leachate. I assume that approval was given, because on 16 May Miss Kelly informed Miss Cavill that a subsequent batch of treated leachate would be discharged as it was within the discharge consent limits. Miss Kelly's evidence, which I accept on this point, is that leachate was being discharged only in batches in order to ensure that the discharge remained within limits.

112. With effect from the end of May 2016 Miss Kelly resigned from her employment with GDE.

113. Mr Lynass came to the conclusion that the only way in which the leachate treatment process could operate profitably was to have a continual flow to the drain, but that the only way in which it could operate lawfully was to process leachate in batches and not continuously. Therefore the system required substantial and costly improvements. Mr Lynass put this conclusion to Mark Hazell and Oliver Hazell. Meanwhile he introduced a rule that, if any sample revealed a breach, DCWW would be notified and the processing would be stopped until the cause and necessary remedial measures had been identified.

114. On 21 November 2016 Mr Lynass sent an email to James, via Mr Allison, in which he intimated a complaint that MDW had been misled into paying more than the shares were worth. He referred to an attachment that he said showed on-going and continued breaches of consent since 2012, and he continued:

> "In the material and interviews and due diligence material we believed [we were] buying a 'Continuous Flow treatment and discharge facility' capable of discharging up to the consent of

> 522CUM weekly over a 5 day week on day shift operations only.
>
> We asked on several occasions in writing if there were any breaches of consent or if there was anything material that needed to be disclosed, at no stage were we advised that material on-going and continuous breaches of the consent were occurring even at the time of acquisition, this has the effect of substantially reducing our profitability due to many reasons I'm happy to discuss with you in detail when we meet.
>
> The issue is the valuation we paid for this part of the company as it was in the figures some 40% of the profitability depicted to us in the financials and operationally assessed and valued as a profit stream not as an asset value (although this was done also). This leads us to reassess the value of the business potentially.
>
> Equally when I take you through the detail when we meet I will show you that a system that was discharging continuously illegally cannot produce the sustainable profits generated without operating illegally and would require substantial investment enable it to achieve the same level of profitability valued at acquisition.
>
> I am very keen to get your insight into this system to see if we can find a way to mitigate the issue together."

115. James replied in a long email on 9 December 2016, which included the following passages:

> "1. Trade Effluent breaches dating back to 2012: The previous plant was replaced in Autumn 2013 to ensure no further breaches. The Plant installed and in situ at point of sale has a capacity to process 90 CUM per day within Ammonia consent levels. The diligence folders disclosed a letter confirming that consent levels were not being achieved and that upon investigation a pump malfunction was the cause and this was addressed. Please see the letter.
>
> 2. Continuous flow system capable of discharging 522 CUM per week: Provided there have been no unauthorised manufacturer alterations carried out, you have a continuous flow system capable of discharging 630 CUM per week (7 x 90CUM daily). As the Licence was for 80 CUM per day, you actually have a system that is over-specification. There are many factors that could affect the level of discharge being achieved linked to the capacity, biology, scale of automation (full or semi - yours is a semi automated system but can easily be upgraded to a fully automated system) and the quality/dilution levels of leachate processed.

> 3. Ongoing breaches and anything material being disclosed: Nothing not disclosed to my knowledge in the due diligence process.
>
> 4. Reassess the value of the business: I don't see how I can comment on this other than you appear to have arrived at this conclusion through insufficient knowledge, experience or data for the system and its use.
>
> 5. System needing to discharge continuously illegally to produce sustainable profits and requires substantial investment to achieve the levels of valuation: As acknowledged above, the plant did have issues but these arose due primarily to a pump malfunction which was addressed and formed part of the ongoing monitoring process. Any subsequent and ongoing breaches can only be caused by the human intervention process which can be dealt with by going to a fully automated system at a relatively low cost of somewhere in the region of £20-30k."

116. This exchange of emails led to a meeting on 12 January 2017, which was attended by James, Mr Lynass, Oliver Hazell, and Harvey West of Hydroventuri. On the following day, Mr West set out his views in an email to Mr Lynass:

> "[M]y informal view at the moment is, basically, that the level of manual monitoring and balancing is still insufficient for the process needs to maintain an optimum performance, i.e. you either need to further increase these or put a fully automated control system in, as originally envisaged. If you are going to increase capacity in the future, then frankly the latter is a no-brainer in my view to get ahead of the curve, and more into a fully automated continuous flow process over a 24/7 period."

117. On GDE's instructions, in late February 2017 Mr West produced a "Report on Process evaluation and Options for improvement for Newport Leachate Treatment Plant". The report explained that GDE's leachate treatment facility was currently being run as a batch process; if it were being operated on "the continuous flow procedure designed and initially commissioned by Hyrdroventuri", the average time taken to treat a unit of leachate would be "approximately 50% less" than under the batch treatment process. Three "key objectives" were identified: (i) to reduce the risk of breaching the Site's discharge consent limit for ammonia; (ii) to restore the treatment capacity / throughput of the process to its design level of 90m³ per day; (iii) to increase the treatment capacity / potential throughput of the process to something in excess of 90m³ per day. The report identified three options for GDE:

1) To do nothing other than implement improved control and compliance management and an improved data collection regime. This would be the cheapest course (approximately £14,000), but it would require greatly increased staff input, would leave GDE still needing to engage third parties to dispose loads with a higher ammonia content, and would restrict future income for GDE.

2) To engage three additional members of staff in order to enable the plant to move towards a continuous flow process and enable it to operate as it had initially been designed to do. As the system would remain manual, the risk of operator error would remain. The major disadvantage of the option, however, was cost, because the initial set-up costs would be £25,000 more than under Option 1 and there would be an additional annual operating cost of perhaps £110,000.

3) To have a fully automated control system, together with additional storage and certain other enhancements to the system. This would reduce the risks of breaching discharge consents for ammonia and of operational error, as well as obviating increased staff costs. The total estimated cost of this option was said to be in the range £93,000 to £113,000.

Mr West recommended maintaining the approach in Option 1 for the time being, while proceeding to the first stage of Option 3 (design, specification and tendering); that initial stage would cost £7,000 to £10,000 and should be completed in 4 to 6 weeks.

118. Mr West's report was discussed with GDE at a meeting on 7 March 2017, after which GDE instructed Hydroventuri to proceed with the first stage of Option 3.

119. On 10 March 2017, Ms Green asked Mr Lynass if he could provide an estimate of the amount expended by GDE in order to comply with its permit. Mr Lynass gave a figure for past expenditure and continued:

> "[W]e have currently committed a further 167,000GBP for the current calendar year FY17 to fully automate the plant to remove an human intervention and therefore potential for non-compliance to occur, this will also allow us to accept higher levels of contamination inbound to the system as the treatment dwell time will be adjusted according to the inbound material."

120. In fact, that statement was untrue. GDE had not committed to that expenditure, and it never did so thereafter. Hydroventuri produced a further brief report after 7 March 2017 in accordance with its instructions. However, Mr Lynass concluded that the rates for treatment of leachate that had been agreed with Newport City Council did not support the further investment that would be required by full implementation of Option 3. No final decision had been taken by October 2017, when Mr Lynass returned to Australia. At around that time, the leachate contract with Newport City Council fell due for renewal. GDE did not secure renewal of the contract and never went ahead with Option 3.

*Notification of claims and commencement of proceedings*

121. As will be mentioned in more detail later in this judgment, the SPA made liability on the part of the defendants for any breach of warranty dependent on the prior written notification of a claim in that regard within certain time limits. The first such notification was given in a letter from MDW dated 23 August 2017, which identified the complaint as follows:

> "In particular, it is evident you were aware that prior to the sale completing that there were ongoing and continued breaches of the Company's liquid waste processing facility (which was duly represented by you and was fully used by the Company at the time as a continuous flow system). During the course of our due diligence enquiries, whilst we were informed that the system had experienced on a couple of occasions or so over the years some minor issues, we were also told each time we raised the question that there had been no breaches of any of the Company's Permits, Licences and Consents it held.
>
> As you have already been informed, in mid-November 2015, the Company was served under cover of letter dated 11 November 2015 with a notice of intended prosecution by Welsh Water for continued and ongoing breaches of its Trade Effluent Discharge Consents, predominantly ammonia levels and metals being well in excess of permitted levels. Given the instances of the breaches highlighted by Welsh Water and the dates that those occurred, it is clear that you would have been fully aware of the scale and extent of the issue. It is evident from that letter that those breaches had been ongoing since the beginning of 2013 and this would have been known by each of you. Despite this knowledge, you neither told us about it in your replies to our Due Diligence Pre-Completion Enquiries nor mentioned it, when you had the further chance to do so, in your Disclosure Letter."

After flagging up certain other matters, the letter continued:

> "Whilst at this stage it is not possible to provide an accurate assessment of the amount of the loss, which has been suffered as a consequence by us and the Company, an initial assessment places such loss as being in the magnitude of between £300,000 and £600,000. This is based on the formula that was used by us to calculate the purchase price we agreed to pay you for the shares in the Company and based on a recalculation of this by reference to the real profits the Company was generating prior to completion."

122. On 11 October 2017 MDW wrote again in respect of the same matters, putting the defendants on notice that it intended to withhold the next instalment of the Deferred Consideration under the SPA and asking for a response to the letter of 23 August 2017. The letter said:

> "Following further investigations and consideration we hereby give you formal notice that the amount claimed in accordance with the notification letter and paragraph 7.5 of the SPA is likely to be in excess of the amounts previously specified and are now believed to be in the region of £1,000,000 (one million pounds). It is impossible to be any more precise at this point in

> time pending further investigations/valuation advice and we therefore reserve all rights and claims."

123. On 17 January 2019 solicitors acting for MDW sent a letter of claim and formal notification of intention to commence legal proceedings. The letter referred to the trade effluent consent breaches mentioned in the 2017 letters and to the responses given to the due diligence enquiries and alleged that the defendants "wilfully concealed and/or withheld documents during the pre-acquisition disclosure exercise and/or fraudulently misrepresented [G]DE's track record of trade effluent consent breaches in its disclosure" and that "test sample results were also doctored prior to [MDW's] acquisition of GDE." The letter of claim raised, in addition, the allegations relating to disposal of cess waste in the magic hole:

> "Furthermore, since completion of the SPA, our client has been informed by previous and existing employees of GDE that employees were regularly instructed to dispose of waste into public drains/sewers. Our client has been informed that employees would regularly be instructed to dispose of waste in a public drain, within the Newport area, on a weekly basis (normally on a Sunday). We are instructed that witness evidence will be provided to this effect in the proceedings that will follow, if a resolution to this dispute cannot be reached."

The letter of claim gave further particulars of the alleged losses:

> "Our client has now taken steps to quantify its claim for breach of warranty. Our client's loss is at least £452,067 (plus interest) and has been calculated, in accordance with the (established) test for the calculation of damages for breach of warranty set out in *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep. 324 CA, using the assessed diminished profitability figure of £65,517, multiplied by the applicable P/E multiple of 6.9. The attached schedule further explains how the loss has been calculated. This will be the subject matter of expert evidence in due course.
>
> Our client reserves the right to provide further details of loss pursuant to the test applied for damages in the event fraudulent misrepresentation is established. In which case, all directly caused losses can and will be claimed, including all remediation costs. These costs will increase the damages figures set out above."

124. The claim form was issued on 6 February 2019. Particulars of claim were filed on 19 February 2019. The claim form and particulars of claim were served on 20 February 2019.

125. On 5 August 2019 MDW's solicitors sent to the defendants a further notification of claim. In addition to matters concerning the breaches of trade effluent consents and the discharge of cess waste into the magic hole, the letter raised the issue of tank bottom waste:

> "The Company regularly disposed of hazardous sludge, known as 'tank bottom waste', unlawfully, by mixing it with dry waste, masking the hazardous sludge as dry waste, and disposing of it as dry waste at a much lower cost to the Company than if it were lawfully disposed of it as hazardous sludge".

The letter gave an updated estimate of the value of the claim:

> "Our client has taken steps to quantify the loss which has been suffered as a consequence of the claims which currently form the subject of the High Court claim together with the further matters which are set out at the start of this letter. This has been currently assessed at £744,276. This figure is based on the formula that was used by our client to calculate the purchase price our client agreed to pay you for the shares in the Company, but with the post-tax profits reduced by £107,866 to reflect the costs that should have been incurred by the Company prior to completion if it had been operated in accordance with the Warranties. That reduction can be multiplied by the multiple of 6.9 (used at the time of completion) to reach £744,276.
>
> However, the systematic non-compliance with environmental law set out above further reduces the value of the goodwill of the Company. The multiple used in the formula that was used to calculate the purchase price which our client agreed to pay you for the shares in the Company was not applicable in the circumstances, and a multiple of 5.2 (as opposed to 6.9) is more appropriate to apply to the (adjusted) profit figure. The loss has been assessed at £1,111,913 (reached by applying the adjusted multiple of 5.2 to the adjusted post-tax profit figure, and subtracting that adjusted figure for goodwill from the figure for goodwill used at the time of completion).
>
> The current assessment of loss is therefore £1,111,913. We refer to the Schedule enclosed for further detail.
>
> For the avoidance of doubt, this loss is based on all of the numerous breaches of warranty, including those of which you have already been notified and which are the subject of the High Court claim. It is not reasonably practicable to identify how much of the amount claimed is attributable to each specific breach outlined above."

126. At the case and costs management conference on 30 September 2019 permission was given to MDW to amend the particulars of claim to include the allegations relating to tank bottom waste. The amended particulars of claim were filed on 3 October 2019.

## D. Expert Evidence

127. This is a convenient point at which to consider the expert evidence of the forensic accountants. Although this evidence is directed largely to issues of quantum, a major plank of MDW's case regarding breach of warranty consists in the inferences it invites me to draw as to GDE's pre-SPA conduct from a comparison of GDE's financial performance pre- and post-SPA. The expert evidence was given by Mr Seamus Gates, a retired partner in Baldwins, for MDW and by Mr Geoff Mesher, a partner in Tempest Forensic Accounting UK LLP, for the defendants. Both experts are very experienced in the valuation of businesses, though neither has specialist knowledge of the waste disposal industry. The manner in which they gave their evidence, both written and oral, was of great assistance, and I was satisfied that they were expressing independent and honestly held opinions and acting in accordance with their professional duties as expert witnesses. In what follows I shall not attempt to refer to all of the detailed matters of analysis and refinement in the expert evidence; only what I see as the main points will be mentioned.

128. The context in which the expert evidence falls to be considered is as follows. The total price paid by MDW was £3,881,224. Of this, £297,000 was attributable to a share capital contribution; excluding that element, the price was £3,584,224. That price represented an amount attributed to the valuation of the shares (£3,500,000) and an adjustment for working capital items (£84,224). The valuation of the shares at £3,500,000 was not arrived at by a method agreed between the parties, but it appears that the approach adopted by or on behalf of MDW was as follows: (a) goodwill was valued by applying a multiple of 6.9 to adjusted post-tax profits of £324,123, giving a figure of £2,236,449; (b) to this was added a figure for net assets within GDE: £1,263,092; (c) the sum of these figures, £3,499,541, was rounded to £3,500,000.

129. Both experts proceeded on the basis that the quantification of damages for breach of warranty required identification of the difference between (a) the objective market value of the business as warranted ("Warranty True") and (b) the objective market value of the business with the alleged breaches ("Warranty False"). Although the experts noted the inclusion of claims for damages for misrepresentation, they did not consider that those claims raised any different questions or required separate treatment.

*Mr Gates' approach*

130. Mr Gates' basic approach was to consider how breaches of warranty, relating to illicit practices and regulatory infractions on the Wet Side, would impact on the properly sustainable profitability of the business as a whole and therefore on either of the commonly adopted methods of valuation of the business, namely EV/EBITDA[1] and

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[1] EBITDA is Earnings Before Interest, Tax, Depreciation and Amortisation. The EV/EBITDA method involves three stages: first, calculation of the level of maintainable EBITDA which could reasonably be expected to be achieved during the average year; second, application of a suitable multiple, so as to calculate capitalised earnings, giving what is sometimes referred to as the "Enterprise Value" ("EV") of the business; third, deduction of net debt from the Enterprise Value. The first stage requires reference to the historic performance of the company and to available forecasts. The second stage involves consideration of publicly available multiples that might be relevant to the company to be valued, as well as of key strengths, weaknesses, risks and opportunities facing the company.

PAT[2]. (Mr Gates considered that these different methods ought to be used in conjunction and that either of them could reasonably have led to the figure at which MDW valued GDE, though he thought that figure rather on the high side.) The basic approach was applied by comparing internal Sage accounting records for the Wet Side for the two years pre-SPA and the two years post-SPA, using sample transactions for comparison of the Sage records with the original invoices. In his main report, dated 27 August 2020, Mr Gates concluded that, although the value of wet waste sales had remained constant (£2,676,000 for the former period; £2,541,000 for the latter period), the costs of disposal of wet waste had increased significantly (£245,000 for the former period; £444,000 for the latter period). Thus costs of disposal as a percentage of the value of sales rose from 9.2% to 17.5%. (The comparable figures for the single years immediately preceding and immediately following the SPA were 8% and 20%.) On the basis of these figures, Mr Gates opined "that the wet waste disposal costs increased significantly in the two years after the acquisition, supporting both the claimant's position that only then was wet waste being properly processed and disposed" and "the contention that profits were overstated in the year prior to acquisition" (main report, paras 4.3.6 and 4.3.8). (Sections 4 and 5 of the main report set out more detailed analysis and cross-checks that need not be recited here.) In cross-examination, Mr Gates confirmed that his main report had proceeded on the basis that all of the increase in wet waste direct disposal costs in the two years after the SPA was attributable to cess waste, tank bottom waste and leachate.

131. On the basis of these figures, Mr Gates concluded that the wet waste disposal costs were artificially reduced by £89,402 p.a. (if a two-year period were taken) or by £126,330 (if only the single years immediately pre- and post-SPA were taken). Although he thought the latter the more appropriate comparison in principle, he adopted a mid-point of £107,866 p.a. This would require to be reflected directly in an adjustment of pre-SPA profits. The profit adjustment for the EBITDA method of valuation would have to be grossed up to £134,832 to take account of tax. This would lead to a reduction of the value of GDE: (a) on the valuation method adopted by MDW, a reduction of £744,276; (b) on the PAT valuation method, a reduction of £1,164,424; (c) on the EBITDA valuation method, a reduction of £591,379.

132. However, Mr Gates further opined that, if there were "fraudulent misrepresentation [in context, that must mean "to the regulator"] or systematic non-compliance with the environmental regulations", it would be reasonable not only to reduce the multiplicand in the manner summarised above but also to discount the multiple, or multiplier, by 25%[3]. This would lead to a total reduction of the valuation of GDE as follows: (a) on the valuation method adopted by MDW, £1,111,913; (b) on the PAT valuation method, £1,748,318; (c) on the EBITDA valuation method, £1,716,263.

133. Accordingly, the analysis of waste disposal costs in Mr Gates' main report has a twofold significance: first, it serves to provide confirmation of the allegations being

[2] PAT is Profit After Tax; this valuation method is also sometimes referred to as the Price Earnings Ratio (P/E Ratio) method. It values a business by applying a multiple, based on a benchmark but subject to adjustments reflecting the relative risks and prospects of the subject company relative to the companies from which the benchmark is derived, to the company's actual or forecasted profit after tax and seeks thereby to determine the price that represents an acceptable return for the subject company's income stream.

[3] Different multipliers would be appropriate for the PAT and EBITDA methods. Mr Gates thought that the purchase price would be justified by a multiplier of 10.8 on the PAT method and of 4.43 on the EBITDA method.

made in respect of improper practices until 2015; second, it proposes a method of quantifying the overpayment made by MDW under the SPA.

*Mr Mesher's Critique*

134. Mr Mesher proceeded largely by way of reliance on the groundwork laid by Mr Gates and a critical analysis of his methods and suppositions. I shall pick out what I see as the main points in his report dated 16 October 2020.

135. First, Mr Mesher rejected the relevance of the valuation method apparently adopted by MDW/HAASCO (a multiple of Profit After Tax, plus Net Assets) on the grounds that it is not a recognised method of business valuation. He also expressed the view that valuation methods based on EBITDA were preferable to the PAT method, as providing a clearer picture of the financial performance of a company. His calculation of the adjusted EBITDA for valuation purposes was £1,128,962 (materially identical to Mr Gates' figure of £1,130,305) or £1,153,000 with certain further adjustments. His calculation of the adjusted figure of PAT for valuation purposes was £323,000, which again was materially identical to Mr Gates' figure of £324,000.

136. Second, Mr Mesher's headline figures for sales and direct disposal costs on the Wet Side for the two years immediately preceding the SPA and the two years immediately following the SPA were similar to those of Mr Gates.[4] However, in section 3 of his report Mr Mesher gave reasons for supposing that the accounting records used by Mr Gates were not a reliable guide to the correct allocation of transactions to the Wet Side and the Dry Side.

137. Third, in an important part of his report, Mr Mesher recorded his analysis of invoices from the electronic accounting records, invoices in hard copy, and the invoice narrative in the Sage accounting records for the purpose of determining specific waste types. In para 3.38 he wrote:

> "There are records that positively identify the type of waste as cess, tank bottoms or leachate. Others are positively identified as something other than these types, such as gully waste or tile washings. Where an invoice has a description such as oil sludge, I have considered where this waste was collected: if it was off-site, I have assumed that this cannot be tank bottoms waste generated by the plant. Where I have been unable to determine the type of waste, I have noted the type as 'unknown'. I am not an expert in types of waste so there may be a limitation in my analysis in respect of knowledge; it must also be acknowledged, as noted elsewhere in my report, that the records are numerous and not always uniform. However, I consider that I have approached this task objectively and that I have done the best that I can with the contemporaneous records available."

[4] For the two years immediately preceding the SPA the headline figures were: £2,592,000 for sales and £241,000 (9.3%) for disposal costs; the corresponding figures for the two years immediately following the SPA were £2,565,000 and £460,000 (18%).

The results of the analysis were set out in detail in Appendix 4 to the report and were summarised in Table 10 within the report:

| **Direct wet waste disposal costs**<br>**By type of waste** | **2013-14**<br>**£000** | **2014-15**<br>**£000** | **2015-16**<br>**£000** | **2016-17**<br>**£000** |
|---|---|---|---|---|
| Cess waste | 62 | 67 | 65 | 58 |
| Tank Bottoms | 33 | 30 | 26 | 11 |
| Leachate | 7 | 0 | 56 | 36 |
| Other | 23 | 2 | 114 | 70 |
| Unknown type | 3 | 0 | 7 | 13 |
| Accounting adjustments | 5 | 10 | (3) | 6 |
| **Total Direct Disposal Costs** | **133** | **108** | **265** | **195** |

138. If these figures are at least broadly reflective of the true position, certain conclusions follow: first, the increased costs of disposal do not relate either to cess waste or to tank bottom waste; second, one major increase in disposal costs is in respect of the disposal of leachate, which Mr Gates and Mr Mesher agree relates to sending leachate to Tradebe Limited; third, the largest increase in disposal costs relates to waste types that are not cess, leachate or tank bottom waste. Mr Mesher opined (para 3.45) that "a host of factors" could explain why costs after the SPA were different from those before the SPA, and he saw this as an illustration of why it was unsafe to use the post-sale period as a guide in assessing pre-sale valuation.

139. Fourth, Mr Mesher's views on valuation included the following main points.

1) On a Warranty True basis, the natural assumption is that GDE was worth what MDW, as a willing buyer at arm's length, paid for it.

2) An appropriate EBITDA valuation would take a multiplicand of £1,153,000 and a multiplier of 4.2, resulting in an EV of £4,842,600. After deduction of the company's debts of £1,501,324, that would give a valuation figure of £3,341,276. The actual price paid by MDW would be justified by a multiplier of 4.34, which is within the reasonable range of multipliers, though at the

upper end of that range. The assumption that MDW paid the true value of GDE is therefore confirmed, on a Warranty True basis.

3) Mr Gates was in error in seeking to gross up the additional disposal costs to account for tax, because any additional disposal costs were calculated before the effects of taxation were taken into account; and, as disposal costs were expenditure, they would serve to reduce the taxable profits: EBITDA is earnings *before taxation*.

4) On a Warranty False basis, the only relevant disposal costs could be those for leachate, on the basis that lawful operation of the Wet Side in the period 2013 to 2015 would have required sending approximately 60% of the leachate for processing by Tradebe Limited. This would result in an additional cost of approximately £38,400 p.a. (7,680 tonnes of leachate, at a cost of £5 per tonne). This would reduce the EBITDA multiplicand to £1,115,000 and, assuming a multiplier of 4.34, a valuation of £3.4m. This equates to a loss of £160,000.

5) However, the Report produced by Mr West of Hydroventuri in February 2017 indicates that adoption of Option 3 (a fully automated system) would have obviated the problems with processing leachate for a cost of between £93,000 and £113,000. A rational and willing buyer and seller would have agreed a reduction of price of no more and possibly less than that cost, which therefore caps the difference between Warranty True and Warranty False valuations.

6) Mr Mesher accepted in principle that a history of persistent regulatory breaches could possibly result in some reputational damage and thus have some impact on valuation, but he did not consider Mr Gates' "somewhat arbitrary" application of a 25% discount of the multiplier to be justified, and he made no allowance in that regard.

*Development of the Expert Evidence*

140. I shall comment briefly on some of the main points to emerge in the experts' joint statement dated 2 November 2020, in Mr Gates' supplemental report dated 20 November 2020, and in the oral evidence.

141. There was significant dispute concerning the analysis in Mr Mesher's Table 10, especially as regards tank bottom waste. Mr Gates' view was that, as (i) GDE's wet waste sales had remained broadly constant over the relevant four-year period, (ii) the "customer mix" of the business had not altered significantly, and (iii) the wet waste disposal costs had increased significantly, it was likely that costs in 2015 – 2017 shown by Mr Mesher as "Other waste types" related to waste types in one or other of the three claim categories (cess, tank bottom waste, leachate).

142. Accordingly, Mr Gates asked MDW to undertake a line-by-line review of each item of cost within each category identified by Mr Mesher. The result of this review and of the revision to the results recorded by Mr Mesher is summarised in the following table drawn from para 6.5 of Mr Gates' supplemental report (I use the same form of

rounded figures that Mr Mesher used in his Table 10, and I mark significant alterations by underlining):

| **Direct wet waste disposal costs**<br>**By type of waste** | **2013-14**<br>**£000** | **2014-15**<br>**£000** | **2015-16**<br>**£000** | **2016-17**<br>**£000** |
|---|---|---|---|---|
| Cess waste | 62 | 67 | 65 | 58 |
| Tank Bottoms | <u>55</u> | 30 | <u>96</u> | <u>79</u> |
| Leachate | 6 | 0 | 56 | 36 |
| Other | <u>4</u> | 2 | <u>50</u> | <u>13</u> |
| Unknown type | 1 | 0 | <u>1</u> | <u>2</u> |
| Accounting adjustments | 5 | 10 | (3) | 7 |
| **Total Direct Disposal Costs** | **133** | **108** | **265** | **195** |

The major difference, accordingly, is that for the first, third and fourth years a large amount of the disposal costs attributed by Mr Mesher to "Other" waste types have been attributed by MDW and Mr Gates to tank bottom waste.

143. Mr Gates applied his original methodology, by which he stood, to these new figures, excluding all costs in respect of "Other types of waste". The cost of disposals was now £240,000 (9% of sales) in the period 2013-2015 and £381,000 (15% of sales) in the period 2015-2017. (The percentages in the single years immediately preceding and immediately following the SPA were 8% and 16%.) The effect of this on the calculation of the reduction of the value of GDE produced the following figures:

a) on the valuation method adopted by MDW, a reduction of £516,341 (or, with a 25% discount of the multiplier, £940,136);

b) on the PAT valuation method, a reduction of £807,656 (or, with a 25% discount of the multiplier, £1,480,742);

c) on the EBITDA valuation method, a reduction of £408,450 (or, with a 25% discount of the multiplier, £1,579,997).

144. I shall come back to some of these valuation issues when I consider quantum of damages.

## E. Core Allegations of Non-Compliance

145. I shall now say something more concerning the practices that underlie MDW's complaints. As mentioned above, these relate to three specific areas: first, the breaches of discharge consents, with particular reference to the discharge of leachates; second, the disposal of cess waste; third, the disposal of tank bottom waste.

Leachate and trade effluent

146. This was the original matter of complaint. The relevant facts largely appear in the narrative set out above. MDW advances two distinct but related contentions: first, that GDE was persistently in breach of the 2012 Consent; second, that GDE repeatedly misled DCWW and NRW by the provision of false test results in respect of sample discharges.

147. The fact of repeated and persisting breaches of the 2012 Consent is a matter of record and is not disputed. Tables showing the levels of contaminants and the occasions of breach were put in evidence; I have referred to only some of the occasions in the narrative above. Mr Ayres submitted that GDE was "continually and systematically" in breach of its consent levels. That is right, save that if "systematically" suggests a planned and intentional course of conduct for the purpose of breaching of the 2012 Consent it goes too far. The truth is simply that GDE found itself unable to contain the levels of contaminants within the permitted levels and on occasion resorted to falsification in order to conceal this from NRW. What is also true is that GDE was unwilling to take steps that might have enabled it to comply with the 2012 Consent but at a commercial cost.

148. Gary Gray's evidence was that, as the person responsible for testing the discharged leachate, he knew that GDE was continually in breach of the limits in its Permit. The principal reason he gave for the persistent breaches was that from 2012 until October 2015 GDE was collecting more waste than it could treat correctly, with the result that waste was passing through the system too quickly. He raised this problem with Miss Kelly, but nothing was done to reduce the amount of waste being collected, so the problem continued. A second problem was that there was insufficient testing of the leachate being received at the Site; the result was that some of the leachate had such a high level of restricted elements that it was impossible to treat it sufficiently to bring it within permitted levels. A third problem was that the leachate treatment plant, which he alone operated, was designed for optimum performance through continuous operation but was in fact only operated intermittently, batch by batch. This evidence is consistent with other evidence, both from the records of the test results and from Mr West, and I accept it.

149. Mr Gray was also responsible for collecting samples of the discharge for testing and for providing the results to Miss Kelly for submission to NRW or DCWW. His evidence was that he took the samples from the inspection chamber, that is, the magic hole. In his witness statement, he said: "On a few occasions Lindsey asked me to change the test sample results before they were sent to WW or NRW to give the impression to the regulators that the test sample results showed that particular discharge was within the discharge consent limits." That evidence is borne out by a

number of emails to that effect and by the clear evidence that the regulators were provided with false results. The provision of those false results was a criminal offence; see paragraph 25 above.

150. The position is fairly summed up in the concluding paragraphs of Ms Cavill's witness statement in these proceedings:

> "53. I can confirm that according to sample analysis taken from samples taken by DCC, GDE was in continuous breach of its Discharge Consent as from 20 February 2015 up until 15 October 2015, which I understand is the date on which the claimant purchased GDE. The Letter [of 11 November 2015] records significant breaches back to at least 19 February 2014 …
>
> 54. It appears that there were more breaches than I was aware of for the period of at least 20 February 2015 up to and including 7 October 2015. I do not have an explanation as to why GDE's internal schedule of test results differs to the test results provided to me on occasion throughout this period.
>
> 55. I note from the Schedule [to the Letter] that it appears every single test result which was sampled by GDE as from 17 February 2014 up to and including 7 October 2015 breached the Discharge Consent limits. According to the Schedule, there were at least 80 samples taken by GDE during this period and all of the samples breached the Discharge Consent in respect of at least one constituent element. It appears from the Schedule that there were repeated and significant breaches throughout this period in respect of ammonia, copper and lead."

Cess waste

151. It is not disputed that the practice of discharging cess waste directly into the public sewer commenced in the 1980s and was carried on for many years afterwards. The factual issue between the parties is as to when the practice ceased. MDW's case is that the practice was stopped only in the run-up to the sale of the business in 2015. The defendants' case is that it had stopped several years previously. Evidence on the practice of disposing cess waste into the public sewer via the magic hole was given by several witnesses on each side, principally the following: for the claimant, Christopher Jordan, Natalie Lane, Mr Gray and Andrew Sainsbury; for the defendants, Mr Roderick, Miss Kelly, and James.

152. I shall first deal separately with the evidence of Anthony O'Connor, which gives rise to significant problems.

1) Mr O'Connor's witness statement for the claimant was made on 5 August 2020. He was then still employed by GDE as a tanker driver at the Site, where he had been based since about the beginning of 2013. His duties in the period 2013 to 2015 solely involved the collection and transportation of cess waste.

In October 2020, before the trial, Mr O'Connor resigned his employment with GDE after facing dismissal upon an allegation of misconduct.

2) The evidence in the witness statement was as follows. Cess waste collected from addresses outside the Newport area would be taken to a DCWW treatment plant. However, this was done only very rarely with cess waste that had been collected within the Newport area. Once or twice every day Mr O'Connor would discharge such waste into the magic hole, and on the majority of occasions when he did so there was another tanker on site waiting to dispose of cess waste into the magic hole after him. This practice was followed at the direction of Mr Doe, who made it clear that drivers had to be discreet when discharging of cess waste in that manner, lest DCWW's personnel saw what was happening. Mr Doe also instructed the drivers to complete waste transfer notes to show that cess waste had been disposed of at a treatment plant, even when it was discharged into the magic hole. It was only in around April 2015, a few months before the sale to MDW, that Miss Kelly instructed the tanker drivers to stop disposing of cess waste into the inspection chamber. And it was only when they nevertheless continued the practice that she put an end to the practice by causing a padlock to be placed on the cover of the inspection chamber. James and Miss Kelly were aware of the practice.

3) In examination in chief, Mr O'Connor gave materially different evidence by way of purported correction of his witness statement. He said that the padlock was placed on the magic hole, and the practice of discharging cess waste there ended, about three months after he began his employment as a tanker driver—that is, the practice ended in about April 2013—and that in that three-month period he had put cess waste down the magic hole on only two or three occasions; the rest of the time he had taken it for disposal at treatment plants. He said that the statement was wrong to say that, on most of the occasions when he disposed of cess waste in the magic hole, there was another driver waiting to do likewise: this happened only once. Similarly, he said that only once had Mr Doe instructed him to falsify a waste transfer note.

4) Mr O'Connor's evidence in cross-examination by Mr Sims was to the same effect as his oral evidence in chief. In answer to questions as to why he had signed his witness statement, Mr O'Connor said that he had "just got confused with the wording and the way it was being done", and he readily agreed with Mr Sims' suggestion that he had felt under pressure because he was working at GDE when he made the statement.

5) I permitted Mr Ayres to cross-examine Mr O'Connor as a hostile witness. Mr O'Connor denied that he had sought to sabotage MDW's case on account of a grudge. He said that James might have seen him put cess waste down the magic hole, but only once, because he had only done so two or three times. The main part of the questioning concerned documentation that Mr Ayres suggested, and Mr O'Connor accepted, did not show recorded collections of cess waste being taken to treatment plants. The question what is the significance of the documents will be dealt with separately.

153. For the defendants, Mr Sims submitted that Mr O'Connor's witness statement ought to be viewed with considerable caution, because it was evident that he had signed it under a degree of pressure and it had been largely repudiated when that pressure no longer existed. The possible existence of subtle pressures upon employees to provide evidential assistance to their employers, even if the pressures are unintended and unaccompanied by threats or inducements, must be acknowledged. Further, I am by no means predisposed by experience to place undue reliance on witness statements, particularly as regards the finer points of their drafting and expression; the very process of composition, refinement and editing can all too often result in the assimilation of honest recollections to a form that is most convenient for the case being advanced by the party procuring the statement. Nevertheless, these points only go so far. First, Mr O'Connor's witness statement was signed immediately below a statement of truth in the correct form. Second, his repudiation of his witness statement did not concern fine details or unsatisfactory wording: he did a wholescale volte face. I do not accept that this is a matter of confusion or misunderstanding. Third, Mr O'Connor gave no evidence of threats or inducements to persuade him to support MDW's case. The furthest the matter went was that he readily gave affirmative answers to Mr Sims' questions, "Did you feel a bit under pressure to do it [i.e. to sign the statement]?" and "Because you were working there at the time?" Leading questions in cross-examination are of course permissible; there are, however, occasions when they are liable to elicit answers on which little reliance can be placed, and this was one of those occasions. I was not impressed either by the questions or by the answers they predictably received from a willing witness. Mr Sims' cross-examination of Mr O'Connor was like giving candy to a child. Fourth, as it is clear that Mr O'Connor resigned from his employment with GDE by walking out of a disciplinary interview at which he faced being dismissed for misconduct (specifically, what amounted to moonlighting on the company's time: a matter to which he admitted in evidence), it is quite believable that he might have animus against the company's owners. Fifth, the manner in which he resiled from his written evidence—at trial, without prior warning to MDW's representatives—is suggestive of a deliberate attempt to ambush MDW's case. Sixth, this suggestion is the stronger in the light of James's oral evidence that Mr O'Connor had spoken to James and thereafter to the solicitors acting for the defendants about the statement he had given to MDW's solicitors:

> "He contacted me, once he had made or been made to sign a statement, that he wasn't happy with, asking where he stood. I didn't know, so I put him in touch with my solicitors, that I believe gave him employment advice as to what he – he was worried he would lose his job if he didn't sign his statement. So he signed his statement. And then Blake Morgan gave him advice as to the mechanics of what you do when you are unhappy with signing his statement."

There is no suggestion that the defendants' solicitors acted in any way improperly. James's evidence is nevertheless striking, because it must mean that Mr O'Connor had discussed with James resiling from his statement in the period August to October 2020, and that he did not then express any reservations to MDW's solicitors before the trial started on 18 January 2021, although he was not employed by MDW after October.

154. In the circumstances, I find myself unable to place significant weight on Mr O'Connor's evidence. I regard his oral evidence as a deliberate attempt to ambush MDW's case and as being so tainted as to be unreliable. However, that does not necessarily mean that his written evidence was either honestly given or, if honest, accurate. I should not be willing to accept any of his evidence unless it were supported by other, reliable evidence.

155. The truth of the matter has to be arrived at by examining the totality of the evidence, both oral and documentary, and considering the inherent probabilities of the matter. Documents are usually a more reliable guide than witnesses' memories, but that is not necessarily so in circumstances such as those of this case, where the issue is whether a long-standing and illicit (so itself undocumented) practice ended at a given time or had ended five or ten years previously; honest memories may in such a case be more significant than in a case where the issue concerns a single event.

156. Mr Jordan was employed at the Site from 2005 until October 2013, initially as a general operative and for the final two years as senior operations supervisor. In his witness statement made in August 2020 Mr Jordan said that throughout his employment he had seen cess waste being discharged into the magic hole, on average once or twice a week; he stated that conversations with tanker drivers led him to believe that the practice happened "almost on a daily basis." The statement said that the tanker drivers were expressly instructed by Mr Doe to discharge cess waste into the magic hole and to complete false waste transfer notes to show that the waste had been taken to one of DCWW's treatment plants. Mr Jordan stated that Miss Kelly and James were well aware of the practice. In cross-examination he denied that Miss Kelly had disapproved of the practice during the period of his employment. He also denied that a lockable cover had been placed over the magic hole during the period of his employment, though he said that he had later heard of one being fitted. He acknowledged that he could not "personally say" that James knew of the practice in 2013.

157. Ms Lane was GDE's Dry Waste Manager from 2006 until she left the company in November 2014. (She re-joined GDE in 2018 in a similar role.) In her witness statement, Ms Lane said that throughout her first period of employment she had witnessed disposal of cess waste down the magic hole on an almost daily basis, and numerous times a day. Instructions for this practice came initially from Stephen and were subsequently repeated by James, and they required that steps be taken to ensure that DCWW personnel in the area did not see what was going on, and for that reason she and other administrative staff were told to monitor the area: "If at any time we saw (from the office or whilst in the yard) a Welsh Water operative, we were instructed to immediately call the cess waste drivers who were working on that day and tell them not to return to the yard and to either await further instruction to confirm that the area was clear of Welsh Water operatives or to dispose at the Welsh Water treatment plant." Ms Lane stated that she had personally made "numerous calls" of that nature to tanker drivers. This evidence is curious on its face, because no good reason has been identified why full tankers should not return to the Site; the problem concerned the emptying of the tankers. Ms Lane stated that James was well aware of the practice and, when not on holiday, was on site at least two or three times a week after Mr Roderick took over as managing director, though rather less in the few months leading up to November 2014. In her oral evidence, Ms Lane said that the

practice of putting cess waste down the magic hole had not stopped by the time she left GDE in November 2014 and that she was not aware of any instruction that it should stop. She also said that she did not know of a padlocked cover on the magic hole.

158. Mr Gray has been employed by GDE for many years. From 2013 until after the SPA he had responsibility for the day to day running of the plant and the general operation of the wet waste treatment and discharge to the public sewer; in that role he was answerable to Miss Kelly, at whose bidding he was complicit in the falsification of data provided to the regulators. He gave detailed evidence concerning tank bottom waste and the treatment of leachate. However, his witness statement contained only a single paragraph in respect of cess waste, which said that he did not knowingly see anyone disposing of waste unlawfully into the magic hole, though he did see tankers discharging into the magic hole (he could not say whether those were unlawful discharges) and he "had heard it [unlawful disposal of waste there] was a common practice." Mr Gray was also responsible for GDE's internal testing of the treated leachate being discharged into the public sewer. He took the samples for testing from the inspection chamber, that is, the magic hole. In his witness statement, he said: "WW would independently attend the Site and take their own samples for testing during 2012 to October 2015. WW as far as I am aware would attend without notice and at any time. This could vary from once or twice a month to once or twice a week when discharge rates were particularly bad (i.e. too high and severely in breach of the discharge limits)."

159. Mr Gray's evidence is of considerable significance on the issue of cess waste, although he has little to say about it. First, if the practice of discharging cess down the magic hole were continuing on a regular and frequent basis during 2013, 2014 and the early part of 2015, Mr Gray would have been unlikely to know of it only by hearsay: he would have been bound to know of it by direct observation. Second, it is relatively improbable, though not of course impossible, that the magic hole would have been used as a regular discharge point for cess waste after it became necessary to test leachate samples at the magic hole. Third, it is very improbable that tankers were discharging cess waste into the magic hole on practically a daily basis, as MDW alleges, if the regulators were liable to attend the Site without warning for the purpose of taking samples from the magic hole. These considerations tend to suggest that, at least from the time when GDE started processing leachate at the Site, the practice of discharging cess waste into the magic hole was at most occasional, if it had not stopped altogether.

160. Mr Sainsbury has been employed by GDE as a tanker driver for some fourteen years. His oral evidence was that the practice of putting cess waste into the magic hole ended at roughly the time when Mr Doe left the company and Mr Roderick joined, and that Miss Kelly did not give instructions for the practice. In fact, Mr Roderick joined GDE in June 2013 and Mr Doe left in April 2014, and Miss Kelly became General Manager in December 2013. Mr Sainsbury's evidence, though imprecise, tends therefore to suggest that the practice did not continue beyond the latter part of 2013 or the early part of 2014.

161. For the defendants, Mr Roderick's written evidence, short and to the point, was that the practice of putting cess waste down the magic hole did not exist during the time he was with GDE.

162. Mr Roderick's oral evidence was to this effect. When he started at the company, he made an effort to learn about the waste business by going out with the drivers. In the course of general conversation, he heard mention—no more than gossip—about the practice with the magic hole. He mentioned it to James, who told him that it was not something that went on. He was satisfied with that answer. He did not see cess waste being disposed of down the magic hole. Indeed, he did not know where the magic hole was. He did not have any recollection of the investigation carried out by Ms Green and the NRW in 2014, but he would doubtless have discussed it at the time with Miss Kelly. It did not occur to him, in the light of that investigation, to question whether James's reassurance that there was no such practice were correct: "It didn't cross my mind, to be honest. … [B]ecause we were compliant. I was happy with our level of compliance. So I had no reason to question."

163. I asked some questions of Mr Roderick:

> "Q. What was the nature of the gossip about the magic hole?
>
> A. It was actions that had gone on previous. I don't know when. It didn't materialise. There was no – that I can recall, there was no specific dates or anything of that nature. Just the fact that it was – and again it's – I can't recall who I had the conversations with. Whether they directly did it or not did it, I couldn't say.
>
> Q. Okay. So, accepting that you can't remember precisely how it arose, the gist of it as you recall is that there was gossip that there used to be a practice with the magic hole. Yes?
>
> A. Yes.
>
> Q. And the nature of the practice with the magic hole, according to the gossip, was what?
>
> A. Waste was discharged through it. I don't even know what it was they were referring to. As I said, my experience is very limited of wet waste prior to joining the business.
>
> Q. So, any particular sort of waste? Or just that waste would be put down the magic hole?
>
> A. Just liquid waste. There's no specific.
>
> Q. And appreciating that you say you don't have any recollection of precisely when or precisely in what circumstances you learned this or precisely from whom, what was the gist of why this was being mentioned to you at all?
>
> A. I'm not sure. I'm not sure what the motives – at all. Possibly just to make me aware.
>
> Q. Why did you ask James Norvill about it?

> A. Because I wanted to be 100 per cent clear that there was no noncompliance actions going on.
>
> Q. And did you ever ask any of the drivers, or whoever was giving you the gossip, where the magic hole was?
>
> A. No.

164. I do not regard that evidence as credible. It seeks acceptance of several things that are improbable individually and are very improbable in conjunction: (1) that drivers, for no apparent reason, chatted to Mr Roderick about a purely historic practice involving wrongful disposal of liquid waste in a "magic hole"; (2) that they did not tell him and he did not ascertain what sort of liquid waste was involved; (3) that they did not tell him and he did not ascertain from them or ever thereafter learn where the "magic hole" was; (4) that nevertheless he asked James about the practice; (5) that his conversation with James did not enlighten him as to the whereabouts of the magic hole or, apparently, the nature of the waste; (6) that, when an investigation into what can only have sounded like the same practice was launched by NRW at most some seven or eight months later, he made no further enquiry and had apparently no concern lest the historic practice of which he had been told were continuing.

165. Mr Roderick's account also raises questions in connection with enquiries made by NRW well before the February 2014 investigation (paragraph 43 above): in July 2013, which would have been at around the time when, on Mr Roderick's account, he heard gossip about the "magic hole" from GDE's drivers. (Mr Roderick was not asked about these enquiries, but they can be examined on their own terms.) The evidence about these enquiries is as follows:

1) On 2 July 2013 a telephone conversation took place between Ms Green and Miss Kelly, as a result of the receipt of a complaint received by NRW from a third party between 28 June and 2 July. No such complaint is referred to in Ms Green's witness statement (which was accepted as written evidence; she did not attend at trial), and its nature has to be inferred from the emails. Ms Green must have told Miss Kelly the nature of the complaint and the time at which the matter complained of was said to have occurred and asked her to look at GDE's CCTV footage. After the conversation, Ms Green enquired, "Anything interesting in the CCTV?" Miss Kelly replied:

> "I've checked the CCTV and there is nothing suspect. Also I have checked the work logs for that week and the week prior and we didn't do any work for the Celtic Manor. I can show you the CCTV & Trackers when you are on site next.
>
> Please be assured that GD take these matters very seriously."

2) Ms Green replied on 3 July:

> "Is there any other operation that might be carried out in that yard that might appear to a casual observer to be pumping something down the sewer? Do you take all the septic waste

> you collect direct to WW? What do you use the holding tank & centrifuge for now?
>
> Please keep the CCTV tapes for me, I should like to see them when I come."

3) On 4 July Miss Kelly replied: "We clean the interceptor ourselves every week, this could be perceived as GD discharging to the chamber when in fact we are emptying." (In oral evidence, Miss Kelly explained that "the interceptor" contained three inspection chambers, the last of which is the point of discharge, the so-called magic hole.) Ms Green replied: "Thanks for that. So do you pump out the interceptor & then put it in your oily waste tank? Do the times correspond with those in the complaint?" Miss Kelly replied:

> "I've checked the CCTCV (sic) for 28th June 7-7.30 and 3.30pm, the cameras are on sensors so if there is any traffic at that end of the site the camera automatically turns to this area and records. There is no action in the area of the interceptor on this date at these times.
>
> Yes the interceptor is pumped into the tank and then treated on site."

4) Immediately after sending that email, Miss Kelly sent an email to Mr Roderick and Mr Doe, commenting that Ms Green didn't "seem to be letting this drop." Mr Doe replied to Miss Kelly, copying in Mr Roderick:

> "The CCTV will only flick down that way on sensing movement but any vehicles working in that area would actually mask the activity going on in the interceptor. We also wash down the Manhole periodically as well as jet to the outfall."

5) It appears, accordingly, that someone had informed NRW of what, rightly or wrongly, he or she took to be occasions when cess was being discharged into the sewer. As the incident must have taken place either shortly before or shortly after the time when Mr Roderick alleges he received gossip about improper practices at the magic hole from the drivers, it renders the evidence that he gave in that regard even less credible than it might otherwise have been.

6) As for the exchange between Mr Doe and Miss Kelly, it might be taken in either of two ways: either that Ms Green's persistence would lead nowhere, because there was nothing to hide; or that it would lead nowhere because the malpractice was well hidden. Miss Kelly's explanation in cross-examination accorded with the former interpretation. In the context of the evidence as a whole, however, the latter seems to me the more probable interpretation.

166. Miss Kelly said nothing in either of her witness statements concerning the disposal of cess waste in the magic hole. In cross-examination, her evidence was that she had seen it taking place in the first month or so of her employment by GDE but had

prohibited it and caused a cover to be placed over the magic hole. She insisted that the practice had not continued after 2012. She described the suggestion that the practice had been stopped only in April 2015 in readiness for the sale of the business as "100% incorrect".

167. James's evidence was that the practice of putting cess waste into the magic hole had started before the company had been incorporated; he could not recall precisely when it had ended but thought that it was between five and ten years before the SPA. The practice had not been discouraged but nor had it been actively encouraged; it was a matter of the drivers' discretion. Although the practice avoided the cost of disposal of cess waste at a treatment centre, it was not generally economically advantageous, because it was inefficient: it required the tanker to be drained only by gravity, which could take between 40 minutes and an hour, whereas cess could be discharged under pressure in five to fifteen minutes at a treatment facility. The reason why the practice was not discouraged, however, was that if a tanker had been unable to discharge at the treatment facility in the evening, it would be unable to discharge there until 8.30 o'clock on the following morning; this would delay the start of the tanker's work. James said that if there had been any significant activity of the kind alleged, NRW would have been bound to discover it. In that regard, he observed that NRW was able to attend without warning and to require access both to paperwork and to CCTV recordings.

168. Two arguments from the documents fall to be considered. First, the analyses carried out by the two expert witnesses show that GDE's costs of disposing of cess waste were not materially different in the two years immediately following the SPA from the costs in the two years immediately preceding the SPA. This suggests that any malpractice regarding the disposal of cess waste in 2014 and 2015 is unlikely to have been significant. MDW's case is that the disposal of cess waste down the magic hole "caused a significant boost to profit made by GDE from cess waste", because up to 50% of the charge to the customer should have been used to discharge at DCWW's treatment facility (closing submissions, paragraph 49). The fact that disposal costs did not increase after the SPA is significantly adverse to MDW's case on this point.

169. Second, Mr Ayres developed an argument from a comparison of the run sheets and invoices relating to the collection of waste from GDE's customers and the invoices—or lack of them—relating to discharges at DCWW's treatment facilities. The analysis is said to show that on numerous occasions waste was collected from customers but not taken to sewage treatment plants. I am sceptical of this argument. First, it was not explored with the defendants' witnesses. The only witness with whom it was explored was Mr O'Connor. Second, the argument rests on an analysis essentially similar to that carried out by NRW in 2014, when the regulator concluded that the discrepancies did not evidence improper discharge of untreated waste. Third, Mr O'Connor suggested reasons for the discrepancies that were consistent with the conclusions reached by NRW. It may be that the suggested explanations are not capable of explaining all of the discrepancies, but the attribution of substantial amounts of discrepancy to improper discharge of cess waste is neither a necessary conclusion nor one supported by the experts' financial analysis. Fourth, the same analysis appears to be capable of showing a discrepancy in the month preceding the SPA and a further discrepancy after the SPA, neither of which is consistent with MDW's case that the practice ended in about April 2015.

170. Finally, it is relevant to note the (quite different) way in which the complaint about untreated waste was put in the letter of claim dated 17 January 2019, nearly 18 months after the initial notification regarding the environmental breaches:

> "Furthermore, since completion of the SPA, our client has been informed by previous and existing employees of GDE that employees were regularly instructed to dispose of waste into public drains/sewers. Our client has been informed that employees would regularly be instructed to dispose of waste in a public drain, within the Newport area, on a weekly basis (normally on a Sunday). We are instructed that witness evidence will be provided to this effect in the proceedings that will follow, if a resolution to this dispute cannot be reached."

171. Taking all the evidence together, and having regard to the observations made above, I reach the following conclusions:

1) MDW's case on this issue has been considerably exaggerated. The practice of discharge of cess waste down the magic hole was not a daily occurrence and tankers did not queue up, as has been alleged.

2) It is improbable that there was more than occasional discharge of cess waste down the magic hole after 2012, having regard to the Newport leachate contract, NRW's rights of unheralded inspection and testing, and Mr Gray's evidence.

3) There were probably occasional discharges in 2013; these would have taken place if a tanker had been unable to discharge at a DCWW facility during working hours and were required for an early start the following day. Such discharges would have been in the evening or at weekends. I find on the balance of probabilities that the discharge of cess waste into the magic hole took place on occasion after October 2013 and in early 2014; one such occasional discharge may have prompted the investigation in February 2014. However, these occasions will have been very few. Any discharges while Mr Doe was still employed (that is, up to April 2014) were probably authorised; if any took place after that date (they may have done, but I am unable to find that they did) they were probably unauthorised by management personnel and unknown to them.

4) I find that the practice had no significant impact on GDE's financial performance or accounts in the two years immediately preceding the SPA.

Tank bottom waste

172. As already mentioned (paragraph 15 above), tank bottom waste is of two kinds: (1) the "hard solids" at the very bottom of the separator tanks; (2) the "sludge" that sits above the hard solids and comprises suspended solids.

173. The evidence for the defendants from James, Miss Kelly and Mr Roderick was clear that the consistent practice had been to take the hard solids to the Dry Side and dispose of them as non-hazardous waste, and that this was a permissible procedure

because the hazardous waste in Tank A and Tank B had been removed by the separation process.

174. In my judgment, the admitted practice in respect of the hard solids was unlawful. The List of Wastes states expressly that waste type 13 05 01*, which includes solids from oil/water separators, is hazardous waste. Both Mr Gray and Mr Jordan gave evidence that they knew that the hard solids were hazardous waste; although their evidence is not necessarily reliable, I see no reason to doubt it on this point. On balance, I am inclined to accept that Mr Roderick did not know that the hard solids were hazardous waste. However, I do not accept that James and Miss Kelly thought that they were non-hazardous waste. If the sludge that sits above the hard solids is hazardous, as James and his witnesses accepted it was, there could be no proper reason why the hard solids that are in contact with the sludge would not similarly be potentially hazardous. (Mr Sims' argument about the effects of gravity on oil and water explains why most of the oil would have been removed, but neither I nor, evidently, those who compiled the List of Wastes find it sufficient to justify treating the hard solids as non-hazardous. Further, the very fact that Tank A is followed by Tank B shows that gravity is not the final word on the matter.) James and Miss Kelly were sufficiently aware of proper practices to have known this and I am satisfied that they did know.

175. Mr Sims submitted that MDW had not pleaded a case in respect of hard solids. I do not agree. The amended defence complained of ambiguity (paragraph 5(ei)); but the ambiguity complained of was supposed uncertainty about whether MDW was intending the term "tank bottom waste" to "also include suspended solids (above the solid bottom waste)". The reply made clear that both kinds—that is, both the hard solids and the liquid sludge—were included. Contrary to Mr Sims' complaint, that was not the use of a reply to plead a new claim; it was clarification of a claim already pleaded.

176. However, I regard the disposal of hard solids as having very little significance in the case. Tank bottom waste was nearly always removed by suction; the manual extraction of hard solids was rare and, as Mr Gray observed, was understood to be an undesirable practice for safety reasons. Only on a very few occasions were hard solids dug out separately after the sludge had been sucked out. Therefore, for all practical purposes the disposal of tank bottom waste on the Dry Side almost always involved sludge. Bits of hard, solid matter might be sucked up with the sludge but it would not then be separate from it; it would be disposed of with the sludge. Only the hard solids that were not sucked up with the sludge would be disposed of separately.

177. The major issue concerns the sludge. It is common ground that the sludge is hazardous waste and ought to be disposed of as such. If, as MDW alleges, GDE's practice until about April 2015 was to dispose of the sludge by mixing it with dry waste and passing it off as non-hazardous waste, GDE was operating unlawfully in that regard. The defendants deny that there was any such practice.

178. According to Mr Lynass, the issue concerning tank bottom waste first came to light shortly after the SPA had been completed, when he learned from conversations with employees at the Site that sludge was being brought to the Dry Side. He said that he asked Miss Kelly about the practice, and she told him that from time to time the material from the tank bottoms would be mixed with rubble and soil and then taken to landfill; this practice had been going on "for ever", the waste was not hazardous, and

Newport City Council was aware of it. Mr Lynass accepted her assurance that there was nothing untoward about the practice.

179. Miss Kelly gave a largely similar account of the conversation with Mr Lynass, but she said that the conversation was about the hard solids, not about sludge. In her oral evidence, Miss Kelly distinguished firmly between the hard solids, which were taken to the Dry Side, and the sludge, which was taken off-site for disposal by a third party.

180. I am unable to place any significant weight on Mr Lynass's evidence concerning the conversation with Miss Kelly as proof of an admission about what was done with the sludge. I accept that Mr Lynass gave his evidence to the best of his recollection, and I consider him to be an honest witness. However, his evidence has obvious limitations. First, it represented recollections of a single conversation that took place more than five years before the trial. Second, as Mr Lynass was apparently satisfied by what he was told it is relatively less likely that the details of the conversation would stick in his mind. Third, Mr Lynass had little experience of waste disposal and may not have been attuned to the nuances of what Miss Kelly was saying. Fourth, if Miss Kelly said what Mr Lynass says she said, her lie was brazen and easily detected. This makes it unlikely, albeit not impossible, that she was referring to sludge. Fifth, the conversation did not result in either complaint or enquiry and the matter of tank bottom waste was not raised as an issue for a considerable time thereafter: the risk that present allegations have distorted Mr Lynass's recollection of the conversation is obvious.

181. James's evidence as to past practice with tank bottom waste was substantially similar to that of Miss Kelly. He stated that solid waste would quickly accumulate at the bottom of the separator tanks, thereby reducing the volume available for new liquid within the tank, and that therefore Tank A would be dug out, either manually or with the use of a so-called Super Sucker vehicle, perhaps four or six times each year. This waste (the hard solids) would be taken to the Dry Side, as was hard material that was dug out of the reception pit on a more frequent basis. Before it was possible to get to the hard solids at the bottom of Tank A, the water and oil layers would be removed and then the "suspended solids" (that is, the sludge) would be sucked out by a tanker. After the hard solids had been removed, the suspended solids would be pumped back into the tank for further processing. James said that there was no reason to believe that the hard solids were hazardous. However: "The suspended solid layer, above the solid bottom waste, was potentially hazardous waste because that layer could still have contained oils, which had not separated out. However, suspended solids were always treated as hazardous waste until properly separated out or disposed of".

182. James also said that the alleged practice of disposing of sludge by mixing it with dry waste would have been uneconomic. The cost of disposing of sludge would have been about £125 per tonne. The cost of disposing of uncontaminated sawdust as wood would have been up to £20 per tonne. The cost of disposing of uncontaminated soil would have been about £6 per tonne. To soak up a tonne of sludge would have required an equivalent amount of soil or sawdust, and to dispose of the resulting mixture as general waste would have cost about £95 per tonne. This evidence is plausible, but it is hard to assess on its own terms. In his oral evidence James insisted that wet waste could not be taken into the Dry Side. However, a sequence of emails in December 2013 shows that GDE was bidding for a contract that would have required it to take mud slurry into the Dry Side, mix it with sawdust and dispose of it

as fines. James explained that the mud slurry was non-hazardous. Doubtless that was so; the point of the allegation in the present case, however, is that hazardous wet waste (sludge) was being disguised as non-hazardous by mixing with dry waste. It is true that the emails in December 2013 show that James was not enthusiastic about the proposed contract, because the movement of the slurry would be costly and would disrupt the operation of the dry yard. However, the willingness to consider the job at all, coupled with the proposed method of disposal of the slurry, seems to me to weaken the force of James's financial objection to the allegation concerning tank bottom waste.

183. Mr Roderick accepted that the hard solids were disposed of as dry waste—there was, he said, no reason to think that they were hazardous or required testing—but he too denied that sludge was disposed of by mixing with dry waste.

184. Evidence to the same effect was given by Jason Yearsley, who from 2012 until 2016 was the Dry Waste Yard Manager at the Site and who for the last three years has worked for another of James Norvill's companies. (I am not persuaded that his evidence was of a different process from that described by James and Miss Kelly, though he described only that part of the process which concerned the emptying of the contents of the tankers that had transported waste to the Dry Side.)

185. MDW's witness evidence on this point, in addition to that of Mr Lynass, came from Mr Jordan and Mr Gray.

186. In his witness statement, Mr Jordan stated that in the period 2011 to 2013, on the instructions of Mr Doe, he would arrange for the solids at the bottom of Tank A to be extracted, usually with the use of the vacuum arm of a so-called super sucker vehicle, and then driven to the transfer station (that is, the Dry Side) for disposal, where it was tipped into an area called the "swimming pool", which contained non-hazardous dry waste. This happened every four to six weeks, and the amount of tank bottom waste on each occasion was between 2000 and 4000 gallons. "The dry waste would be continually added until the tank bottom waste effectively soaked up into the dry waste and the mixed waste would then be left for a sufficient period to allow it to 'dry out'." Although the tank bottom waste was "hazardous waste/sludge", its transfer to the Dry Side was not recorded under consignment notes. Occasionally, tank bottom waste had been transferred to an external facility under a consignment note; this was in order to show to regulators the existence of records for the lawful disposal of tank bottom waste. Mr Jordan said that he had directly engaged in the unlawful process of disposal into the swimming pool when he worked as a tanker driver in the period before 2011. He said that Miss Kelly knew of the practice and that James must have done so, as he was on site "almost on a daily basis" unless he were on holiday. In cross-examination Mr Jordan was insistent that the tank bottom waste he was referring to was not the hard solids but the sludge. He accepted that the figure he had given for the volume of tank bottom waste was only an estimate, but he was unwilling to accept that the estimate in his witness statement was substantially inaccurate. It was put to Mr Jordan that his evidence about the use of the Super Sucker was wrong, because that vehicle was not purchased until more than a year after he had left GDE's employment; however, I think that he was correct to say that the vehicle purchased in late 2014 replaced an earlier vehicle.

187. Mr Jordan's evidence gives the clearest account of the quantities of liquid sludge wrongfully disposed of, according to MDW's case. However, there are a number of problems with it. First, Mr Jordan was not an impressive historian. Second, the period to which he speaks does not extend beyond October 2013; it is a period several years before he gave evidence. Third, the figures given by Mr Jordan are put forward as an estimate. Fourth, the figures cover an extremely wide range: from about 17,500 gallons per annum to about 52,000 gallons per annum. This tends to suggest that the estimate is at best impressionistic. Fifth, the evidence is inherently implausible (see below). Sixth, the documents do not support the evidence.

188. Mr Gray's evidence regarding tank bottom waste was to the following effect. He was responsible for monitoring the levels of tank bottom waste in Tank A and informing Mr Doe, and after his departure Miss Kelly, when it needed to be extracted; if it built up too much, the amount of waste that could be processed in Tank A was unduly limited. The tank bottom waste comprised both "suspended solids" (that is, the sludge) and "heavier solids" (that is, the hard solids). Both kinds of tank bottom waste were removed from Tank A by suction, though a water jet was required to break up the heavier solids before they could be extracted; on two occasions that he recalled the heavier solids were dug out with a shovel. Both kinds of tank bottom waste were taken to the Dry Side, where they were put in the so-called swimming pool for disposal in due course as dry waste in landfill sites, thereby saving the cost of sending it as hazardous waste to third parties. This practice ceased, for reasons he did not know, some months before the business was sold to MDW; in cross-examination he suggested eight to twelve months, and in re-examination twelve months, before the sale, though all of these figures were presented as no more than best estimates. In his witness statement, Mr Gray stated:

> "James was regularly at the Site and I assume knew of this practice. Approximately one year before MDW purchased GDE, James was on site less, but still regularly and I would say on a weekly basis. Lindsey [Kelly] knew of this practice; she sanctioned it and instructed drivers directly to extract the tank bottom waste and transport it to the Transfer Station. Matthew Roderick and Lindsey were on site almost every day."

189. A significant omission from MDW's evidence on the point was anything from Ms Lane. From about 2006 until November 2014 she was the Dry Waste Manager at the Site; therefore she could not have been ignorant of disposal of tank bottom waste on the Dry Side. Yet her witness statement said nothing about it, although it did describe what it called "several unlawful practices undertaken by GDE during the period 2004 to 2014." It is true, of course, that she did not mention the disposal of hard solids on the Dry Side, which undoubtedly took place. But this was a rare occurrence, and it was also something that would be unlikely to jeopardise the operations of the Dry Side in the manner that the frequent depositing of several thousand gallons of sludge would do. The absence of evidence from Ms Lane on the point tends to suggest that the evidence of Mr Jordan and Mr Gray is at best exaggerated.

190. The inherent probabilities of the matter seem to me to count against the case advanced by MDW's witnesses. It is easy to see how the very occasional disposal on the Dry Side of the hard sediment at the bottom of the separator tanks would go unnoticed by regulators with an interest in respect both of the Wet Side and of the Dry Side. It is

far harder to believe that the regular admixture of thousands of gallons of liquid sludge with dry waste could have been carried on for many years without coming to the regulator's attention: either by consideration of the waste disposal records relating to the Wet Side or by physical observation of the Dry Side. (One of the ironies of the case advanced by MDW is that it makes much of the importance of compliance in a highly regulated industry, while at the same time positing that egregious practices could be continued on a large scale for many years without detection; thus it seems to view regulation as something of a dead letter.) Further, as Mr Sims and Mr Jagasia submitted, if liquid sludge had been deposited on the Dry Side in the manner alleged, the dry waste would have become swamped and contaminated.

191. I am further of the view that the documents do not support MDW's claim.

1) Mr Mesher's analysis, which has not been rebutted, shows that in each of the years 2013-2014 and 2014-2015 tank bottom waste was disposed of to third-party operators on ten occasions. This is directly inconsistent with MDW's pleaded case that (a) tank bottom waste was removed from the separator tanks every 4 to 6 weeks, that is, about 10 times a year, (b) that once or twice a year the tank bottom waste was disposed of correctly via a third-party operator, and (c) that approximately 8 times a year the tank bottom waste was wrongly disposed of on the Dry Side (cf. amended particulars of claim, paragraph 44A). And it tends to suggest that all or practically all of the liquid sludge was being disposed of correctly.

2) Although there is an immediate attraction in MDW's argument that comparison of the pre-SPA and post-SPA financial records supports its claim, because the total direct disposal costs rose from about £241,000 in 2013-2015 to about £460,000 in 2015-2017, there are substantial problems with the argument.

   a) First, the usefulness of the comparison rests on the assumption that, because income streams were broadly comparable in the two periods, the figures are truly comparable in the relevant respect. However, there is nothing in the nature of a rigorous comparison of the operation of GDE's business in other respects, and Mr Mesher cautioned—rightly, I think—against making assumptions that the different figures are to be explained only by more waste being sent for processing.

   b) Second, a substantial part of the difference is attributable to the cost of sending leachate to third parties: about £7,000 in the former period, about £92,000 in the latter period.

   c) Third, when the argument was first advanced no distinction was made between different waste streams; Mr Gates did not attempt a distinction.

   d) Fourth, Mr Mesher was the first person to perform the exercise of allocation of disposal costs to specific waste streams. Although he is not expert in waste disposal, he performed a rigorous exercise by reference to the records. His analysis commands respect and has been

subjected to serious challenge only as regards the distribution of costs between tank bottom waste and "Other" kinds of waste.

e) Fifth, although the very large amount of costs Mr Mesher attributed to "Other" in 2015-2017 gives one pause, it may be noted that even MDW's response attributes ten times the costs to "Other" kinds of waste in 2015-2017 as compared with 2013-2015.

f) Sixth, MDW's response to Mr Mesher's exercise is not convincing. It rests on an analysis carried out by Oliver Hazell. However, I have no confidence in Mr Hazell's analysis, which appears to a large extent arbitrary and gives the impression of an exercise in trying to salvage a case that had initially been advanced without a sound evidential basis. In particular, it is apparent that some of the waste streams have been attributed to tank bottom waste, although they can hardly have done more than contribute to the final build-up of sludge in the tank bottoms. (I understood Mr Gates to accept this in cross-examination: transcript, day 7, pages 83-84.) Mr Gates was naturally unable to confirm the accuracy of the figures in MDW's re-analysis.

g) Seventh, on the basis of MDW's argument, the figure for tank bottom waste in 2014-2015 is significant. For at least 6 months of that year, and probably for 9 or 10 months of that year according to Mr Gray's evidence, tank bottom waste was being disposed of lawfully, yet the disposal costs in that year are agreed to be only £30,000. As it is MDW's case that the income streams were relatively stable over the four-year period under consideration, one would expect the disposal costs to be markedly higher in 2014-2015 than in 2013-2014 and comparable to the costs in 2015-2016; yet that is not the case, on MDW's analysis. This, again, suggests that Mr Mesher was right to query the soundness of the assumptions on which MDW's case was advanced.

192. In the light of all the evidence, my conclusions are as follows.

1) Hard solids were occasionally dug out of the very bottom of the separator tanks, in particular Tank A, and were disposed of as dry waste on the Dry Side. This was an improper practice, because the hard solids ought to have been disposed of as hazardous waste. James and Miss Kelly knew that it was improper. However, this practice was rare—it involved only the hard deposits that were not sucked up with the sludge, and the practice of manually digging them out was recognised as unsafe for employees and was carried out infrequently. The impact of the practice on GDE's financial performance cannot be quantified accurately but will have been minimal.

2) I do not accept MDW's case regarding the sludge. I find that this was disposed of correctly to third-party operators.

3) If I had found that MDW's case as to sludge was substantially correct, I would have considered that the impact of the wrongful practice on GDE's financial

performance could not be quantified with any degree of accuracy, though it would have been significant.

## F. The Share Purchase Agreement

193. In setting out the summary and selections that follow, I bear in mind that the SPA is to be construed having regard to its provisions as a whole and as their contents and the general scheme of the SPA.

194. The SPA contained the following relevant provisions that are relied on by MDW:

> "*Clause 6*
>
> 6.1 The Sellers [the defendants] acknowledge that the Buyer [MDW] is entering into this agreement on the basis of, and in reliance on, the Warranties.
>
> 6.2 The Sellers warrant to the Buyer that except as Disclosed, each Warranty is true and accurate on the date of this agreement."

195. Clause 1 contained definitions, including the following that are important for clause 6:

- "Disclosed" was defined to mean "fairly disclosed (with sufficient details to identify the nature and scope of the matter disclosed) in or under the Disclosure Letter."
- "Disclosure Letter" was defined to mean "the letter from the Sellers to the Buyer, in agreed form, with the same date as this agreement that is described as the Disclosure Letter, including the Disclosure Bundle."
- "Disclosure Bundle" was defined to mean "the bundle of documents, in agreed form, annexed to the Disclosure Letter."
- "Warranties" was defined to mean "the warranties given pursuant to clause 5 [an apparent error] and set out in Schedule 5."

196. The Disclosure Letter comprised (a) the letter itself, (b) disclosures contained in a Disclosure Schedule that was Schedule 1 to the letter, and (c) the contents of the Disclosure Bundle that was Schedule 2 to the letter. It described itself as constituting "formal disclosure to the Buyer of the facts and circumstances which are or may be inconsistent with the Warranties for the purposes of qualifying the Warranties contained in the SPA." Under the heading "General Disclosure" the letter stated:

> "The Buyer acknowledges and agrees that the following matters are disclosed or deemed disclosed to it to the extent that such matters are Disclosed:
>
> 1. the terms of the SPA;

2. all matters Disclosed in the documents contained in the Disclosure Bundle;

3. any matters Disclosed in written correspondence (including email) received not later than 2 Business Days prior to the date of this letter between the following individuals on behalf of the Sellers (on the one hand) … and (on the other hand) the following individuals on behalf of the Buyer …, in each case together with all enclosures and attachments attached thereto; [individuals were listed at the ellipses]

4. all matters which would be revealed on the file of the Company and the Subsidiary at Companies House by conducting an online search against the Company and the Subsidiary on the date which is two Business Days prior to the date of this letter;

5. …

6. all matters shown on the face of or specifically provided for in the Accounts and/or the Management Accounts."

197. Schedule 5 to the SPA set out the express warranties in numbered paragraphs. The following are relevant:

"5.1 The Company [GDE] and the Subsidiary [Skip Solutions Limited] has at all times and in all material respects conducted its business in accordance with all applicable laws and regulations in the UK to which the Company and the Subsidiary is subject."

"6.1 The Company and the Subsidiary holds all regulatory licences, consents, permits and authorities which are required by law to enable it to carry on its business in the places and in the manner in which it is carried on at the date of this agreement (Consents). Details of the Consents and copies of all related documentation have been Disclosed.

6.2 Each of the Consents is valid and subsisting, and neither the Company nor the Subsidiary is in breach of the terms or conditions of the Consents (or any of them)."

"9.1 Neither the Company nor the Subsidiary, nor any of their respective Directors, nor any person for whose acts the Company or the Subsidiary are (sic) vicariously liable, is engaged or involved in, or otherwise subject to any of the following matters (such

matters being referred to in this paragraph 9 as Proceedings):

(a) any litigation or administrative, mediation, arbitration or other proceedings, or any claims, actions or hearings before any court, tribunal or any governmental, regulatory or similar body, or any department, board or agency (except for debt collection in the normal course of business); or

(b) any dispute with, or any investigation, inquiry or enforcement proceedings by, any governmental, regulatory or similar body or agency in any jurisdiction.

9.2 No Proceedings have been threatened or are pending by or against the Company, the Subsidiary or any Director for whose acts the Company and/or the Subsidiary may be vicariously liable and, so far as the Sellers are aware, there are no circumstances likely to give rise to any such Proceedings."

"18.1 The Accounts [the financial statements of the Company and the Subsidiary as at and to the Accounts Date, 31 March 2015, including the balance sheet and the profit and loss account]:

(a) show a true and fair view of the state of affairs of each of the Company and the Subsidiary, …, in each case as at the Accounts Date, and of the profit or loss of each of the Company and the Subsidiary, …, in each case for the accounting period ended on the Accounts Date;

…"

"29.2 The Company and the Subsidiary have at all relevant times obtained and complied in all material respects [with] all EHS Permits. All EHS Permits currently held by the Company and the Subsidiary are in full force and effect, and, so far as the Sellers are aware, there are no facts or circumstances in existence as at Completion that are likely to result in the revocation, suspension, variation or non-renewal of any EHS Permits.

29.3 The Company and the Subsidiary have at all material times and in all material respects operated in compliance with all EHS Laws in force from time to time and, so far as the Sellers are aware, there are no

facts or circumstances in existence as at Completion that are likely to lead to any breach of or liability under any EHS Laws.

29.4 Other than routine investigations and inspections in the ordinary course of business, there have been no claims, investigations, prosecutions or other proceedings against or threatened against the Company or the Subsidiary in the past 36 months in respect of Harm arising from the operation of the Business or occupation of any of the Properties or for any breach or alleged breach of any EHS Permits or EHS Laws, and, so far as the Sellers are aware, there are no facts or circumstances in existence as at Completion that are likely to lead to any such claims, investigations, prosecutions or other proceedings. at no time has any of the Sellers, the Company or the Subsidiary received any notice, communication or information alleging any liability in relation to any EHS Matters or that any remediation works are required.

…

29.6 Copies of all:

(a) current EHS Permits;

…

(f) non-routine correspondence on EHS Matters between the Company or the Subsidiary and any relevant enforcement authority received in the past 12 months; …

relating to the Business or any of the Properties have been disclosed and all such statements, reports, records, correspondence and other information are complete and accurate and are not misleading."

198. The relevant definitions for paragraph 29 were contained in paragraph 29.1 and included the following:

"EHS Permits: any permits, licences, consents, certificates, registrations, notifications or other authorisations required under any EHS Laws for the operation of the Business [viz. the business carried on by GDE] or in relation to any of the Properties [which included the Site]."

"EHS Laws: all applicable laws, statutes, regulations, subordinate legislation in force from time to time which are

legally binding on the Company or the Subsidiary relating to EHS Matters."

"EHS Matters: all matters relating to:

(a) pollution or contamination of the Environment;

(b) the presence, disposal, release, spillage, deposit, escape, discharge, leak, migration or emission of Hazardous Substances or Waste;

…"

"Harm: harm to the Environment, and in the case of man, this includes offence caused to any of his senses or harm to his property.

Hazardous Substances: any material, substance or organism which, alone or in combination with others, is capable of causing Harm [to the Environment] …

Waste: any waste, including any by-product of an industrial process and anything that is discarded, disposed or, spoiled, abandoned, unwanted or surplus, irrespective of whether it is capable of being recovered or recycled or has any value."

199. The defendants rely on a number of specific provisions in the SPA as precluding MDW from maintaining its present claim.

200. First, clause 6.5 contains a provision limiting the Sellers' (that is, the defendants') rights of recourse against GDE's officers and employees:

"6.5 The Sellers agree that the supply of any information by or on behalf of the Company, the Subsidiary or any of their respective employees, directors, agents or officers (Officers) to the Sellers or their advisers in connection with the Warranties, the Disclosure Letter or otherwise shall not constitute a warranty, representation or guarantee as to the accuracy of such information in favour of the Sellers. Each Seller unconditionally and irrevocably waives all and any rights and claims that he may have against any of the Company, the Subsidiary or the Officers on whom that Seller has, or may have, relied in connection with the preparation of the Disclosure Letter, or agreeing the terms of this agreement, and further undertakes to the Buyer, the Company, the Subsidiary and the Officers not to make any such claims."

201. Second, the defendants rely on a contractual notification and limitation provision in clause 7:

> "7.5 The Sellers shall not be liable for a Claim unless notice in writing summarising the nature of the Claim (in so far as it is known to the Buyer) and, as far as is reasonably practicable, the amount claimed, has been given by or on behalf of the Buyer to the Sellers:
>
> …
>
> (b) … prior to the expiry of the period of 2 years commencing on the Completion Date [14 October 2015],
>
> and the Sellers shall not be liable in respect of any Claim (if not previously satisfied, settled or withdrawn) unless legal proceedings have been validly issued and served on them before the date falling 18 months after the date on which notice of the Claim was served under this clause 7.5 …"

"Claim" was defined in clause 1.1 as "a claim for breach of any of the Warranties." I should refer also to clause 7.7, which provides in part:

> "7.7 Nothing in this clause 7 or Schedule 6 or Schedule 10 applies to exclude or limit the liability of the Sellers:
>
> (a) to the extent that a Claim … arises or is delayed as a result of dishonesty, fraud, wilful misconduct or wilful concealment by the Sellers, their agents or advisers; …"

202. Third, the defendants rely on clause 7.6 in respect of "matters Disclosed":

> "7.6 The Sellers shall not be liable for a Claim to the extent that the Claim:
>
> (a) relates to matters Disclosed; …"

203. Fourth, the defendants rely on two clauses to exclude claims based on misrepresentation:

> "15. This agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous discussions, correspondence, negotiations, drafts, agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter."
>
> "25.1 Except as expressly provided in this agreement, the right and remedies provided under this agreement are in addition to, and not exclusive of, any rights or remedies provided by law.

> 25.2 Notwithstanding that the Buyer becomes aware at any time that there has been a breach of any provisions of this agreement, the Buyer shall not be entitled to rescind this agreement or treat the agreement as terminated and, accordingly, the Buyer waives all and any rights of rescission it may have in respect of any such matter (howsoever arising or deemed to arise).
>
> 25.3 The Buyer irrevocably and unconditionally acknowledges and agrees that save in the instance of dishonesty, fraud, wilful misconduct or wilful concealment by the Sellers its sole remedy in respect of any claim (sic) arising from a breach of any Warranty contained in this agreement shall be a remedy for breach of contract in accordance with the terms of this agreement and it hereby waives the right to pursue any other right or remedy which might otherwise be available to it in respect of the falsity of any Warranty set out in this agreement."

204. In conjunction with clause 25, it is necessary to note clause 26:

> "26. Without prejudice to any other rights or remedies that the Buyer may have, the Sellers acknowledge and agree that damages alone would not be an adequate remedy for any breach of the terms of clause 11 or clause 12 by a Seller. Accordingly, the Buyer shall be entitled to the remedies of injunction, specific performance or other equitable relief for any threatened or actual breach of the terms of clause 11 [restrictions/restraints on the Seller] or clause 12 [confidentiality] of this agreement."

205. Fifth, the defendants rely on an exclusion of liability in respect of matters known to the Buyer, which is contained in paragraph 4 of Schedule 10 to the SPA:

> "4. The Sellers shall have no liability in respect of any Claim to the extent that the Buyer has actual knowledge of the matter, fact or circumstance giving rise to such Claim and actual knowledge that such matter, fact or circumstance represented a breach or potential breach of such Warranty in each case as at Completion. For the purposes of this agreement, the actual knowledge or awareness of the Buyer shall be limited to the actual knowledge of the following individuals: Mark Hazell, Oliver Hazell, Ian Lynass, David Thomas (HAASCO), David Evans (HAASCO), David Jones and Claire Walters."

I ought to refer to two further paragraphs in Schedule 10:

> "9. Nothing in this agreement shall be deemed to reduce the obligations of the Buyer under common law to mitigate its loss."
>
> "10. Notwithstanding any other provision in this agreement nothing in the Schedule 10 shall apply to exclude any liability of the Sellers to the extent that a Claim arises or is increased by reason of (or the delay or discovery of which results from) any fraud, fraudulent misrepresentation or wilful concealment by or on behalf of the Sellers."

## G. MDW's Pleaded Case—a Summary

206. The allegations of breach of warranty are in paragraph 46 of the amended particulars of claim, which extends over 17 pages of text. The thrust of the allegations is that, by reason of the non-compliant practices that have been discussed above, the concealment of those practices from the regulators, and the failure to disclose them and the enquiries being made by the regulators to MDW, the defendants were in breach of the warranties in Schedule 5 to the SPA set out above.

207. The representations on which MDW claims to have relied in entering into the SPA are set out in paragraphs 12 to 15 of the amended particulars of claim and are in summary as follows:

1) Written representations, contained in the Due Diligence Index and Responses provided to MDW by Gambit on 30 September 2015:

    a) That there were no relevant enforcement actions or convictions;

    b) That consent levels were being reviewed by Dŵr Cymru because it agreed they were too low but (by implication from the failure to mention anything else) that there were no other matters to disclose in respect of discharge consents, monitoring data or any breaches;

    c) That there had been no written complaints;

    d) That there had been no pollution incidents;

    e) That there were no outstanding investigations, enquiries, prosecution or enforcement actions.

2) Oral representations made on behalf of and with the authority of the defendants:

    a) A representation made by James to Mr Lynass for MDW between 1 August 2015 and 23 September 2015 that GDE's plant was in good repair and met all its legal requirements;

b) A representation made by Miss Kelly to Mr Lynass for MDW on or around 23 September 2015 that the plant at the Site was fully compliant with all regulatory bodies and limits and was operated in accordance with the permits and licences;

c) Representations made twice by Mr Roderick to Mr Lynass for MDW between 1 August 2015 and 14 October 2015 (i) that there were no known breaches of mandatory consents or permits and (ii) that there were no known environmental issues;

d) A representation made by Miss Kelly to Ms Walters for MDW on or around 29 September 2015 that there had been some breaches of the consent to discharge, which was under review by DCWW, and that discussions with DCWW were going well; which implied the further representation that there was no cause for concern with respect to environmental compliance vis-à-vis DCWW and that any breaches were merely technical or otherwise minor.

3) Implied representations

a) A representation, implied by the disclosure of the letter dated 28 May 2015 from GDE to DCWW but of no other communications between them, that the letter dated 28 May 2015 was the only material communication with DCWW;

b) A representation, implied by all of the others and by the absence of further disclosure, that the full extent of non-compliance comprised only the minor or immaterial or technical breaches of the 2012 Consent.

208. Paragraphs 47 to 53 of the amended particulars of claim allege that all of these representations were false. The matters relied on are those appearing at greater length in the factual narrative set out above. All of the alleged misrepresentations, both the one made by James and those made by others on his behalf, are alleged to have been made fraudulently by him in that he knew they were false or did not believe them to be true or was reckless as to their truth or falsity. The particulars of knowledge make clear that the allegation is in fact that James both knew of the representations being made on his behalf and knew that they were false. The amended particulars of claim also rely on common law negligence and section 2(1) of the Misrepresentation Act 1967 against all the defendants.

## H. Liability: Breach of Warranty

209. MDW claims damages on two different grounds: first, breach of the warranties in the SPA; second, pre-contractual misrepresentations, either on the basis of deceit or under section 2(1) of the Misrepresentation Act 1967. As no issue arises in respect of foreseeability or remoteness, the sole relevance of the claim for misrepresentation concerns the application of the contractual notification requirement in clause 7.5 of

the SPA. The primary claim is that for breach of warranty and I shall discuss that first.

Breach

210. I refer to paragraph 206 above for a very short summary of MDW's case.

211. The defendants have not sought to advance a case by way of a detailed analysis of the various warranties; rather, they have disputed the factual bases on which some of the allegations of breach of warranty rest (as to which, I refer to my findings above) and have focused on the questions of MDW's state of knowledge and of the financial relevance of the practices complained of. For this reason, I shall take the basic allegations of breach of warranty shortly.

212. By reason of GDE's non-compliant practices discussed above and the findings I have made in respect of them, the defendants were in breach of the warranty in paragraph 5.1 of Schedule 5 to the SPA.

213. By reason of GDE's ongoing failure to operate within the limits of the 2012 Consent in respect of discharges of leachate, the defendants were in breach of the warranty in paragraph 6.1 of Schedule 5. By reason of the same matter, the defendants were in breach of the warranty in paragraph 6.2 of Schedule 5. The unlawful disposal of cess waste down the magic hole in 2013-2014 and the occasional disposal of hard solids from the tank bottom waste on the Dry Side also constitute breaches of the warranty in paragraph 6.1, though I do not regard either of those malpractices as having practical significance in the case (a point that I shall not repeat every time they are mentioned).

214. The defendants were further in breach of the warranty in paragraph 6.2 by reason of the disposal of tank bottom waste (hard solids) on the Dry Side (cf. conditions 2.3.3 and 2.4.1 of the 2012 Consent), as well as by making false statements to regulators in breach of the general legal prohibition that was reflected by conditions in both the 2012 Consent and the Permit.

215. I am not satisfied that the defendants were in breach of the warranty in paragraph 9.1 of Schedule 5. It seems to me that the "Proceedings" to which that paragraph refers are of a more formal nature than the enquiries that were being made by the regulators.

216. However, in my judgment the defendants were in breach of the warranty in paragraph 9.2 of Schedule 5. The letters of 11 May 2015 and 2 June 2015 clearly amounted to a threat of Proceedings, albeit not to a statement of a settled intention to take Proceedings. Further, on the facts as found, there were "circumstances likely to give rise to any such Proceedings". Here and elsewhere in the warranties I should understand "likely" to have the meaning "such as might well" rather than "more probable than not": prospective judgements of the balance of probabilities are inapt as a means of defining the scope of a contractual duty, whereas it is perfectly straightforward to give a warranty that one does not know of anything that might well have a certain result.

217. The defendants were in breach of the warranty in paragraph 18.1 of Schedule 5. The accounts did not show a true or fair view of the state of affairs of GDE, because they

showed a financial performance that had been artificially enhanced by non-compliant practices in respect of leachate.

218. The non-compliant practices in respect of leachate and the provision of false data to DCWW also constituted a breach of the warranty in paragraph 29.2 with respect both to its first and to its second sentences. The critical facts in this regard were the misleading statements to regulators and the persistent failure to bring discharges of effluent within the scope of the 2012 Consent, together with Miss Cavill's letters of 11 May 2015 and 2 June 2015. The defendants, in the person of James, knew of matters likely to result in the revocation, suspension, variation or non-renewal of EHS Permits. (There was also a breach of the warranty in paragraph 29.2 by reason of (a) the manner of disposal of tank bottom hard solids and (b) the past disposal of cess waste down the magic hole. These, however, were not in my view of any significance in the case; a point that I shall not repeat every time it is relevant.)

219. For the same reasons, there was a breach of the warranty in paragraph 29.3 of Schedule 5.

220. By reason of the matters mentioned in respect of paragraphs 9.2 and 29.2 of Schedule 5, I consider that the defendants were similarly in breach of the warranty in paragraph 29.4, but I do not consider that they were otherwise in breach of that warranty.

221. The defendants were in breach of the warranty in paragraph 29.6 of Schedule 5, because they had not disclosed non-routine correspondence with DCWW. In particular, the letters of 11 May 2015 and 2 June 2015 had not been disclosed; nor had the defendants disclosed the regular communications regarding discharges with contents of contaminants well above permitted levels. None of those communications could properly be considered "routine".

<u>Defence: matters disclosed</u>

222. As a defence to the claim for breach of warranty, the defendants rely on clause 7.6 (see paragraph 202 above). For this purpose, by reason of the definition in clause 1 (see paragraph 195 above), a matter is "Disclosed" if (i) it is "fairly" disclosed, (ii) it is disclosed "with sufficient details to identify the nature and scope of the matter disclosed", and (iii) it is disclosed "in or under the Disclosure Letter".

223. In *Triumph Controls UK Limited v Primus International Holding Company* [2019] EWHC 565 (TCC), which involved a clause materially similar to clause 7.6 in the SPA, O'Farrell J considered the authorities relating to disclosure clauses and at [335] stated the principles that she took from them:

> "i) The commercial purpose of such disclosure clauses is to exonerate the seller from its breach of warranty by fairly disclosing the matters giving rise to the breach.
>
> ii) The disclosure requirements of the contract in question must be construed applying the usual rules of contractual interpretation, by reference to the express words used, the relevant factual matrix and the above commercial purpose.

> iii) The adequacy of disclosure must be considered by careful analysis of the contents of the disclosure letter, including any references in the disclosure letter to other sources of information, against the contractual requirements.
>
> iv) A disclosure letter which purports to disclose specific matters merely by referring to other documents as a source of information will generally not be adequate to fairly disclose with sufficient detail the nature and scope of those matters. For that reason, disclosure by omission will rarely be adequate.
>
> v) However, it is open to the parties to agree the form and extent of any disclosure that will be deemed to be adequate against the warranty. That could include an agreement that disclosure may be given by reference to documents other than the disclosure letter, such as by list or in a data room.
>
> vi) Where disclosure is by reference to documents other than the disclosure letter, only matters that can be ascertained directly from such documents will be treated as disclosed."

224. Two specific points bear highlighting, because they make clear that disclosure clauses have a clear purpose. First, the commercial purpose of such clauses was clearly identified by Gibson J in *Levison v Farin* [1978] 2 All ER 1149, 1157:

> "I do not say that facts made known by disclosure of the means of knowledge in the course of negotiation could never constitute disclosure for such a clause as this but I have no doubt that a clause in this form is primarily designed and intended to require a party who wishes by disclosure to avoid a breach of warranty to give specific notice for the purpose of the agreement, and a protection by disclosure will not normally be achieved by merely making known the means of knowledge which may or do enable the other party to work out certain facts and conclusions."

Second, and accordingly, the word "fairly" reinforces this purpose. In *Daniel Reeds Limited v EM ESS Chemists Limited* [1995] CLC 1405, Beldam LJ said:

> "… fair disclosure requires some positive statement of the true position and not just a fortuitous omission from which the buyer may be expected to infer matters of significance."

225. The defendants' reliance on clause 7.6 is nothing if not bold. The Disclosure Letter contained nothing about the disposal of cess waste down the magic hole or about the wrongful disposal of tank bottom waste. As regards the 2012 Consent and the discharge of leachate with contaminants in breach of permitted levels, the only disclosure of any kind that was given was the inclusion in the Disclosure Bundle of the letter dated 28 May 2015 referencing the Improvement Plan. That letter seems to show that there had been a breach of consent in May 2015, apparently because of a pump malfunction. It does not constitute disclosure of the history of non-compliance,

or the subsequent non-compliance, or the provision of false data to DCWW, or the warnings of the possibility of prosecution.

226. I hold that clause 7.6 does not exonerate the defendants from liability for breach of warranty.

Defence: matters known to the Buyer

227. Paragraph 4 of Schedule 10 to the SPA (paragraph 205 above) exonerates the defendants from liability for breach of warranty to the extent that MDW had actual knowledge of the matter, fact or circumstance giving rise to the Claim; such actual knowledge being limited to that of the persons named in that paragraph, one of whom is Ms Walters.

228. To the extent that the matters known to MDW go beyond what was Disclosed in or under the Disclosure Letter, they concern matters within the knowledge of Ms Walters, as recorded in her first and second reports (see paragraphs 83 and 87 above) and confirmed in her witness statement (see paragraph 85 above). Mr Sims' submission was, in summary, that MDW knew that there had been breaches over a long period of time and thereby knew that there was a material risk that there would be breaches in the future. The result was that it had knowledge of all relevant matters, albeit not of all of the detail making up those relevant matters.

229. In my judgment, paragraph 4 of Schedule 10 is of no real assistance to the defendants. Ms Walters knew (or thought she knew): that there had been some one-off breaches of the discharge consent limits in early 2014, apparently relating to operational issues with the leachate treatment plant; that the annual average discharge levels for ammonia and copper in 2014 had been in excess of the discharge consent limits; that, however, the conclusion of the Annual Environmental Performance Report for 2014 confirmed what Miss Kelly had told her, namely that the breaches were historic, in that they were "during and prior to the commissioning of the new aeration [system], and that there were no ongoing breaches; that DCWW had agreed to double the discharge consent limit for ammonia; and that DCWW had approved an improvement plan, which was going well. She did not know: that DCWW had not agreed to increase the discharge consent limit for ammonia; that every test carried out by GDE of discharges between 17 February 2014 and 21 October 2015 recorded a failure in respect of at least one parameter; that breaches of the 2012 Consent were continuing right up until the execution of the SPA; that DCWW had made a threat of prosecution; that there was a likelihood of the revocation of the 2012 Consent; or that GDE had repeatedly and deliberately given false data to DCWW in order to conceal the extent of its breaches with the 2012 Consent.

Defence: late notification

*Principles*

230. The defendants rely on clause 7.5 (see paragraph 201 above), which required a claim for breach of warranty to be notified before 14 October 2017. Mr Sims submitted that no notification at all was given in respect of claims concerning cess waste and tank bottom waste before 14 October 2017 (which is correct), and that the notification in respect of leachate did not comply with the requirements of clause 7.5. He further submitted that MDW could not avail itself of clause 7.7(a), because the claims neither arise nor have been delayed as a result of dishonesty, fraud, wilful misconduct or wilful concealment "by the [defendants], their agents or advisers", and because clause 7.7(a) served only to suspend time until discovery and MDW did not make a claim within time after discovery.

231. "[E]ach notice clause has to be construed for itself and in the light of the commercial context in which it is found and the commercial purpose it is intended to serve": *Laminates Acquisition Co v BTR Australia Ltd* [2004] 1 All ER (Comm) 737, *per* Cooke J at [29]. The summary of the general principles given by Gloster J in *RWE Nukem Ltd v AEA Technology plc* [2005] EWHC 78 (Comm) at [10] remains useful:

> "(i) Every notification clause turns on its own individual wording.
>
> (ii) In particular, due regard must be had to the fact that where such notification clauses operate as a condition precedent to liability (as in this case) it is for the party bringing a claim to demonstrate that it has complied with the notification requirement in that it gave proper particulars of its claims and did give those specific details as were available to it (see paragraph 30 of the judgment in the *Laminates Acquisition* case).
>
> (iii) That wording must, however, be interpreted by reference to the commercial intent of the parties; that is to say, the commercial purpose that the clause was to serve. In a case such as this 'the clear commercial purpose of the clause includes that the vendor should know at the earliest practical date *in sufficiently formal written terms* that a particularised claim for breach of warranty is to be made so that they may take such steps as are available to them to deal with it'; in other words 'that the notice should be informative'; see per Stuart-Smith LJ in *Senate Electrical v STC* [1999] 2 Lloyd's Rep 423 at paragraph 90, citing with approval (and with his emphasis) from the decision of May J at first instance.
>
> (iv) Where the clause stipulates that particulars 'of the grounds on which a claim is based' are to be provided:
>
>> 'Certainty is a crucial foundation for commercial activity. Certainty is only achieved when the vendor is left in no reasonable doubt not only that a claim may be brought but of the particulars of the ground upon which the claim is to be based. The clause contemplates that the notice will be couched in terms which are sufficiently clear and

> unambiguous as to leave no such doubt and to leave no room for argument about the particulars of the claim' (per Stuart-Smith LJ in *Senate Electrical* at paragraph 91).
>
> (v) In all cases it is important to consider the detailed claim being made in terms of both the breach complained of and the remedy being sought, to ensure that it was a claim which was properly notified."

232. Although it relates to the particular clause that she was considering, Gloster J's approach in the *RWE Nukem* case, at [11], is also instructive:

> "In my judgment what has to be notified in relation to any particular claim in the present case will largely depend on the nature of the Claim, the facts known to the vendor at the date of the notice, and whether it is realistic to put any monetary quantification on the amount claimed. I do not think one can lay down too rigid a formula for ascertaining what precise particulars or details have to be notified; the answer is that it will all depend. However, … I would expect that a compliant notice would identify the particular warranty that was alleged to have been breached; I would expect that, at least in general terms, the notice would explain why it had been breached, with at least some sort of particularisation of the facts upon which such an allegation was based, and would give at least some sort of indication of what loss had been suffered as a result of the breach of warranty …"

233. A notification given pursuant to a notification clause is to be construed in accordance with the principles explained in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, *per* Lord Steyn at 767–8 and Lord Hoffmann at 779–780. The question is how the notice would be understood by a reasonable recipient with knowledge of the context in which it was sent.

*Leachate*

234. MDW gave notification of the warranty claim regarding leachate in the letter of 23 August 2017, which was amplified in the letter dated 11 October 2017 (paras 121 and 122 above). The defendants contend that this notification did not comply with clause 7.5 because it did not summarise, "as far as [was] reasonably practicable, the amount claimed": although MDW says that it became aware of the alleged breaches as a result of receipt of DCWW's letter dated 11 November 2015, and although it was in possession of all of the information that it required in respect of increased disposal costs for leachate, there is no evidence as to the steps taken by MDW to quantify its losses before giving notification and, indeed, at no time before Mr Mesher's expert evidence was received did MDW attempt to identify and quantify the losses that could be causally linked to the specific breach in question.

235. Mr Sims relied on the decision of HHJ Waksman QC in *Highwater Estates Ltd v Graybill* [2009] EWHC 1192 (QB). The share purchase agreement provided: "The Vendor shall not be liable for a claim unless it receives from the Purchaser written

notice of the Claim stating in reasonable detail the matter giving rise to the Claim and the nature and amount of the Claim" by a certain date. It was common ground that, in considering the adequacy of a written notice under that agreement, the correct approach was to examine the claim advanced in the particulars of claim and see whether *that claim* was properly notified in the notice; see [23]. The judge found that the notice given in that case was non-compliant in several respects; one of them concerned the quantum of the claim:

> "45. I also take the view that the discrepancy between the amount claimed in the Particulars of Claim (£2.06m) and that claimed in the Claim Letter (£387,000) is a further ground for non-compliance. The sums are vastly different and the vendor might obviously take a different view when he knows that he is facing a claim of those proportions in relation to one particular matter. It is no answer to say that the Court will decide damages in the round. The Court might dismiss the claim altogether, but the vendor's need is to see what he is facing from the purchaser.
>
> …
>
> 47. Where a clause expressly requires the amount of the claim to be given and in truth the amount of the claim pursued in the Particulars of Claim is simply missing from the Claim Letter to a very substantial extent, which cannot be described as a mere difference in detail, the clause has not been complied with."

236. I was also referred to the recent decision of Mr Peter MacDonald Eggers QC in *Dodika Ltd v United Luck Group Holdings Ltd* [2020] EWHC 2101 (Comm), where a number of authorities on notification provisions were considered, including the *Senate Electrical, Laminates Acquisition* and *Highwater Estates* cases. In *Dodika*, the agreement provided that "any Warranty Claim shall only be enforceable if the Buyer gives written notice to the Warrantors stating in reasonable detail the matter which gives rise to such Claim, the nature of such Claim and (so far as reasonably practical) the amount claimed in respect thereof" by a certain date. The claimants contended that the notice given to them was deficient in that, among other things, it failed to state "in reasonable detail … (so far as reasonably practical) the amount claimed". The written notice given by the Buyer did not state an amount claimed; it said that it was not currently possible to quantify the claim. The deputy judge refused the Seller's application for summary judgment on the issue of the inadequacy of the notice in that regard (he granted it for other reasons), because it was not possible to know whether or not it had been reasonably practicable for the Buyer to quantify the claim; that was a triable issue: see [104]-[107]. Mr Sims submitted that the triable issue in this case was whether it was reasonably practicable for MDW to have stated the amount claimed and whether it had failed to do so.

237. I agree with Mr Ayres that the notification requirement in clause 7.5 sets a low threshold. There is no requirement to set out the specific grounds of the Claim or reasonable detail concerning the matters said to constitute the breach; similarly, there is no requirement to explain how the amount claimed has been calculated or the manner in which it is causally related to the matters complained of. This, in my view,

is relevant when considering the approach to the requirement that the clause "summaris[e] …, as far as is reasonably practicable, the amount claimed".

238. In my judgment, MDW did comply with the notification requirement in respect of the claim relating to leachate. It stated a figure for the amount of the claim in August 2017 and a revised figure in October 2017 and made clear that the figures represented the reduction in value of the shares by reason of the breaches complained of. The provision of those figures must be seen in context. The nature of the breaches of warranty meant that there was no documentary record of the amount by which GDE's profits had been unlawfully inflated by breaches of the 2012 Consent; any approach to quantification had to rely on an indirect process of inference. When Mr Lynass raised the problem concerning leachate with James in late 2016, James's response was to say that the supposed need to reassess the value of the business was due to the new owners' "insufficient knowledge, experience or data for the system and its use" (see paragraphs 114 and 115 above). This was followed by enquiries pursued with Hydroventuri. Further, only after 17 October 2017 did MDW have two years of financial performance to compare with the years 2013-2014 and 2014-2015. Having regard to the available evidence, including passages in evidence of Oliver Hazell to which Mr Sims referred me, I consider that MDW did summarise the amount claimed so far as was reasonably practicable at the time.

239. If that conclusion were wrong, I should nevertheless consider that MDW was entitled to rely on clause 7.7. This clause was not subjected to a great deal of analysis in the course of argument. However, in my judgment the claim in respect of leachate arose "as a result of dishonesty, fraud, wilful misconduct or wilful concealment" by the defendants or their agents.

1) I accept Mr Sims' submission that the breaches of the 2012 Consent were not *in themselves* actions of the defendants but of GDE.

2) However, on the facts of the case the breaches of the 2012 Consent did involve wilful misconduct on the part of those controlling and running GDE, including James, who was clearly the ultimate authority in the company. The leachate processing business was persistently and knowingly carried on in a manner that involved a throughput of leachate that the company was unable to treat compliantly. Those responsible for this method of business were in my view guilty of wilful misconduct. There was also wilful misconduct and dishonesty in the provision of false information to the regulators; in this, again, James was complicit.

3) The breaches of warranty themselves involved dishonesty, fraud and wilful concealment on the part of James, who knew the true position and who also clearly acted as his parents' agent in the negotiation and conduct of the sale.

240. Mr Sims submitted that, properly construed, the operation of clause 7.7(a) is only suspensory. This submission was not developed further, however, whether by reference to the scheme of clause 7, Schedule 6 or Schedule 10 or to authority on similar clauses. The proposed construction has its attraction and is suggested by the reference to a Claim being "delayed". However, in my judgment it is difficult to get the clause to say what Mr Sims wants it to say without rewriting it. Clause 7.5 is the contractual time bar, and it says nothing about dates of knowledge; it simply imposes

a two-year period. Clause 7.7(a) does not purport to modify or refine clause 7.5 or to create a new two-year period, for example one starting on a certain date of knowledge. It simply has the effect (for present purposes) that clause 7.5 does not exclude or limit the Sellers' liability "to the extent that a Claim … arises or is delayed as a result of dishonesty, fraud, wilful misconduct or wilful concealment" etc. A provision with suspensory effect, postponing the start of the period allowed for notification, could easily have been provided, yet it was not. Further, I do not see that Mr Sims' construction is required to give a commercially sensible reading. It is quite reasonable to suppose that any Claim arising from the Sellers' dishonesty etc should not be defeated by a contractual time-bar. I think it also reasonable to suppose that the clause has similar effect for a Claim that has been delayed by the Sellers' dishonesty etc. I acknowledge that there is a certain awkwardness in the expression, "to the extent that a Claim … is delayed as a result of dishonesty etc". However, in connection with the word "arises" there is no good reason to construe "to the extent that" as referring to duration of time; it appears to refer to such part of the Claim as arises as a result of dishonesty etc. (as distinct from such part of the Claim as does not so arise). I do not see why "to the extent that" should be read in a temporal sense when governing "is delayed" if it does not bear that sense when governing "arises". Further, as I have said, if its force is temporal in respect of delay, there remains the problem of supplying practical meaning to the provision.

*Tank Bottom Waste and Cess Waste*

241. No claim in respect of tank bottom waste or cess waste was intimated within the two-year period. Therefore MDW has to rely on clause 7.7(a).[5]

242. In my judgment, it is able to do so, on a limited basis, namely that the disposal of hard solids on the Dry Side and the disposal of cess waste down the magic hole were a matter of knowing and deliberate misconduct by those responsible for it, who included James. The warranties in paragraphs 5.1 and 6.2 of Schedule 5, involved both dishonesty and wilful concealment by James, insofar as they did not disclose the practices in respect of tank bottom waste and cess waste.

Conclusion

243. The defendants do not avoid liability for their breaches of warranty by reason of the contractual defences on which they rely.

## I. Liability: Misrepresentation

Availability of claims for misrepresentation

[5] I ought to mention that, in his oral submissions, Mr Sims conceded that clause 7.5 was not engaged unless the Claim were known to the Buyer; he remarked on the difficulty of knowing when the potential claims in respect of cess waste and tank bottom waste were known to MDW. I do not regard the concession as correctly made. Knowledge is not a requirement for the purposes of clause 7.5: the time limit achieves its certainty by being worded in a manner that makes knowledge irrelevant to the running of time. The inroad into that position concerns only dishonesty, fraud etc. I surmise that the concession was considered to be required in order to justify the construction that the defendants sought to place upon clause 7.5 in respect of deferring the commencement of the two-year period.

244. For the defendants, Mr Sims relied on several authorities in support of his submission that the warranties in the SPA were only contractual promises and were not capable of constituting representations of fact. I think that the submission was correct: see *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch) (Mann J), esp. at [200]-[211]; *Idemitsu Kosan Co Ltd v Sumitomo Corp* [2016] EWHC 1909 (Comm) (Andrew Baker QC), esp. at [14]-[23]; Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edition), at para 8-02. However, as MDW does not allege that the warranties constituted representations, the submission struck only a straw man.

245. Mr Sims also submitted that MDW was not permitted to maintain a claim on the basis of pre-contractual representations and that its only remedies lay under the SPA for breach of contract. In this regard, he relied in particular on clause 15 and clause 25, both of them of course to be construed in the context of the SPA as a whole.

246. Clause 15 does appear, at first sight, to lend support to Mr Sims' submission, in particular in respect of the provision that the SPA "supersedes and extinguishes all previous … assurances, … representations and understandings between [the parties], whether written or oral, relating to its subject matter." However, in my judgment clause 15 has no bearing on MDW's pleaded claim in misrepresentation. It is an "entire agreement" clause, the purpose of which is to make it clear that nothing said, written or done prior to the SPA creates contractual obligations or liabilities. It has nothing to do with reliance on prior statements, far less their existence, or with excluding claims of a non-contractual nature. In *Al-Hasawi v Nottingham Forest Football Club Ltd* [2018] EWHC 2884 (Ch), HHJ David Cooke considered a materially identical clause in the light of authorities, including in particular *Axa Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, and concluded, in disagreement with the Master, that it did not preclude claims for pre-contractual misrepresentations.

247. All cases have to be considered on their own facts, and identical clauses may bear different meanings if their contractual contexts differ. Nevertheless, the remarks of Rix LJ in *Axa Life Services* at [94] are on point:

> "… No doubt all such cases are only authority for each clause's particular wording: nevertheless it seems to me that there are certain themes which deserve recognition. Among them is that the exclusion of liability for misrepresentation has to be clearly stated. It can be done by clauses which state the parties' agreement that there have been no representations made; or that there has been no reliance on any representations; or by an express exclusion of liability for misrepresentation. However, save in such contexts, and particularly where the word 'representations' takes its place alongside other words expressive of contractual obligation, talk of the parties' contract superseding such prior agreement will not by itself absolve a party of misrepresentation where its ingredients can be proved."

Neither clause 15 nor any other provision of the SPA states an agreement that there has been no representation, or that there has been no reliance on a representation, or that liability for a representation is excluded. Further, to suppose that the normal right

of a party to claim damages for a pre-contractual misrepresentation made fraudulently or negligently subsists is not contrary, as Mr Sims submitted it was, to the commercial purpose of the contractual time limit in clause 7.5: there is a clear difference between, on the one hand, allowing a party to evade a time limit on claims for breach of warranty by re-casting a contractual falsehood as a misrepresentation and, on the other, recognising a party's right to bring a claim based on pre-contractual falsehoods outside the time limit applying only to contractual claims. (For this reason, the decision of the Court of Appeal in *Bottin (International) Investments Ltd v Venson Group Plc* [2004] EWCA Civ 1368 is not on point.)

248. Clause 25 does not seem to me to have any bearing on the matter. Clause 25.1 applies generally to both parties to the SPA and does not say or imply anything about what if any rights subsist outside the agreement. Clause 25.2 bars rescission; this is not in issue in the present case. Clause 25.3 is concerned solely with available remedies for breach of warranty; it has nothing to do with pre-contractual representations.

249. Accordingly, I hold that the SPA does not preclude MDW from bringing a claim for damages for misrepresentation that would otherwise be available to it.

The alleged misrepresentations

250. MDW claims damages on the basis of written, oral and implied representations made before the SPA; these are set out in paragraphs 12 to 15 of the amended particulars of claim. I shall consider the facts of each in turn, before considering other issues that arise.

*Written representations*

251. MDW alleges written representations, contained in the Due Diligence Index and Responses provided to MDW by Gambit on 30 September 2015 (see paragraph 88 above), as follows:

a) That there were no relevant enforcement actions or convictions;

b) That consent levels were being reviewed by DCWW because it agreed they were too low but (by implication from the failure to mention anything else) that there were no other matters to disclose in respect of discharge consents, monitoring data or any breaches;

c) That there had been no written complaints;

d) That there had been no pollution incidents;

e) That there were no outstanding investigations, enquiries, prosecution or enforcement actions.

252. I make the following findings in respect of each alleged misrepresentation in turn:

a) I do not consider that it was false to say that there were no relevant enforcement actions or convictions. There were none.

b) The representation in respect of consents, monitoring data and breaches was false. The statement that consent levels were being reviewed is vague enough to have been true. The statement that DCWW agreed that levels were too low was, in my view, false, because there was no agreement to increase the levels. Further, and at best, the response was partial and misleading. Mr Sims submitted that the written responses were qualified by the information provided orally and in writing to the effect that there had been breaches of the 2012 Consent, that there was an improvement plan in place which had not been fully implemented, and that there were ongoing discussions between GDE and DCWW. However, the information given in the Disclosure Bundle and orally to Ms Walters did not disclose the persistent and ongoing breaches of discharge consents, and the written responses thereby implied that there was nothing to disclose in that regard. Whether or not one thinks that MDW would have done well to enquire further, it is hardly surprising that both Ms Walters and Mr Lynass believed that breaches were historic and not a matter of ongoing concern. That was a natural and reasonable interpretation of what they were told.

c) Similarly, the response in respect of DCWW sampling results was false. Literally, the response "As above" makes no additional statement. But when taken with the previous response it implies that there was nothing adverse to disclose, particularly as regards results after May 2015.

d) The response in respect of "pollution incidents" was, in my view, true in respect of leachate and in respect of cess waste but not in respect of the hard solids in tank bottom waste. The expression "pollution incidents" is undefined, and counsel did not seek to define it in the course of submissions. It seems to me that it does not merely refer to discharges outside the scope of consents; the concept of a pollution incident seems to have something to do with an objective standard of environmental harm. (If "pollution incident" is equated to "unauthorised discharge or disposal", the existence of a pollution incident is liable to depend on whether the regulator has yet agreed to increase the undertaking's permitted discharge levels. That does not seem to me to be what is meant by pollution incident.) I am of the view that the discharge of raw cess waste into the public sewer would not be a pollution incident, for a different reason: so far as is established by the evidence, the effect of putting cess waste down the magic hole is simply to avoid incurring the costs of taking the waste to treatment works; the cess waste will still be treated as raw sewage and the practice does not lead to pollution. If that were wrong, I should nevertheless consider that the practice in question was a historic matter and that in the circumstances the failure to mention it did not render the written response false. The position regarding the disposal of hard solids on the Dry Side is different, as that remained the practice, albeit occasional, of GDE and involved the wrongful disposal of waste classified as hazardous. However, such is the uncertainty of the meaning of "pollution incidents" in this context that I should think it understandable, and even reasonable, if the defendants did not think the disposal of hard solids relevant to mention in response to this question; I should not think it established that the answer was given fraudulently, whether knowing that it was false or not believing in or caring about its truthfulness.

e) I do not regard the response in respect of "outstanding investigations [or] enquiries" as false. There was ongoing monitoring by the regulators and concern over persistent breaches. That does not seem to me to be a matter of investigations or enquiries; nor do I regard it as "enforcement action". In any event, the representation is to be taken as qualified by disclosure of the letter of 28 May 2015, which disclosed such facts as could be said to constitute any outstanding investigation or enquiry. (Further, if I thought that the question to which the answer was given was objectively to be construed differently and that the answer given was strictly false, I should nevertheless think it reasonable to have given that answer and should not consider the answer to be fraudulent.)

*Oral representations*

253. MDW alleges that a number of oral misrepresentations were made on separate occasions:

1) A representation made by James to Mr Lynass for MDW between 1 August 2015 and 23 September 2015 that GDE's plant was in good repair and met all its legal requirements;

2) A representation made by Miss Kelly to Mr Lynass for MDW on or around 23 September 2015 that the plant at the Site was fully compliant with all regulatory bodies and limits and was operated in accordance with the permits and licences;

3) A representation made by Miss Kelly to Ms Walters for MDW on or around 29 September 2015 that there had been some breaches of the consent to discharge, which was under review by DCWW, and that discussions with DCWW were going well; which implied the further representation that there was no cause for concern with respect to environmental compliance vis-à-vis DCWW and that any breaches were merely technical or otherwise minor.

4) Representations made twice by Mr Roderick to Mr Lynass for MDW between 1 August 2015 and 14 October 2015 (i) that there were no known breaches of mandatory consents or permits and (ii) that there were no known environmental issues;

254. As to the oral representation said to have been made by James to Mr Lynass to the effect that GDE's plant was in good repair and met all its legal requirements:

a) I am not satisfied that the representation was made. There may have been some sort of conversation in which plant was mentioned, but its terms are far too uncertain for me to be able to make any findings that it was in the terms alleged.

b) If the conversation was in the terms alleged, I do not consider that what James said was materially false. Mr Ayres referred to James's acceptance that, if he said what he is alleged to have said, the test results show it to have been false (transcript, day 5, p.132). I take that evidence into account, but it is not the end of the matter. There had certainly been occasions when pumps in the

leachate plant had malfunctioned. But it is unreasonable to construe a remark that the plant was in good repair as meaning that no mechanical failures had ever occurred. There is no good evidence that the plant was in a state of anything other than generally good repair, certainly as at the time when the representation is said to have been made.

c) As for the plant meeting all its legal requirements, Mr Ayres submits that "the plant clearly did not meet its legal requirements, as discharges from it continually breached the 2012 Consent." I do not think that follows. It is certainly the case that GDE was not meeting its legal obligations. This, however, is because of the manner in which it was conducting leachate processing; I have commented on this in connection with Mr Gray's evidence. GDE's malfeasance is obvious. This does not mean that the plant itself failed to meet its legal requirements.

255. As to the several oral representations said to have been made by Miss Kelly and Mr Roderick to Mr Lynass, I am unpersuaded. I accept that Mr Lynass was an honest witness, but I did not find his recollection to be very reliable on matters of detail. Mr Sims characterised the evidence as to these representations as vague, insubstantial and unconvincing, and I agree. The alleged representations are entirely undocumented and unrecorded. Any conversation between Mr Lynass and Miss Kelly is likely to have been fleeting and in passing; I think it improbable that he has any real recollection of what she said to him, and it is more likely that he has read his own understanding at the time of the SPA back into what was no more than a casual chat. Mr Lynass's conversations with Mr Roderick were doubtless longer and more detailed, but I am not satisfied that any specific discussion was held about matters of environmental compliance, which were matters on which specialist advice was being taken by MDW.

256. As to the oral representations said to have been made by Miss Kelly to Ms Walters, on the basis of the evidence in Ms Walters' witness statement and the record contained in her Addendum Report of 30 September 2015 I accept that the tenor of the representations was that there had in the past been some breaches of the consent limits but that such breaches were not ongoing; that DCWW was continuing to monitor the situation but that discussions with DCWW were going well, and (by implication) that there was no current cause for concern regarding compliance. Those representations were false, for reasons sufficiently appearing in the narrative; I refer also to the foregoing remarks on the written representations. Miss Kelly was seriously misleading Ms Walters as to the true position.

*Implied representations*

257. MDW alleges that two representations were implied by the defendants' conduct:

1) A representation, implied by the disclosure of the letter dated 28 May 2015 from GDE to DCWW but of no other communications between them, that the letter dated 28 May 2015 was the only material communication with DCWW;

2) A representation, implied by all of the other representations and by the absence of further disclosure, that the full extent of non-compliance comprised only the minor or immaterial or technical breaches of the 2012 Consent.

258. I do not consider that these representations add anything or that they are to be implied independently of the other representations alleged. Non-disclosure of documents is not, in and of itself, a misrepresentation. The relevance of the non-disclosure of documents other than the letter of 28 May 2015 is twofold: first, the absence of other documents provided the context for interpretation of the oral and written representations that were made, in particular in the Due Diligence Index and Responses; second, the omission of further documents from the Disclosure Bundle has the effect that the defendants' ability to use clauses 6.2 and 7.6 as a means of restricting the scope of their liability for breach of warranty is correspondingly reduced.

Fraud/Negligence

259. Paragraphs 47 to 53 of the amended particulars of claim allege that all of the pleaded representations were false and that they were made fraudulently by James in that he knew they were false or did not believe them to be true or was reckless as to their truth or falsity. The particulars of knowledge make clear that the allegation is in fact that James both knew of the representations being made on his behalf and knew that they were false. The amended particulars of claim also rely on common law negligence and section 2(1) of the Misrepresentation Act 1967 against all the defendants.

260. I find that James knew that the written representations were being made. It has not been suggested that he did not know.

261. I also find that James knew that the representations in respect of breaches and DCWW's sampling results were false. There is in my view no doubt but that he knew of the persistent breaches of the 2012 Consent. In his oral evidence he claimed that between May and October 2015 he was being assured that the discharges were within permitted levels, but I reject that evidence, which is incredible and receives no objective support from other evidence. Consideration of the totality of the evidence, including in particular the specific points mentioned in the foregoing narrative, persuades me that James knew perfectly well of the matters of non-compliance at all times before the SPA.

262. Further, none of the defendants had reasonable grounds for supposing the answers in respect of breaches and sampling results to be true. Indeed, as Jane and Stephen had left the negotiation and handling of the sale to James, they are responsible for his fraud, though themselves innocent of it.

Agency

263. The question of agency arises, because such misrepresentations as have been proved were made were made by persons other than the defendants, namely Gambit and Miss Kelly.

264. The written misrepresentations in the Due Diligence Index and Responses were made (on instructions) by Gambit. There can be no question but that Gambit was acting as the agent of the defendants.

265. Miss Kelly was employed by GDE in a senior managerial position. Mr Roderick was also employed and was a director; I shall refer to him in this context, though on my finding that he made no representation as alleged the question of his agency does not arise. A company and its officers are not in the normal course agents of the shareholders of the company; if it were otherwise, the commercial purpose of the recognition of the separate legal personality of companies would be defeated. However, the particular facts of a given case may constitute companies or their officers agents of the shareholders. An example is in *Briess v Woolley* [1954] 2 WLR 832, where the House of Lords held that the shareholders of a company in general meeting had appointed the managing director to act as agent on their behalf to negotiate the sale of their shares and that accordingly they were responsible for the fraudulent misrepresentations he had made in the course of those negotiations.

266. Mr Sims submitted that it would drive a coach and horses through the SPA if Mr Roderick and Miss Kelly were treated as agents of the defendants. In support of this submission he relied in particular on clause 6.5 of the SPA (see paragraph 200 above): if the Sellers could not rely on information provided to them by the company or its Officers as constituting representations or warranties and waived any right of recourse in respect of such information, it was (he submitted) difficult to see how the parties could properly have viewed the company or its Officers as agents of the Sellers in respect of the provision of information to the Buyer.

267. I do not find that argument persuasive. The purpose of clause 6.5 is to protect GDE (and ultimately MDW as its Buyer) from claims against it by the defendants; the protection of GDE's Officers, whether it be viewed as a necessary component of the protection of the company or as ancillary, is obviously also in GDE's and therefore MDW's interests. Clause 6.5 is concerned with the defendants' reliance on information provided to them by the company's Officers, not with the question of the Officers' status when providing information to the Buyer. If information provided by the Officers to the defendants or Gambit caused the defendants to provide misinformation to MDW and thereby to incur liability, clause 6.5 prevents the defendants from seeking recourse against the Officers. This does not preclude the possibility that, in providing information to MDW, one or more of GDE's Officers was acting as the agent of the defendants.

268. For MDW, Mr Ayres relied on passages in the written and oral evidence of James and in the oral evidence of Mr Roderick, which he said showed that both Mr Roderick and Miss Kelly were acting as agents for the Sellers. The main passage in James' evidence was as follows (transcript, day 5, pp. 74-76):

> "Q. [Miss Kelly is] assisting you and, through you, she's assisting your parents as well. Do you agree with that?
>
> A. Well, the business, not assisting me. She's doing what Mathew or Gambit required of her.
>
> Q. And what Gambit required of her was to provide information for the purposes of the sellers. So she's assisting the sellers, do you agree with me?
>
> A. The business, yes.

Q. You are not agreeing with me, then?

A. I'm not sure. I feel like you are trying to trist my comment, in that she's working for the company. I'm not giving her direct instruction. Gambit are asking her for information. Mathew is asking her for information, and they send it to Gambit.

Q. You are not giving her direct instruction, but she's doing what she's doing because the sellers, including you and your parents, are selling the business, correct?

A. Yes, that's the result of her actions, yes.

Q. And she's doing that effectively on the instruction of the sellers, do you agree with me?

A. Through an agent, yes.

Q. And Mathew Roderick's in the same sort of category as Lindsay Kelly, isn't he, that he is certainly assisting all three of you, in the sense of you and your parents, yes?

A. Well, he's working for the company, and we own the company.

Q. That's a statement that's actually true, but in terms of my question Mathew Roderick is going beyond working for the company, he's assisting the sellers in the process of sale. Correct?

A. Yes, well, he's working for the company. He's doing what is required by the company, for the company, by him. And we own the company. So is he working for us? I guess so, yes, but not under—particularly under instruction to work for me or my mum or my dad."

Later, James said that he told Mr Roderick and Miss Kelly "to give all documents required [viz. to Gambit]" (transcript, day 5, p. 96; see also p. 132).

269. I have also had regard to the oral evidence of Mr Roderick, and in particular to two passages. The first (transcript, day 6, p. 40):

"Q. Now, we know that Gambit are acting for the sellers in this transaction. Do you agree?

A. Yes.

Q. Now, we obviously know that MDW and people like Ian Lynass, they're obviously not customers of GDE, are they? They are prospective purchasers of the shares, agreed?

A. Yes.

Q. So you'd agree with me that, when you are providing information as part of the sale process, you are doing that on the instructions and on behalf of the sellers. Agreed?

A. Yes."

The second (transcript, day 6, p. 46):

"Q. Do you remember a meeting on 23 June attended by Ian Lynass, David Jones, David Thomas, Frank Holmes and you? …

A. I don't, sorry.

Q. So, just on the assumption that thou could remember that meeting, it would be fair to say that, from all those people I described, Frank Holmes and you are the people representing the sellers. Correct?

A. Correct."

270. I do not find in these passages persuasive support for Mr Ayres' submission. The passages of James's evidence relate to the dealings of Mr Roderick and Miss Kelly with Gambit. For present purposes, nothing of importance turns on those dealings, because Gambit clearly was the agent of the defendants in passing information on to MDW. However, I do not think that they establish that Mr Roderick and Miss Kelly were acting as the sellers' agents. It is obvious that the only reason for their contact with Gambit was that the shareholders wanted to sell their shares; that proves nothing about agency. Due diligence enquiries in anticipation of a share purchase agreement will necessarily concern not the shares themselves (about them, there will usually be little to ask) but the company in which they are held. That indeed was the situation in the present case: the due diligence enquiries concerned GDE, not the defendants. The fact that a company discloses information about the company to the sellers' agent does not, in my view, render the company an agent of the sellers. Before employees or officers of the company can disclose information about the company to a selling agent, they will wish to know that they have the company's authority to disclose and that the selling agent has the sellers' authority to receive information. That is what happened here. There is no evidence that Mr Roderick and Miss Kelly did more than provide information concerning the company and its operations; they were not authorised to negotiate for the sellers. In my judgment, to suppose that the provision of GDE's data to Gambit by Mr Roderick and Mr Kelly made them the agents of the defendants is to elide the distinction between a company and its members and to draw an inadmissible conclusion from the fact that the occasion of the provision of the information was the prospective sale of the company.

271. Similarly, in my judgment, meetings between Mr Lynass or Ms Walters with Mr Roderick or Miss Kelly were meetings with senior management of GDE for the purpose of obtaining information about GDE, and I see no greater reason to think that

Mr Roderick and Miss Kelly were acting as agents of the defendants for those purposes than that they were doing so when communicating with Gambit.

272. The passages cited above from Mr Roderick's evidence do not lead me to any different conclusion. The first passage might have been more persuasive if it had not played on the *non sequitur* that Mr Ayres smuggled into his questioning. The obvious fact that MDW was neither a customer nor a prospective customer of GDE does not mean that company officers, in providing information to the sellers' agents, were acting as agents of the sellers, and Mr Roderick's answers would have borne more weight if it had not been suggested to him that it did. Similarly, although the second passage is noted, the close connection between the company and its owners, coupled with the facts that Mr Roderick was providing information to Gambit and that the others allegedly present at the meeting were from MDW, means that one ought to be cautious about treating the answer either as a proposition of law or as imparting specific and useful factual information. The nature and content of the meeting were not explored in evidence, and no representation is said to have been made at that meeting in any event.

273. Accordingly, the sole representations that are to be attributed to the defendants are the written representations in the Due Diligence Index and Responses concerning breaches of the 2012 Consent and the DCWW sampling results (which James knew to be false) and concerning "pollution incidents" in respect of the disposal of hard solids from the tank bottoms (as to which, because of the uncertainty of meaning of "pollution incidents", I do not consider that he knew it was false or that he was reckless as to its truth. As I trust I have made clear, I do not regard the misrepresentation concerning tank bottom waste as having any practical relevance in the case).

Reliance

274. I find that MDW was induced to enter into the SPA by the misrepresentations in the Due Diligence Index and Responses. That document was provided in response to questions specifically asked by MDW in the course of the due diligence process. Its reason for asking the questions can only have been that it wanted to know the answers, and its reason for wanting to know the answers can only have been because they would inform its decision whether to buy the shares. There is a rebuttable inference of fact that a person who has entered into a contract after receiving a material representation of fact relied on that representation: *Mathias v Yetts* (1882) 46 L.T. 497 (Court of Appeal), *per* Jessel MR at 502; *Smith v Chadwick* (1882) 20 Ch. D. 27 (Court of Appeal), *per* Jessel MR at 44–45, *per* Lindley LJ at 75; (1884) 9 App. Cas. 187 (House of Lords), at 196. Similarly, it would not be credible to suppose that the defendants gave the answers without intending MDW to rely on them. Further, a person who makes a fraudulent misrepresentation is rebuttably presumed to have intended the representee to act in reliance on it: *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501; *Goose v Wilson Sandford & Co (a firm)* (Court of Appeal, unreported, 14 March 2000) at [47].

275. Mr Sims submitted that the presumption of reliance was rebutted. He relied on two matters: first, the contractual scheme in the SPA; second, the evidence of Mr Lynass

that the purchaser of a company would rely on the contractual document and not on "the chitter-chatter before". Neither of these matters is persuasive. As to the SPA, it has already been observed that it does not purport to preclude claims based on pre-contractual representations. Mr Sims relied on the remarks of Mr Andrew Baker QC in *Idemitsu* at [18] as showing that a claim to have relied on pre-contractual representations would be unconvincing where parties had "agreed to structure their deal on the basis that only if the representations were warranted could reliance be placed on them." However, the matter under consideration in that paragraph was whether warranties as to fact were capable of supporting a claim in misrepresentation; that is a different point. The undoubted fact that the buyer of a company will wish to protect itself to the maximum possible extent in the provisions of the contract does not at all suggest, far less demonstrate, that the buyer was not induced by pre-contractual representations to enter into the contract. As for Mr Lynass's evidence, it related to "chitter-chatter", not to formal answers given in response to due diligence enquiries.

276. If I had found that Mr Roderick and Miss Kelly had made the alleged oral representations to Mr Lynass, I would not have held that MDW relied on them, in circumstances where they were undocumented and unrecorded remarks on matters that were subject of a formal due diligence procedure.

## J. Liability: Summary

277. The defendants are liable for breach of warranty in respect of:

1) The persistent and continuing breaches of the 2012 Consent concerning the discharge of leachate;
2) The false information provided to DCWW;
3) The disposal of hard solids from the tank bottom waste on the Dry Side;
4) The disposal of cess waste down the magic hole;
5) The failure to disclose the misfeasances in respect of hard solids as pollution incidents;
6) The failure to disclose the misfeasances in respect of leachate, hard solids, cess waste, and provision of false information to DCWW as non-compliances with regulatory consents and permits;
7) The threat of prosecution by reason of the breaches of the 2012 Consent;
8) The likelihood of revocation of the 2012 Consent by reason of those breaches.

278. However, breaches of warranty in respect of cess waste and tank bottom waste were of no demonstrable significance, because it has not been proved that they had any causal relation to any loss and damage. Therefore, in short, the relevant breaches of covenant concerned only the discharge of leachate: the persistent discharge in breach of the 2012 Consent, the threat of prosecution for that reason, the likelihood that the

breaches would result in revocation of the 2012 Consent, and the provision of false information to DCWW.

279. The actionable misrepresentations were those in the Due Diligence Index and Responses; there were no other actionable misrepresentations. They cover the same ground as the breaches of warranty. The misrepresentations constituted deceit on the part of James. Jane and Stephen are liable for the same misrepresentations, and to the same extent, on the basis of section 2(1) of the Misrepresentation Act 1967. They would also be liable in deceit because, although innocent themselves, they are liable for the fraud of their agent, James.

## K. Quantum of Damages

280. It is common ground that the proper measure of damages for breach of warranty is the difference between (a) the value of GDE on the basis that the warranties were true ("Warranty True") and (b) the actual value of GDE given that the warranties were false ("Warranty False"). No different measure has been suggested for any claim in respect of fraudulent or negligent misrepresentation, at least for the purposes of this case. I shall refer generally only to breach of warranty.

281. There is a fine but important distinction between two closely connected stages of analysis: proof of causation of loss; and quantification of damage.

a) If it is to recover anything more than nominal damages for breach of contract, the claimant has the burden of proving on the balance of probabilities that the defendants' wrongdoing caused it loss. In *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm), where the fundamental problem concerned the proof that any loss had been suffered, Leggatt J referred at [164] to principles that may assist a claimant who has difficulty in proving loss, in particular that difficulty of estimation will not prevent the court from awarding damages, especially if the difficulty arises from the defendant's breach, but at [165] he noted that the principles have limits and do not, for example, "enable the court to conjure facts out of the air" and remarked, "They may give the claimant a fair wind, but not a free ride: see Adam Kramer, *The Law of Contract Damages* (2014) at 470-1."

b) If the court finds on the balance of probabilities that loss has been suffered, it must do the best it can on the evidence available; at this stage, the matter is not one of balance of probabilities: see *Chitty on Contracts*, 33rd edition, para 26-018; *Wemyss v Karim* [2016] EWCA Civ 27 at [40]-[49], per Lewison LJ; and *116 Cardamon Ltd v MacAlister* [2019] EWHC 1200 (Comm) at [77]-[83], per Cockerill J. However, "doing the best one can" still does not entail a free ride. The court cannot ignore the statements of case: damages cannot be awarded for a loss that has not been pleaded. Further, if a claimant pleads a loss in an exaggerated amount, he "cannot complain if, through opening his mouth too wide, he fails to prosecute a more modest claim and the judge does not deal with the matter as sympathetically as he might otherwise have done": see *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* (Court of Appeal, 22 June 1998, unreported) at [53].

282. The amended particulars of claim allege that by reason of the breaches of warranty the shares were worth considerably less than was paid for them. The precise amount of the difference was said to be left for expert evidence. However, the "current estimate" (as at October 2019) was in the sum of £1,111,913, based on the effects of the breaches of warranty on both the multiplicand (post-tax profitability) and the multiplier. The figure ultimately contended for by Mr Ayres, on the basis of the expert evidence, was £1,210,439.

283. These figures immediately give one pause. The price paid, leaving aside the share capital contribution, was £3,584,224. Therefore the difference that the breaches of warranty made is being put at about one third of its total value. Some 35% of the total value was attributed by MDW to the net assets; these were unaffected by the breaches of warranty. Therefore 65% of the total value was attributable to profits. However, the core allegations all relate to the operations on the Wet Side of GDE's business. The Information Memorandum produced by Gambit in June 2015 contained, at Appendix One, a profit and loss summary, broken down by reference to the continuing activities of each division of the company; this showed that the wet waste division accounted for 25% of the gross profits of the company and at best (the calculation is not easy to make) no more than one third of the operating profits. This would lead one to suppose that the complete elimination of the wet waste division would result in a diminution of the value of the business by between about £580,000 and about £780,000. Of course, the alleged breaches of warranty do not, even on their own terms as pleaded, suggest that GDE ought to be valued on the basis that its wet waste division was worthless. This by itself indicates that the approach adopted by MDW to the valuation of its claim is likely to be overblown.

284. I find that the breaches of warranty in respect of leachate and misleading the regulators did cause MDW to suffer loss. However, as I have several times indicated, I find that the breaches of warranty in respect of cess waste and tank bottom waste did not cause MDW to suffer loss; I shall ignore them in what follows.

285. I find that the value of GDE on the Warranty True basis was £3,341,276. I make this finding for the following reasons.

1) The price paid may be a guide but it can be no more than that. Bargains can be good or bad; they are not always just right.

2) The method adopted by MDW/Haasco to value GDE is not a recognised valuation method, though of course it has affinities with such methods, and would not fall for consideration if it were not the method actually used by one side of this transaction.

3) The EV/EBITDA multiplier approach is acknowledged by both experts to be the method more commonly used by professional business valuers, and I accept Mr Mesher's opinion that it is the preferable method because it facilitates a ready comparison of businesses that have different capital structures and pay tax at different rates. Although it is not suggested that the use of PAT methodology is "wrong" in a case such as the present, I see no need to introduce it into consideration when there is no reason to suppose that the EV/EBITDA method is unlikely to give a satisfactory result.

4) I accept Mr Mesher's analysis both of the multiplicand (which is quite close to that of Mr Gates) and of the multiplier (namely, 4.2): see paragraph 139 above. Both experts regarded the EBITDA multiplier that would be required to justify the purchase price as being on the high side and I see no reason therefore to accept it as the correct multiplier.

286. My approach to the Warranty False valuation is set out in the following paragraphs.

287. First, for the reasons given by Mr Mesher, I would find that the appropriate multiplicand was £1,115,000. This figure reflects the additional costs that would have been incurred in the lawful operation of the leachate processing operations at the Site and, correspondingly, the reduced profits. Mr Sims submitted that this approach of the defendants' own expert was generous to the claimant, principally because the true comparison was not between Breach and No-Breach but between Breach and At-Least-Some-Breach. However, the critical question, as Mr Sims acknowledged, concerns the effect of breach on valuation. MDW knew that there had been some breaches of the 2012 Consent, but the breaches known to MDW did not indicate any diminution in the value of the company by reason of its inability to carry on its business lawfully.

288. Second, I consider that some reduction in the multiplier is appropriate to reflect reputational damage (or, as it has been put, "the fragility of the goodwill") that the breaches were liable to cause to the company and the jeopardy that they occasioned to the future of the business. Both experts were ultimately in agreement that such a reduction could be justified in principle; they disagreed as to its justification and, if justified, its amount in this case. There is obvious reason to be cautious before discounting the multiplier at all. The effect of the breaches on the value of the business will primarily be reflected in the multiplicand; as the EBITDA would have been adjusted to reflect sustainable levels of profitability, a further qualitative adjustment to the multiplier would present a risk of double counting. The risk is real, but it is not a conclusive reason not to discount the multiplier, as Mr Mesher accepted. An innocent accounting error that overstated the profits would be adequately and completely dealt with by a discount of the multiplicand. The breaches in the present case were of a different order, because they involved not only the running of a non-compliant operation (which might be dealt with in the multiplicand) but the deceiving of the regulator in order to keep that operation afloat. The argument of Mr Sims and Mr Jagasia (written submissions, paragraph 148) that no discount is appropriate because it is known that no risks to the business have been realised since the SPA is to be rejected, as it relies impermissibly on hindsight.

289. However, I consider that Mr Gates' suggestion of a 25% discount in the multiplier is greatly overstated. Mr Gates proposed a discount of that amount on the assumption that there had been systematic non-compliance across the three areas of the claim (cess waste, tank bottom waste, and leachate); the proposal was based on the view that, in those circumstances, 25% of the actual profits of GDE across the entire business (that is, including the Dry Side) were placed at risk because of the possibility of further concealed non-compliances. However, such past non-compliances as I find there to have been in respect of cess waste or tank bottom waste were either historic or very occasional, were not known to the regulators and were in my view very unlikely to become known by them, and (from a valuation point of view at the date of purchase) were unlikely to be continued or repeated by the new owners of the

company; therefore I do not accept that they occasioned reputational damage that ought to be reflected in the valuation. Further, I am not persuaded that the breaches in respect of leachate and the misleading of the regulators created a genuine risk to the viability of the business of the Dry Side. Any discount would, in my view, properly relate only to the risks to the ongoing wet waste division, over and above the reduction in the leachate business. The change of ownership of the company would itself tend to minimise the risks of adverse consequences with the regulators. Again, I do not accept that it is justified to value a business on the basis of possible concealed breaches for which there is no evidence.

290. In my judgment, the discount of the multiplier is to be ascertained, as Mr Mesher suggested, by choosing a figure at an appropriate point within the range of acceptable multipliers for an EV/EBITDA valuation. Mr Mesher considered that the appropriate range was between 3.8 and 4.5; and, although the specific figures at either end of this range were suggested by a fairly limited examination of comparables, I accept his opinion as to range. Having regard to the matters that I have referred to above, I consider that the risk of "reputational damage" is appropriately reflected by discounting the multiplier from 4.2 to 4.

291. This line of reasoning would give a valuation as follows: £1,115,000 x 4 = £4,460,000 - £1,501,324: a total of £2,958,676. On this basis, the difference between the Warranty True valuation and the Warranty False valuation is £382,600, which by my reckoning is about 11.5% of the purchase price.

292. Fourth, the question arises whether the foregoing line of reasoning is undercut by an argument, initiated by Mr Mesher and boldly carried to new lengths by Mr Sims, to the effect that the price arrived at by a willing buyer and seller would have been informed, and any reduction in price on account of breaches of warranty would have been capped, by the knowledge reasonably available to them of the cost of remedying the problems that had given rise to the breaches. The evidential basis of Mr Mesher's argument is summarised in paragraph 117 above, and the core of the argument itself is summarised in paragraph 139(5) above. Mr Sims developed the argument with a view to proving that the breaches of warranty made no difference to the value of GDE: the "cost of cure" would have been of the order of £100,000, which fixes an absolute cap on the difference of value; however, that expenditure would have been considered a sound investment, because it would not result in any increase in fixed costs and might even reduce them, and because it would have increased the capacity of the leachate processing system—Mr West suggested (transcript, day 5, page 78) that it might increase throughput by nearly 70%; any costs associated with the investment would thus be viewed by a reasonable buyer as minimal and as justified by the benefits of the investment. If there were any reduction in value at all, it would be below £50,000 and thus *de minimis*, and reasonable negotiating parties would not have made any adjustment to the price to take account of the breaches in respect of leachate.

293. I reject this argument, for the following reasons.

1) Although the argument does not formally rest on hindsight, it does in fact rest on information that was not obtained in the course of negotiations. The supposition is that such information would nevertheless reasonably have been available to parties to a negotiation. This seems to me doubtful. The

information that we do have was produced by Mr West in late February 2017 after he had put forward initial views in general terms in mid-January 2017; even the later information does not include detailed analysis either of costings or of a programme of works and their likely impact on the operations of the business while they were ongoing. It is quite plausible that a buyer might have obtained general views from a company such as Hydroventuri before proceeding with the transaction, but I doubt whether it would have proceeded to anything in the nature of a detailed costing of works.

2) For similar reasons, I am not persuaded that a buyer would have been inclined to think that the costs of the works would be limited to £113,000, far less that it would have assumed a figure at the lower end of the bracket. The probability is that a buyer would have anticipated a significant interruption of business during the course of the works. The figure by which on Mr Mesher's calculation the reduction of the EBITDA (by £38,000) reduces the value of the company, assuming a multiplier of 4.2, is £159,600: only £46,600 more than the top end of Mr West's bracket for the cost of the works. If a multiplier of 4 is used, the difference made by the reduction of the EBITDA is only £152,000, which is only £39,000 more than the upper end of the estimate of the cost of the works themselves. I am not in a position to arrive at any meaningful assessment of the likely financial cost of business interruption, but I think it improbable that a buyer would have assumed that the cost would be so little as to yield a higher value for the company.

3) The Option 3 works proposed by Hydroventuri would not have addressed breaches of the 2012 Consent in respect of metals, even if they had resolved the problem concerning ammonia.

4) I am wholly unpersuaded by the contention that the possibility of cure would not merely have the effect of capping the diminution in value (as Mr Mesher opined in his report) but would be seen as an opportunity for investment leading to business enhancement and would therefore lead to no reduction in the price. A buyer might well have hoped to develop and expand the business. But I do not for a moment believe that it would have proceeded on any more favourable basis than that currently unsustainable profits might be made sustainable at a cost.

5) If I had accepted the "cost of cure" argument in whole or in part, I should certainly not have thought that it negated the justification for a reduction of the multiplier to 4. On Mr Mesher's figures (see paragraph 139 above), this would have resulted in a reduction in value of £230,600 even without making any reduction for the cost of the works. If the cost of the works be itself taken as a substitute for a reduction of the EBITDA, a further £113,000 would be added. The total reduction of value would therefore be £343,600, which is £39,000 less than the figure I have arrived at.

294. Accordingly, I award damages of £382,600.

## Order

**UPON** the trial on 18, 19, 20, 21, 22, 25, 26, 28 and 29 January 2021

**AND UPON HEARING** Mr Ayres QC and Mr Scher of Counsel for the Claimant and Mr Sims QC and Mr Jagasia of Counsel for the Defendants

**AND UPON RECEIVING** evidence

**AND UPON JUDGMENT** being handed down this day without the attendance of the parties

**AND UPON READING** written representations from Counsel concerning the appropriate terms of order

**AND UPON** the Court considering (1) that there is no good reason why judgment for damages ought not to be entered now, (2) that there is no good reason why any order ought to be made to displace the default position that a judgment is payable in 14 days, and (3) that the appropriate listing for the Consequentials Hearing mentioned below is 3 hours, as this Court does not generally specify "time allowed" by reference to ½ days, and that the parties ought to be able to deal with consequential matters within that time

**IT IS ORDERED that:**

1. There be judgment for the Claimant against the Defendants, jointly and severally, for £382,600 for damages.

2. The non-attended hearing at which the Judgment is handed down be and is adjourned to the first available date after 21 May 2021 with a listing of 3 hours ("the Consequentials Hearing").

3. All matters consequential upon the Judgment, including interest, costs and any application for permission to appeal, be adjourned for consideration at the Consequentials Hearing.

4. The time for filing any appellant's notice by any party be and is extended to 21 days after the Consequentials Hearing.

5. By 4 p.m. on 7 May 2021 the parties shall file their dates of unavailability for the Consequentials Hearing for the period 24 May 2021 to 23 July 2021 inclusive, preferably consolidated and with a single point of contact.

**Date**: 4 May 2021