

Neutral Citation Number: [2020] EWHC 2521 (TCC)

Case No: F50CF002

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT (QBD)**

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

Date: 23 September 2020

Before:

**HIS HONOUR JUDGE KEYSER Q.C.**  
**sitting as a Judge of the High Court**

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Between:

<b>PULLMAN FOODS LIMITED</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>THE WELSH MINISTERS</b>	<b><u>Defendant</u></b>
<b>-and-</b>	
<b>BFS GROUP LIMITED</b>	<b><u>Third Party</u></b>

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**James Hanham** (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Claimant** and the  
**Third Party**  
**Emyr Jones** (instructed by **Hugh James**) for the **Defendant**

Hearing dates: 17, 20, 21, 22, 27, 29 July 2020

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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 Q.C.

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 11am on Wednesday 23 September 2020.

## **JUDGE KEYSER QC:**

### **Introduction**

1. For some years the claimant, Pullman Foods Limited (“Pullman”), was the lessee of a parcel of land on the south side of Langdon Road, Swansea Dock (“the Site”). Latterly the reversion of the lease was held by the defendant, the Welsh Ministers (for convenience, “the Welsh Government”). In 2013 the Welsh Government served on Pullman a notice under section 25 of the Landlord and Tenant Act 1954 (“the 1954 Act”) to terminate the lease. The notice stated that the Welsh Government opposed the grant of a new tenancy. Pullman did not seek a new tenancy and, after an agreed extension of time, the lease ended and Pullman vacated the Site on 6 February 2015.
2. On 6 February 2019, Pullman commenced these proceedings in the County Court at Swansea, claiming £42,500 as compensation for the termination of the tenancy, pursuant to section 37 of the 1954 Act. The Welsh Government does not dispute Pullman’s entitlement to statutory compensation. The proceedings now solely concern the counterclaim brought by the Welsh Government against Pullman and its parent company, the Third Party, BFS Group Limited (“BFS”).
3. In brief summary, the Welsh Government’s case is as follows. Pullman’s covenants under the lease obliged it to remove the buildings that had been erected on the Site and to reinstate it at the end of the lease. Pullman failed to comply with that obligation, because it left on the Site remains of the buildings, which contained asbestos-containing materials (“ACMs”). The Welsh Government then granted two successive licences to BFS to enable it to go onto the Site and remove the remains of the buildings and the ACMs. However, some of the ACMs were not removed and ended up being spread widely over the Site, with the result that the Site was contaminated with asbestos and required expensive remediation works. The Welsh Government claims against BFS an indemnity for the cost of the remediation works pursuant to a provision of the licences; in the alternative, it claims damages: against Pullman for breach of its lessee’s covenants, and against BFS for breach of its obligations under the licences.
4. The rest of this judgment will be structured as follows. First, I shall set out the facts; these are most reliably taken from the documents, to which I shall refer at some length. Second, I shall summarise in rather more detail the issues arising on the Welsh Government’s case. Third, I shall discuss the issues.
5. The trial was held over a period of six days by means of Skype for Business. I am grateful to Mr James Hanham and Mr Emyr Jones, counsel respectively for Pullman and BFS and for the Welsh Government, for their assistance in the conduct of the hearing and for their helpful written and oral submissions.

### **The Facts**

#### *Background and the Lease*

6. The Site is located immediately to the north-east of the Prince of Wales Dock in Swansea, a little over a mile to the east of Swansea city centre, and extends over 4,240m<sup>2</sup>. To the north of the Site is the western part of Langdon Road. To the west is a residential housing development; an access way lies between the Site and the housing.
7. By a lease (“the Lease”) dated 8 November 1972, British Transport Docks Board demised the Site to Abertawe Fresh and Frozen Foods Limited for a term of 42 years from 29 September 1972. Clause 2 of the Lease contained lessee’s covenants as follows:

“(4) To obtain all necessary consents and approvals and to commence and within Twelve months from the date of these presents to complete upon the demised premises the following works namely:

- (i) the first stage of a cold storage and distribution depot at an estimated value of Forty-five thousand pounds
- (ii) the erection of fences on the Northern Eastern and Southern boundaries of the demised premises
- (iii) an adequate septic tank for the disposal of waste effluent from the demised premises

the whole of such works to be in accordance with plans drawings and specifications to be previously submitted to and approved by the Board and to be executed to the satisfaction of the Docks Engineer of the Board’s Swansea Docks and to the satisfaction of any Local or Public Authority having jurisdiction in the matter.”

“(10) At the expiration or sooner determination of the said term quietly and peaceably to deliver up the demised premises leaving the same in good and substantial repair and condition to the satisfaction of the Board having first (if required by the Board to do so) removed any buildings or works and having made good to the satisfaction of the Board all damage occasioned to the demised premises by or in such removal.”

The expression “the Board” was stated “where the context so admits [to] include the person for the time being entitled to the reversion immediately expectant on the determination of the term hereby created”.

8. Pursuant to the covenant in clause 2(4) of the Lease, Abertawe Fresh and Frozen Foods Limited erected buildings on the Site in the early 1970s. Two interconnecting cold-store warehouses occupied most of the south-west quarter of the Site. A separate single-storey office building extended across the central part of the northern end of

the Site. The remaining area, extending over perhaps 60% of the Site, comprised a yard and hardstanding for vehicles.

9. In due course, the Lease was assigned to Pullman. Upon the privatisation of the British Transport Docks Board, the freehold reversion vested in Associated British Ports, from whom it was purchased later by the Welsh Development Agency. The freehold title was subsequently registered in the name of the National Assembly for Wales. By virtue of paragraph 39(1) of Schedule 11 to the Government of Wales Act 2006, by 2013 that title had been transferred to and vested in the Welsh Ministers.
10. The purchase of the Site by the Welsh Development Agency was with a view to its inclusion in what became known as the Swansea SA1 Waterfront Redevelopment Project (“the SA1 Development”), which comprises a mixed development including modern housing, student accommodation, hotels and restaurants. The Welsh Government identified the Site as the major part of Plot E6 within the SA1 Development; Plot E6 extended a little beyond the boundaries of the Site. The eastern part of the Site was to be acquired by the University of Wales Trinity Saint David as part of its Swansea City Centre campus. The western part of the Site was to comprise public open space. Across the central part of the Site, in a roughly north-south orientation, was to be a new link road from Langdon Road to Marina Road. The construction of the link road was to be carried out under what became known as Highways Finishing Contract 6.
11. The person at the Welsh Government with day-to-day management responsibility for the SA1 Development was Mr Peter Kaminaris, a land surveyor. He reported to Mr Paul Williams, his line manager, and high-level decisions were taken by a Property Leadership Team. The Welsh Government’s Project Managers for the SA1 Development were Hyder Consulting, which by 2015 had been acquired by Arcadis NV and later that year became known as Arcadis Consulting. Mr Len Burgess, a senior engineer at Hyder Consulting, had worked almost continuously at the SA1 Development for several years, though he had no involvement with the Site until February 2015.
12. Under cover of a letter dated 31 October 2013, the Welsh Government served on Pullman a notice pursuant to section 25 of the 1954 Act, terminating the Lease on 28 September 2014 and opposing the grant of a new tenancy on the grounds that it intended to redevelop the Site. The letter said:

“Please also note that the Welsh Ministers (as your Landlord) will require the removal of any buildings on the Property by the end of the term and all damage to be made good in accordance with clause 2(10) of the Lease.”
13. Pullman and the Welsh Government subsequently agreed extensions pursuant to section 29B of the 1954 Act, the effect of which was that the Lease would not expire until 6 February 2015.

*Site clearance*

14. In December 2014 Wakemans Limited (“Wakemans”), the property consultants retained by Pullman/BFS, produced an Asbestos Demolition Survey Report in respect

of the Site (“the Wakemans Report”). The Wakemans Report identified only two sources of notifiable (brown or blue) asbestos on site: insulating board in a room in one of the cold-stores, and insulation in part of the office block. The presence of this asbestos would have to be notified to the Health and Safety Executive (“HSE”), and it would have to be removed by specialist removal contractors licensed in that regard by the HSE. Otherwise, the asbestos on site was Chrysotile (white asbestos), which was non-notifiable and could be removed by the demolition contractor’s own personnel, provided they were sufficiently trained and followed the guidance in the HSE Asbestos Essentials Task Manual (HSG 210).

15. Pullman and BFS engaged contractors, Liston Contracting Services Limited (“Liston”), to carry out demolition works on the Site to comply with the obligations in the Lease. For that purpose, Liston was provided with the Wakemans Report. Liston’s contract required it to remove the buildings on the Site down to slab level; however, it was not engaged to remove the concrete slabs themselves. Mr Anthony McLean, a director of Liston, gave evidence as follows:

“From a review of the Site, it seemed to me to be a straightforward job and not a high-risk or high-value project. The Site consisted of two connected ‘cold store’ warehouse buildings and one office building (together, ‘the Buildings’). The remainder of the Site was used for parking or other vehicular access. The Buildings sat upon concrete slabs but, from the proposed scope of the work Liston did not need to remove any of these slabs or other foundations and only had to demolish all structures down to slab level, meaning that the ground itself would not be disturbed.”

16. On 9 January 2015, Liston issued a Method Statement for demolition works at the Site. The sequence of works was summarised as follows:

- “1) Site set up of welfare and perimeter security fencing
- 2) Cat B trained operatives will remove non-notifiable external ACMs  
  
Room E1, External Office Building, Canopy Soffit, Warehouse, External Cladding, Edging and Gutter bracket, Cement Warehouse, Guttering, Cowling and Wastepipes
- 3) Room by Room operatives will also remove internal ACMs from office block
- 4) Operatives remove asbestos cement roof sheets from warehouse
- 5) Machine demolishes office block to top of ground floor slab
- 6) Machine shears down portal frame warehouse building

7) Any bolts and trip hazards trimmed/removed from floor slab and clear site.”

17. Liston commenced work on the Site on 12 January 2015. It had been intended that the notifiable asbestos would be removed before any other work began. In the event, however, it was discovered that the notifiable asbestos identified in the Wakemans Report had already been removed, possibly when previous contractors had gained access to pipework in the buildings on site. Liston’s own workforce removed non-notifiable asbestos from site, including some in the cladding at the warehouse that had not been identified in the Wakemans Report. Liston had completed its work at the Site by 13 February 2015. I shall refer to this work as the Phase 1 Works.
18. Upon completion of the Phase 1 Works, Mr Kaminaris instructed Mr Burgess to inspect the Site. Mr Burgess inspected the Site on 26 February 2015 and reported his findings in an email to Mr Kaminaris:

“The site has been left in an unacceptable condition.

There is an unprotected excavation outside the site which is not backfilled. This blocks the footpath, no RAMS [risk and method statements] were submitted for works outside the site boundary.

There are numerous small pieces of asbestos visible in the debris around the site.

No base slabs have been removed, there are floor tiles visible on the slabs, this type of tile/adhesive usually test to contain asbestos.

Plasterboard piece are visible which should be treated as special waste.

Lighting columns are still in place, and various electrical fittings are visible.”

Photographs were attached to the email to illustrate Mr Burgess’s findings.

19. Mr Burgess’s findings were communicated to Pullman: first, by an email on 26 February 2015 from Mr Kaminaris to Mr Simon Russell of Solace Property Consultancy Limited (“Solace”), which was retained as a consultant by BFS and Pullman; and second, by a letter dated 27 February 2015 from the Welsh Government’s Legal Services Department to Pullman. The letter said:

“In view of the Tenant’s covenants contained in Clauses 2(7)(a) and 2(10) please ensure that the above issues are rectified with immediate effect to enable the cleared site to be handed back to the Welsh Ministers together with all necessary documentation evidencing compliance with the above mentioned covenants.”

20. On 4 March 2015 a meeting took place at the Site between Mr Kaminaris, Mr Burgess, Mr Russell, and Mr Paul Caesar of Wakemans. The evidence in Mr Kaminaris's witness statement, which he maintained in cross-examination, was:

“At the meeting we discussed the need for the following to happen: an asbestos survey; for Solace to provide certificate documentation regarding disconnection of the electricity and water; for Solace to provide copies of the consignment notes and transfer notices for removal of asbestos from the Property; confirmation of HSE notification; a formal agreement to allow [Pullman] and their contractors/agents back on to the Property; that the base should be taken to level 1m below ground; further asbestos testing after further works; and electricity connection/lights[,] rubble [and] pallets to be removed.”

The evidence in paragraph 29 of Mr Russell's witness statement was to materially similar effect. In an email to Mr Kaminaris on 10 March 2015, Mr Russell summarised the Welsh Government's complaints and continued:

“In the first instance we suggest that all the issues identified above are dealt with prior to any break-up of the slabs, for obvious reasons.

The first stage is therefore to remove all debris and ACMs from site and attend to the removal of other items such as plug in points, perimeter spots, steel beam etc.

Once the site is clean, a (sic) specialist contractors will carry out tests and provide certification that the site is clear of asbestos.

Thereafter the slabs will be addressed.”

21. In short, the meeting and subsequent correspondence led to agreement that the necessary remedial works would be carried out in two stages. First, Liston would return to the Site in order to complete satisfactorily the work that it had previously been contracted to do; I shall call this the Phase 2 Works. Then, after Liston had completed the Phase 2 Works, a different contractor would be engaged to deal with the removal of the slabs; this I shall call the Phase 3 Works. As the Lease had come to an end, access to the Site would be given to the contractors for the Phase 2 Works and the Phase 3 Works only pursuant to licences to be granted by the Welsh Government for that purpose.
22. On 7 April 2015 the Welsh Government as Licensor granted to BFS as Licensee a “Licence to Occupy on Short-term Basis” (“the April Licence”) in respect of the Site (there referred to as “the Property”). (This and the subsequent licences, mentioned below, were granted to BFS rather than Pullman, because Pullman was a dormant company.) Clause 2.1 provided:

“Subject to clause 3 and clause 4, the Licensor permits the Licensee to occupy the Property for the Permitted Use for the

Licence Period in common with the Licensor and all others authorised by the Licensor ...”

The “Permitted Use” was defined as being “in order to undertake all necessary works required to comply with clause 2(10) of the Lease”. The “Licence Period” was “the period from and including the date of this agreement until the date on which the licence is determined in accordance with clause 4”; in the event, that was until 24 April 2015. The following provisions of clause 3 are material:

“The Licensee agrees and undertakes

...

(c) not to use the Property other than for the Permitted Use;

...

(f) not to do or permit to be done on the Property anything which is illegal or which may be or become a nuisance (whether actionable or not), annoyance, inconvenience or disturbance to the Licensor or any owner or occupier of neighbouring property;

(g) save to the extent that the agreed works to be carried out at the Property may conflict with this clause, not to cause or permit to be caused any damage to

(i) the Property, or any neighbouring property; or

(ii) any property of the owners or occupiers of the Property, or any neighbouring property;

...

(k) to comply with all laws and with any reasonable requirements or recommendations or regulations of the Health and Safety Executive, local authority and the relevant suppliers relating to the supply of electricity, gas, water, sewage, telecommunications and data and other services and utilities to or from the Property;

...

(m) to leave the Property in a clean and tidy condition at the end of the Licence Period;

(n) to indemnify the Licensor and keep the Licensor indemnified against all losses, claims, demands, actions, proceedings, damages, costs, expenses or other liability in any way arising from

(i) this licence;



- (ii) any breach of the Licensee's undertakings contained in clause 3;
  - (iii) the exercise of any rights given in clause 2; and/or
  - (iv) the Permitted Use
- (o) to carry out any works to the Property in order to comply with clause 2(10) of the Lease in accordance with the method statement and risk assessment annexed to this agreement; and
- (p) to provide the Licensor with an appropriate certificate from a professionally qualified person or company confirming that the Property is free from asbestos within 5 working days of (a) completion of the works to comply with clause 2(10) of the Lease or (b) termination of the licence (whichever is earlier)."

Clause 1.10 provided:

"An obligation on a party not to do something includes an obligation not to allow that thing to be done and an obligation to use best endeavours to prevent that thing being done by another person."

23. The "method statement" referred to in clause 3(o) of the April Licence was a "Method Statement & Plan of Works" issued by Liston on 27 March 2015. Section 2 of the document was headed "Assessment of Work" and sub-headed "General Description of Project & Extent, Type and condition of asbestos to be removed", and the text read:

"The site is a former commercial building on an industrial estate. An asbestos survey was carried out which identified the presence of chrysotile in the form of asbestos cement roof sheets and wall sheets which required safe removal and disposal by a suitably trained non-licensed contractor. The material contains Chrysotile (white) asbestos fibres. The building has been demolished and majority of asbestos removed with a small amount of debris left on the floor slab. There is approximately 2 x bags of asbestos to be removed from the site. Uncontrolled removal of these materials could release asbestos fibres. The work methods and controls detailed in this plan of work will ensure that the asbestos fibre concentrations released will be reduced to less than <1F/cm<sup>3</sup>."

Section 4, "Work Methods", stated:

"All works will be carried out in an orderly and organized manner, so that the risk of any potential accident is minimized.

All parcelled waste will be placed directly into a waiting skip for disposal.

On completion the area will be thoroughly cleaned and checked to remove any residual asbestos.”

Section 5, “Waste”, stated:

“We anticipate the generation of approximately 2 x parcels of asbestos waste on the contract, which will be taken directly to a licensed transfer facility with all necessary documentation.”

Section 7, “Method”, stated:

“Operatives wearing laceless boots, type 5/6 cat 3 disposable overalls and Ori-nasal half masks with P3 filters will clean the floor slab section by section placing visible pieces of asbestos cement debris into a red asbestos waste bag (pre-labelled) by hand and sweeping all other debris into piles before placing into the red bag using a shovel and broom. Each section of floor slab will be mist sprayed using a solution of approved fibre suppressant prior to and during removals with the aid of a manually operated pressure/atomising advice [presumably, device].

Once full, the asbestos waste red bag will be swan necked, taped closed using duct tape, wiped down, and then this process repeated using a clear asbestos waste bag.

This operation will then repeat for the whole of the floor slab and any area on the perimeter that has any asbestos debris.

...

Once the area has been cleared and inspected by the supervisor and the client, a self-certification certificate will be issued to the client.”

The document recorded that the work was expected to take four workmen two days to complete.

24. The “risk assessment” referred to in clause 3(o) of the April Licence was a document titled “Liston Group[:] Task Risk Assessment” and dated March 2015. It is presumably no more than an iteration of the risk assessment prepared for the earlier works; much of it relates to the work that was done in January and February 2015, and as regards asbestos it adds nothing to the method statement.
25. Liston commenced works pursuant to the April Licence on 14 April and completed them on the late afternoon of 15 April 2015. Mr McLean’s evidence was that the work was carried out in accordance with the method statement and that the only other work done by Liston on site was to back-fill a trench that had been left when the utility company disconnected the power supply to the Site. Mr McLean had not been

present on site during the Phase 2 Works, but he attended at the Site shortly after 7 o'clock on the morning of 16 April in order to inspect the works before Liston's workforce attended to remove their equipment and clear the Site.

26. Mr McLean's written evidence of his observations when he inspected the works on 16 April 2015 was as follows:

"I discovered partially buried asbestos cladding in the gravel strip (a 1-2 foot strip between the back of the former Buildings and the fence line). This was not an area where Liston had undertaken any works during Phase 1 [January/February 2015] or Phase 2 [April 2015]. It looked to me as though the cladding had been covered with a blue polythene weed barrier and approximately 100mm of gravel. On closer inspection, I surmised it was non-notifiable asbestos (it was a thin, hard board, whereas notifiable asbestos tends to be soft and pliable) and it had been there for many years as it was green and surrounded by a lot of weeds and moss etc."

In cross-examination, Mr McLean confirmed that he had not dug into the gravel to see the extent of the buried asbestos but had scraped the surface with his foot.

27. Mr McLean immediately reported his observations to Mr Caesar, and by an email at 7.25am he sent him three photographs of "asbestos in far north corner under weed barrier". (The reference to the "north" corner is simply a mistake. It was the south(-west) corner.) By themselves the photographs are not particularly illuminating, but they do show the blue polythene sheeting that was on top of the asbestos sheet—possibly, as Mr McLean thought, as a weed barrier, but more probably just by way of an additional layer of protection over the discarded asbestos cladding. The location shown in the photographs is outside and adjacent to either side of the south-west corner of the former cold store at the Site. The asbestos found by Mr McLean on 16 April 2015 has been referred to as "the gravel trap asbestos" or, for short, "the GTA".
28. The discovery of the GTA was reported on the same day to Mr Dean Watson of Wakemans and Ms Claire Bodsworth of BFS. In an email to Ms Bodsworth at 5.15pm Mr McLean wrote:

"Copy of photos from this morning.

The asbestos sheet is in gravel strip around the side and rear of where the cold stores were situated. It looks like it had a polythene weed barrier laid over it then 100mm of gravel."

Ms Bodsworth asked Mr McLean for an estimate of the cost of removing the GTA, and he replied by a further email, copied also to Mr Caesar and Mr Watson, at 5.40pm on 16 April:

"To return to site and clean the gravel strips of asbestos contamination and issue an inspection certificate please allow the sum of £8,875.00.

We would estimate there to be 25-30 Tonnes of waste in total and will take 4 days to carry out.”

It is clear that the estimate of 25 to 30 tonnes was not confined to asbestos but included all of the surrounding gravel and soil that would have to be excavated in order to ensure the removal of the asbestos.

29. At 10.13am on 17 April 2015, Ms Bodsworth replied to Mr McLean, asking whether it was possible “to get any more detail” regarding the GTA; she remarked: “The photos don’t really show that much but from the quote below there are obviously substantial amounts there.” In his reply at 11.16am, which included the preceding email chain and was copied to Mr Watson, Mr Caesar and Mr Russell, Mr McLean wrote: “You would probably want to engage an asbestos survey company to take samples [to] identify and ascertain the extent of it.”
30. Having received Mr McLean’s latest email, at 11.31am on 17 April Mr Watson sent an email to Ms Bodsworth, copied to Mr Caesar and Mr Russell:

“What are you[r] obligations on the site. It would appear that the buried asbestos was from an original use (either previous demolition or just land filling). Did you construct the original building that has just been demolished or did you occupy an existing building?

Dealing with buried asbestos is expensive as highlighted in Tony’s quote but it may be more extensive particularly if you find it under the slab.”

At 11.35am Ms Bodsworth replied, again copying in Mr Caesar and Mr Russell:

“We took a ground lease originally -I believe it was empty land.

I have discussed with Simon [Russell] and he believes it is our issue to deal with.

I could do with a steer and some advice from you as to what our next steps should be and how this is managed going forwards and who needs to be involved. It is clear that this is far from a straight forward demolition now.”

31. In evidence at trial, Mr Russell confirmed that he had spoken with Mr Watson and Ms Bodsworth about liability for the GTA. His initial view had been that Pullman/BFS was probably liable, but he had agreed with Mr Watson that he would investigate whether liability might be avoided on the grounds that the GTA had been placed on the Site before the commencement of the Lease.
32. Meanwhile, the Welsh Government and its representatives, who had not been privy to any of the communications resulting from Mr McLean’s observations at the Site, still knew nothing about the GTA.

33. At 8.07am on Friday 17 April 2015, Mr Russell had sent an email to Mr Caesar and Mr Burgess, copied to Mr Kaminaris, Mr Watson and Ms Bodsworth:

“I understand that you may both be near to site today.

Len, it would be useful if you could report back verbally to Paul, as I believe the stage 1 [i.e. Phase 2] works (pre-slab breakup) are due to complete.”

34. By the time he sent this email, Mr Russell certainly knew of the discovery of the GTA. In cross-examination he said that he had seen Mr McLean’s first email to Ms Bodsworth late on the afternoon of 16 April, although he said that he had not seen Mr McLean’s photographs until the morning of 17 April. That might be correct; on the whole, however, I think it more likely that, if Mr Russell saw the email on 16 April, he also saw the photographs on that day. Whatever the truth of that matter, he knew of the discovery of the GTA. Mr Caesar, of course, both knew of it and had seen the photographs.
35. At some time on Friday 17 April 2015 Mr Caesar met on site with Mr Kaminaris and Mr Burgess. At this site meeting, Mr Caesar did not tell Mr Kaminaris that buried asbestos had been found on the Site, and they were not shown or made aware of the GTA. In general, Mr Kaminaris was satisfied with the Phase 2 Works, subject to being provided by Liston with the necessary documentation, such as waste transfer notes. However, I accept his evidence that he saw bits of asbestos lying around and was expecting that the works would continue during the following week so that the remaining pieces of asbestos would be removed by the end of the term of the April Licence on Friday 24 April.
36. Mr Caesar did not give evidence; therefore no explanation was given for his failure to tell Mr Kaminaris and Mr Burgess about the GTA. Mr Russell denied that there had been any decision of which he was aware to withhold the information from the Welsh Government. He suggested that perhaps further works had cleared, or at least appeared to clear, the GTA by the time of the site meeting on 17 April. That was a lame suggestion; though in fairness it was not for Mr Russell to account for Mr Caesar’s conduct. In my judgment, the evidence does not disclose any reasonable justification for Mr Caesar’s failure to bring the GTA to the attention of Mr Kaminaris and Mr Burgess on 17 April.
37. Despite his silence about the GTA on site on 17 April, on that same day Mr Caesar took a large number of photographs across the Site, which included photographs of the area of the GTA.
38. On Monday 20 April 2015 Mr Kaminaris sent an email to Mr Russell:

“We met with Paul [Caesar] on site on Friday and we now await confirmation all works are complete and we await confirmation that the site is now asbestos free.”

39. On receipt of that email if not before, Mr Russell understood that Mr Kaminaris knew nothing of the GTA. That morning he replied to Mr Kaminaris:

“My client advises that further, partially buried, asbestos has been discovered on site. This prevents the certification of the site [that is, as being free of asbestos] and obviously stage 2 works [that is, the Phase 3 Works]. Indeed it may be that the methodology will have to be revised as the two cannot necessarily be carried out sequentially.

We also need to ascertain if the buried material pre-dates our client’s liability.”

The email did not confirm the precise location of the “partially buried” asbestos and did not attach any photographs. In cross-examination Mr Russell, while acknowledging that it would have been helpful to provide photographs, denied that he had deliberately withheld them; I accept that evidence, so far as this email goes.

40. Mr Kaminaris replied to Mr Russell at 12.38pm; the email was copied to Mr Caesar, Mr Watson and Ms Bodsworth, among others:

“We would like to come to site and view the asbestos. Can you let me know what dates/times are suitable?”

41. Mr Russell did not reply until 11.47am on 22 April 2015, when he wrote:

“I have now had the opportunity to review matters with Paul Caesar of Wakemans and my client. You are of course very welcome to re-inspect, but I do not have access to keys or security arrangements. Please let me know what is required and the individuals concerned, and I will ascertain on your behalf. I understand that you were on site on Friday and, given this, do wonder what you consider may have changed since this time.

Given that further asbestos has been discovered and partially buried, there are concerns as to what may be further discovered under the surfaced areas. Prior to any further works it would seem prudent to investigate this. Wakemans are making further enquiries with the company that undertook the initial refurbishment and demolition survey in this regard.

To assist in this process we should be grateful if you would disclose any information within your possession relating to the nature of the land use prior to 1971 and any buildings that may have occupied the site prior to the lease being granted, together with the information on the presence or otherwise of asbestos on adjacent sites which have been demolished. In the alternative, if the works have not been undertaken by you, the parties responsible for demolition and site clearance.

...

We propose that no further works are undertaken until further research and investigations are carried out. Clearly my clients do not consider they can be held responsible for any contamination that predates the lease.”

42. Mr Russell was cross-examined about this response; in particular, he was questioned about his delay in replying to Mr Kaminaris’s email of 20 April and about his apparent puzzlement at the request to re-visit the Site. The answers that Mr Russell gave were one of the less impressive parts of his evidence, especially when viewed in conjunction with later events. He complained of a lack of precision in Mr Kaminaris’s requests, said that he did not know what the Welsh Government wanted, and claimed that he did not understand what purpose was supposed to be served by a further site visit. I reject that evidence. In my judgment, in his exchanges with Mr Kaminaris, Mr Russell was being obstructive and playing for time. First, it is notable that, although he generally gave prompt replies to emails, Mr Russell did not reply to Mr Kaminaris for almost two full days, despite the simplicity of the request. By the time he did reply, Mr Russell was about to leave his office for the rest of the week to attend another site; his evidence was that he left at about midday and put on his “Out of Office” notification. Although Mr Russell accepted in cross-examination that he had a mobile telephone on which he had access to his emails when out of the office, he did not respond to Mr Kaminaris’s reply (as to which, see below) that week. Second, I regard Mr Russell’s puzzlement at the request for a further site visit as deliberately obtuse. As he accepted in the course of his evidence, he well knew both that the GTA had been discovered and that Mr Kaminaris and Mr Burgess had neither been told of it nor identified it for themselves when they visited the site with Mr Caesar on 17 April. It was entirely obvious why Mr Kaminaris wanted a further inspection. Third, if Mr Russell had genuinely been puzzled, he could have sent an immediate one-line enquiry seeking clarification. Instead of doing so, he discussed the matter with Wakemans and BFS. They may have had plenty of things to discuss, but difficulties concerning a site visit cannot have been among them. Fourth, Mr Russell’s subsequent conduct gives further reason to believe that he was being obstructive.
43. On 22 April, upon receipt of Mr Russell’s belated reply, Mr Kaminaris replied that neither the Welsh Government nor the original lessor had any information concerning the Site prior to 1971. In response to Mr Russell’s query why a further site inspection was required, he explained that it was “because you have recently advised that you have now uncovered further asbestos at the site.” He repeated the Welsh Government’s insistence that Pullman comply with its obligations under the Lease. The email concluded: “Would it be possible for us to site (sic) on Friday [24 April] – say 8.30am?”
44. As I have said, Mr Russell did not reply to that email that week, although I am satisfied that he could have done so if he had wanted to. Having received no response, Mr Kaminaris asked Mr Burgess to attend the Site. Mr Burgess did so on Friday 24 April, when he was able to gain access to the Site through a gap in the fence. He was not accompanied by anyone from Solace, Wakemans, Pullman/BFS or Liston, and neither he nor anyone at the Welsh Government had been provided with the photographs of the “partially buried asbestos” or with information as to its nature

and location. Unsurprisingly, therefore, he did not find the GTA. However, he did see small pieces of asbestos on top of the concrete slab and asbestos sheeting encased in the cement embedded into the floor slab. He informed Mr Kaminaris of what he had observed and sent photographs as an attachment to an email. Those photographs show the concrete slabs and asbestos (what has been referred to in these proceedings as “the shuttering asbestos”) embedded in the south edge of the slabs. They do not show the GTA found by Mr McLean. But both Mr Kaminaris and Mr Burgess wrongly believed that the shuttering asbestos observed by Mr Burgess was the “partially buried” asbestos referred to in Mr Russell’s email of 20 April.

45. On 28 April 2015 Mr Russell replied to Mr Kaminaris’s email of 22 April. He apologised for his inability to arrange a site visit in the previous week and noted that the April Licence had now come to an end, and he continued:

“There is clearly some concern that [Pullman] may potentially be asked to remediate the land beyond the obligations imposed under the lease. My question regarding the previous use of the site was to ascertain whether the visible asbestos or, indeed, any contamination discovered under the slab/foundations or disturbed by its removal, may have preceded the 1972 lease. To my mind it is logical to differentiate between contamination arising from building materials utilised by the tenant under the lease and that which was in situ prior to the grant of the lease.

You say that neither you or (sic) ABP have any records. What would have happened to the original deeds I wonder? The lease clearly contemplated documenting the initial works and was a requirement for calculating compensation payments.

This being the case my clients feel it only prudent to investigate other potential avenues, such as planning, building regulation and other historical mapping sources.

I have advised [Pullman] that their responsibility is to yield up in accordance with the following:

- ? Removal of the Phase 1 Coldstore and distribution depot
- ? Strictly speaking removal of fences on North East and Southern boundaries (makes no sense)
- ? Removal of septic tank
- ? Removal of subsequent alterations to site.

Given where matters currently rest I think it would be beneficial if you could articulate what you require further and reference it to a site plan, presumably following your visit to site.



I did also ask if you could advise who was responsible for the demolition of the sites immediately adjacent to the subject site to ascertain what was encountered whilst doing these works?

The certification you have requested clearly cannot be provided at this stage and can only be provided after the stage 2 works. In turn my client does not consider further work can be undertaken until a full investigation of the potential extent of buried material has been carried out. Your further responses would therefore be appreciated as soon as possible.”

46. On 30 April, Mr Kaminaris replied to Mr Russell:

“As advised previously, the WG [Welsh Government] has no historical information of the site. We have also checked with ABOP [i.e. the predecessor in title]. In regard to your request for information on neighbouring sites, whilst I am not in a position to comment on your clients site, as far as I am aware no other sites on SA1 have we found asbestos buried under the slabs after demolition.

Are you in a position to confirm our meeting of the 6<sup>th</sup> May on site to discuss taking this forward?”

47. That email indicates that there was a tentative agreement, or at least proposal, that there be a meeting at the Site on 6 May 2015. On 5 May, in an email copied to Mr Burgess and Ms Bodsworth among others, Mr Kaminaris asked Mr Russell: “Are you in a position to confirm the meeting tomorrow. We need to resolve this as a matter of urgency.” I have not seen any reply to that enquiry, but it is clear that no meeting took place on 6 May. The reason appears to be that a dispute over fees had caused BFS to withdraw instructions from Wakemans and that negotiations were under way for the instruction of Solace to take over Wakemans’ previous role.

48. On 12 May 2015 a meeting took place at the Site between Mr Kaminaris, Mr Burgess, Mr Russell and his colleague David Macnamara, a director of Solace. Mr Russell’s evidence concerning the meeting was as follows (statement, para 45):

“The meeting was constructive and we agreed the items that would need to be addressed, which I reported to [BFS] by email on 14 May 2015. No concerns about further buried asbestos alleged by Stenor materialised. The only work agreed which related to asbestos was for the safe removal and disposal of the ends of some asbestos cement cladding sheets which had become encased in concrete [that is, the shuttering asbestos]. This would have to be addressed before the slab itself could be removed. Other agreed work included (i) the prior testing of the slab insulation and tile adhesive (for the presence of ACMs), (ii) filling an interceptor, and (iii) the extraction and crushing of the three slabs, a low brick wall and the remaining hardstanding.”

49. However, Mr Kaminaris's evidence concerning the meeting was as follows (second statement, para 12):

“The only asbestos I recall being shown or discussed at the meeting was the asbestos sheeting encased in the cement slab and the small pieces left still visible on top of the slab. I am confident that I was not told about or shown the GTA during this meeting. I have only recently become aware of the existence of the GTA ... I am not aware of either Simon Russell or David Macnamara at Solace ever making reference in emails to me about a gravel strip on the site or asbestos under a polythene weed barrier.”

50. Mr Macnamara did not give evidence, and there is very little evidence as to his state of knowledge as at 12 May 2015. It appears unlikely that he had been to the Site previously. Mr Russell's evidence was that he had given Mr Macnamara a significant amount of documentation concerning the Site, but he could not remember whether this included Mr Caesar's photographs (in cross-examination, he said that Mr Macnamara had not seen Mr McLean's photographs) or any of the emails relating to the GTA, and he had no recollection of discussing the GTA with Mr Macnamara. There is good reason to think that Mr Macnamara had no knowledge of the GTA; see the remarks below concerning the communications on 19 June 2015. However, both the documentation and Mr Russell's own evidence clearly establish that he, Mr Russell, knew both of the discovery of the GTA and, importantly, of its location at either side of and adjacent to the south-west corner of the former chiller building. He also knew that Mr Kaminaris and Mr Burgess had not been told of the GTA when they met Mr Caesar on 17 April and had not identified it for themselves. There is an issue of fact as to whether or not Mr Russell was informed on 12 May 2015 that Mr Burgess had attended the Site by himself on 24 April. I find that it is more likely than not that Mr Russell was so informed; it is unlikely that the matter was not mentioned in the course of the site visit.
51. Mr Russell did not tell Mr Kaminaris and Mr Burgess about the GTA or point it out to them on 12 May 2015. Nor did he mention to them the photographs taken on 16 April by Mr McLean or those taken on 17 April by Mr Caesar. Those present at the site visit on 12 May did look at the shuttering asbestos and discuss its removal. Mr Russell accepted in cross-examination, and I find as a fact, that Mr Kaminaris and Mr Burgess believed that the shuttering asbestos was the “partially buried asbestos” to which Mr Russell had referred on 20 April.
52. Mr Russell was cross-examined about his failure to identify or mention the GTA or its location on 12 May. I found his evidence most unsatisfactory. I have carefully considered the possibility that the explanation he gave was the result of the common tendency to persuade oneself that the most favourable interpretation of one's own less-than-commendable behaviour is the correct one. However, I should be less than honest to state such a conclusion. I find, with regret, that Mr Russell's evidence in explanation of his conduct was deliberately false. First, Mr Russell's evidence is properly to be viewed not only in its parts but also as a whole. I have regard to his evidence relating to the communications in the week of 20 April 2015 and bear it in mind. Second, in cross-examination Mr Russell was asked whether, when he went to the site meeting on 12 May, he intended to point out the GTA and discuss its removal.

He replied that he had not given the matter any thought. I do not regard that answer as being the least bit credible. The Welsh Government had been pressing for a further site visit specifically because it had been informed that further asbestos had been found, and Mr Russell knew that the further asbestos was the GTA. Third, Mr Russell had seen the photographs, expected to see what they showed, and knew where the GTA was, but when he went around the Site on 12 May he did not see what he had expected. It is remarkable that he did not tell the others that the further asbestos that he had reported on 20 April was nowhere to be seen. Fourth, Mr Russell's attempt to justify his silence on 12 May does not bear examination. He said that he could not see what was shown in Mr McLean's and in Mr Caesar's photographs and assumed that it must have been removed. But the GTA was a matter of considerable concern to his client, as the communications from 15 April onwards show clearly. It is incredible that Mr Russell would have attended the Site on 12 May without ascertaining that the GTA had been removed, if indeed it had been. He cannot possibly have gone to the Site expecting to see the GTA, only to find that, unbeknown to him, it had been removed. Further, it would make no sense to think that it had been removed: the GTA was present on 17 April, after Liston had completed its works; it was anticipated that its removal would be expensive; Mr Russell had discussed the matter with Wakemans and BFS between 20 and 22 April; he had clearly not been led to believe that the GTA would be removed promptly, because he expected to see it on 12 May; and the April Licence, which alone gave BFS access to the Site, ended on 24 April. Fifth, it must have been obvious that, as the Welsh Government had not been informed of the GTA but merely of "partially buried" asbestos in an unspecified location, it was liable mistakenly to take the shuttering asbestos—which could be described as "partially buried"—for the asbestos to which Mr Russell had been referring on 20 April. As Mr Russell had the GTA in his mind when he attended at the Site on 12 May and was looking, unsuccessfully, for what he had seen on the photographs, it is implausible that the Welsh Government's misunderstanding was something that he was not aware of at the time.

53. I find that Mr Russell deliberately failed to bring the GTA to the attention of the Welsh Government and knew that its representatives, Mr Kaminaris and Mr Burgess, believed that the shuttering asbestos was the "partially buried" asbestos of which he had informed them on 20 April.
54. No one from Pullman/BFS was called to give evidence. Apart from Mr Russell, the only witnesses of fact called for those parties were Mr McLean of Liston and Mr Richard Chester, a director of the contractor that carried out the Phase 3 Works (I consider his evidence below). The evidence as a whole presents some reasons for doubting that Mr Russell's deliberate concealment of the GTA from the Welsh Government was a unilateral frolic on his part and for thinking that Pullman/BFS may have been complicit either in that concealment or in subsequently maintaining a discreet silence. However, there is no direct evidence of such thinking on Pullman/BFS's part, and on balance I think that those parties were innocent in the matter. In particular, the exchange of emails between Mr Macnamara and Ms Bodsworth on 19 June 2015, mentioned in detail below, tends to indicate that neither Mr Macnamara nor, in consequence, Pullman/BFS appreciated that the Welsh Government was under a misapprehension or that the Phase 3 Works were not going to remove all of the asbestos that had been identified.

55. Mr Russell reported to BFS on the outcome of the site meeting of 12 May 2015 by an email on 14 May:

“In general terms I would say the meeting with the Welsh Government (and their consultant) was constructive and relatively favourable.

Apart from re-securing the gate (and in this respect of this you will see that they have agreed to Solace retaining the keys to order) the agreed next actions are as follows:

1. Solace to prepare a brief scope of works which will be submitted to the Welsh Government for approval. David will do this and send copy to you. The scope of the works has been agreed by reference to an ordnance survey plan. From the site inspection it is readily apparent that the small wall and area of hard standing outside the footprint of the building forms part of the demise. This means this area together with the slabs of the frozen and other warehouse units, the offices and the hard surfaced yard will all need to be dug up.

2. They have however taken a lenient view on cleaning out and filling an interceptor and allowing the base to be crushed.

3. Samples were taken of the insulating material to the frozen warehouse slab and the adhesive to the tiled area within the previous office block. David is to have these analysed to ensure that they do not constitute notifiable waste.

4. Once the results of the analysis are known, and the Welsh government approves the scope of works, we can obtain quotations for the works.

5. A number of other pieces of information will be required and I will pass to David all the material that was copied to me by Wakemans. ...”

(A similar understanding as to the scope of the required works was reflected in emails sent by Mr Macnamara to Ms Bodsworth on 19 June 2015; see below.)

56. Solace ran a tendering exercise for the Phase 3 Works. It prepared a Specification of Works, which contained the following provisions:

**“2.0 Asbestos Survey**

2.1 Contractor to undertake a Type 3 Asbestos Survey prior to commencement of the works. Upon completion of the survey and confirmation of the result have been approved by the Contract Administrator only soft strip out will be allowed until the all clear has been given. On completion of the demolition works

the contractor to issue a full Asbestos Register and appropriate documentation to comply with the Control of Asbestos Work Regulations 2006.

- 2.1.1 Insulation beneath floor slab to former cold store.
- 2.1.2 Adhesive/floor tile residues to former office floor slab.
- 2.1.3 Sheet ends of asbestos cement cladding cast within floor slab (as per sample 24 within attached asbestos survey)”

“5.0 WORKS[:] DEMOLITION & PREPARATION

Generally

- 5.1 All concrete floor slabs/hardstandings to be crushed to grade 6F1 and left on site.
- 5.2 Brick boundary wall to be removed.
- 5.3 Tarmacadam in front of front boundary wall to be removed.
- 5.4 Drainage interceptor to be cleaned out and filled.
- 5.5 All tenant’s signage adjacent to gate to be removed.
- 5.6 Existing heras (sic) fencing to be made secure for duration of works (Welsh Government have agreed this can remain).”

The Conditions of Tender within the Specification of Works provided *inter alia*:

- “3.4 All works shall be planned and undertaken with due consideration of the CDM Regulations and the Pre-construction Health and Safety Plan. ...”

The Pre-Construction Health and Safety Information document accompanying the Specification of Works provided *inter alia*:

- “2.3.1 Information flow: All parties are required to ensure that all information in their possession and that they produce is made available to others as soon as it becomes available. A document register is included in Appendix F and should be carried forward to the Construction Phase Plan and updated as the works progress.
- 2.3.2 Design Co-ordination: As set out in 2.1.5, all parties (including designers) are required to ensure that available information and designs are passed to others

as soon as possible. To this end, all designers (including sub-contractors where appropriate) shall ensure that the designs are coordinated to eliminate any conflicts in respect of Health & Safety, sequencing or build ability.”

57. The Specification of Works included a plan, on which the area to be “demolished” was shaded blue. The area comprised roughly the 60% western side of the Site. This included the floor slab of the cold stores. It also, however, included all other areas of hardstanding on the Site. As the photographs show, these included an area of concrete hardstanding immediately to the south of the floor slab, between the slab and the southern boundary.
58. The company whose tender for the Phase 3 Works was ultimately successful was Zenith Refitment Services Limited (“Zenith”). Evidence was given by Mr Richard Chester, a director of Zenith. He stated that he was first approached about the Phase 3 Works in late May 2015 by Mr Macnamara, for whom he had done work on previous occasions. Mr Macnamara told him that “there was one length of asbestos cladding that needed to be removed, but that the majority of the work was to break up three concrete slabs that remained where the buildings that had been demolished once stood” (statement, paragraph 12).
59. After this initial telephone contact, Mr Macnamara sent Mr Chester an email on 1 June 2015:
- “Please find attached annotated plan together with Asbestos Demolition Survey [i.e. the Wakemans Report].
- Can you please arrange for asbestos contractor attend site asap and take samples/test the following:
- Insulation beneath floor slab to former cold store
  - Adhesive/floor tile residues to former office floor slab
  - Sheet ends of asbestos cement cladding cast within floor slab (as per sample 24 within attached asbestos survey).
- If you can confirm your budget quote taking into account the above that would be appreciated. I will forward more detailed scope of works document later this week.”
60. Solace did not provide to Zenith the formal Specification of Works for the Phase 3 Works at that stage or indeed until 25 June 2015. When Mr Chester visited the Site on 7 June 2015 for the purpose of starting work on a tender, the documents he had were the email of 1 June and the annotated plan and the Wakemans Report. The annotated plan was a rough sketch of the Site, on which were marked certain features and some manuscript text pointing to those features; in particular, it showed the following:

- In the north-west corner was a hatched area, to which the related text was: “Remove tarmacadam”.
- Immediately to the south of that area was a line, to which the related text was: “Remove former brick wall”.
- In the centre of the southern boundary of the cold-stores was a circled area, to which the related text, (containing a cross-reference to the Wakemans Report) was: “Sheet ends of asbestos cement cladding remaining in slab. Chrysotile sample 24”.
- The eastern end of the cold-stores was hatched, and the related text read: “Insulation beneath slab”.
- The text relating to the office block read: “Adhesive residues to former office floor slab”.

61. With reference to his site visit on 7 June, which he made with a fellow director of Zenith, Mr Chester stated:

“14. When I attended the Site, I saw clearly three concrete slabs arising out of level ground. The Site appeared tidy and was generally in a state that I would expect a site that had recently been the subject of demolition works to be in.

15. I noted one slab (underneath what I understood to be the former cold store) contained the broken ends of approximately 7 asbestos cladding sheets along a section of one side, consistent with the additional insulated concrete slab having been poured against cladding that was in place prior to the pour. Apart from this asbestos that was to be removed and which had already been discussed, I did not notice any other ACMs or other asbestos-related material at the Site.

...

19. The section of known asbestos cladding referred to in paragraph 15 was approximately 7 metres in length by approximately 250 millimetres in depth and was at ground level.”

62. The asbestos referred to in paragraphs 15 and 19 of Mr Chester’s witness statement is the shuttering asbestos, not the GTA. In cross-examination, Mr Chester confirmed that he was not shown the email sent on 16 April 2015 by Mr McLean to Ms Bodsworth and that the matters set out in that email were not brought to his attention. It is clear and I find that Zenith was unaware of its GTA both when it tendered and when it carried out the Phase 3 Works.

63. On 12 June, Zenith submitted a tender for the works identified in the email of 1 June and the annotated plan in the sum of £30,538 plus VAT. (The tender was submitted before Zenith received formal tender documents. The formal tender, referencing the

Specification, was signed only on 25 June, after the contract had been awarded.) Zenith's quotation was cheaper than the only other price tendered. On 19 June Mr Macnamara asked Ms Bodsworth for instructions to appoint Zenith. She replied with a query: "Does the below include the disposal of the buried asbestos and adhesive to the tiled area or will this be additional?" Mr Macnamara replied:

"The costs indicated include for the removal of all remaining asbestos cement sheets cast into the floor slab to the rear of the site (which is the buried asbestos) and the adhesive residues to the office tiled areas. The Welsh Government were only concerned about these two elements. They were not aware of any other buried asbestos."

Of course, the reason why the Welsh Government was "not aware of any other buried asbestos" was that Pullman, BFS and Mr Russell had not told it about the GTA. However, this email does suggest that Mr Macnamara too was ignorant of the GTA and that he, like the Welsh Government, thought that the only asbestos in issue was the shuttering asbestos. At all events, the contract for the Phase 3 Works was duly granted to Zenith on or about 19 June. Mr Chester did not actually see the Specification of Works, with its plan of the areas to be "demolished", until 25 June 2015. He does not appear to have regarded the plan as making a material difference to Zenith's commitments under the contract.

64. For the purpose of enabling samples to be taken from the Site prior to the Phase 3 Works, on 10 July 2015 the Welsh Government granted to Solace a "Licence to Carry out Site Surveys" for the period 12 and 13 July 2015 ("the Survey Licence"). Clause 2.1 provided:

"Subject to Clauses 3 and 4, the Owner is to allow the Licensee to enter and remain on the Property for the purposes of conducting a Survey in accordance with the Method Statement only."

"Survey" was defined to mean: "A visual inspection of the Property". Clause 4.1.3 required the Licensee "to give to the Owner as soon as reasonably practicable copies of any reports or findings in respect of the state and condition of the Property arising out of the Survey."

65. Pursuant to instructions from Solace under the Survey Licence, on 15 July 2015 Zenith sent samples for laboratory testing by Acivico Birmingham City Laboratories, which tested them and produced a certificate ("the Acivico Certificate") on the same day. The Acivico Certificate recorded that Chrysotile was found in the "Roof sheet" and in the "Adhesive", but that no asbestos was detected in the Insulation. In his witness statement, Mr Russell remarked:

"The results showed the insulation to be free from ACMs and the adhesive to contain only *de minimis* traces of ACMs, which made it appropriate for the three slabs to be broken up, crushed and spread over the Site."

Mr Chester's evidence was:



“The results were as expected. The known ACMs cast into one of the slabs could therefore be properly removed and the slabs, insulation and adhesive/floor tile residues could be safely broken up, crushed and distributed around the Site.”

The survey and samples did not, of course, relate to the GTA.

66. On 23 July 2015 the Welsh Ministers as Licensor granted to BFS as Licensee a further “Licence to Occupy on Short-term Basis” (“the July Licence”) in respect of the Site (again referred to as “the Property”). Clause 2.1 provided:

“Subject to clause 3 and clause 4, the Licensor permits the Licensee to occupy the Property for the Permitted Use for the Licence Period in common with the Licensor and all others authorised by the Licensor ...”

The definition of “Permitted Use” was:

“The breakup of all concrete floor slabs hardstanding brick boundary walls and foundations to previously demolished buildings and crushing to grade 6F with all arisings to remain in site and tenant’s signage removed in order to comply with clause 2(10) of the Lease.”

The “Licence Period” was “the period from and including 18 July 2015 until the date on which the licence is determined in accordance with clause 4”; in the event, that was until 6 August 2015. The following provisions of clause 3 are material:

“3.1 The Licensee agrees and undertakes

...

3.1.3 not to use the Property other than for the Permitted Use;

...

3.1.6 not to do or permit to be done on the Property anything which is illegal or which may be or become a nuisance (whether actionable or not), annoyance, inconvenience or disturbance to the Licensor or any owner or occupier of neighbouring property;

...

3.1.11 to comply with all laws and with any requirements or reasonable recommendations or regulations of the Health & Safety Executive, local authority and the relevant suppliers relating to the supply of electricity, gas, water, sewage, telecommunications and

data and other services and utilities to or from the Property;

...

3.1.13 to leave the Property in a clean and tidy condition at the end of the Licence Period;

3.1.14 to indemnify the Licensor and keep the Licensor indemnified against all losses, claims, demands, actions, proceedings, damages, costs, expenses or other liability in any way arising from:

this licence;

3.1.14.1 any breach of the Licensee's undertakings contained in clause 3;

3.1.14.2 the exercise of any rights given in clause 2; and/or

3.2 the Permitted Use

3.2.1 to carry out any works to the Property in order to comply with clause 2(10) of the Lease in accordance with the method statement and risk assessment annexed to this agreement;

and”.

I have set out clause 3.1.14 and clause 3.2 as they appear in the July Licence. Obviously, the formatting and numbering have gone awry. There can be no doubt but that the text ought to read:

“3.1.14 to indemnify the Licensor and keep the Licensor indemnified against all losses, claims, demands, actions, proceedings, damages, costs, expenses or other liability in any way arising from:

3.1.14.1 this licence;

3.1.14.2 any breach of the Licensee's undertakings contained in clause 3;

3.1.14.3 the exercise of any rights given in clause 2; and/or

3.1.14.4 the Permitted Use.

- 3.2 to carry out any works to the Property in order to comply with clause 2(10) of the Lease in accordance with the method statement and risk assessment annexed to this agreement.”

Clause 1 contained a provision in identical terms to clause 1.10 of the April Licence.

67. It was Mr Russell’s evidence that, in the course of his discussions with the Welsh Ministers for the grant of a licence to allow Zenith access to the Site to carry out the Phase 3 Works, “the Welsh Ministers accepted that it was not possible to certify on completion of the works that the Site was free of asbestos” (statement, para 47). Consistently with that evidence, the July Licence did not contain any licensee’s covenant corresponding to clause 3(p) in the April Licence.
68. The method statement referred to in clause 3.2.1 of the July Licence was a document produced by Zenith on 16 July 2015 (“the Zenith Method Statement”). The author of the Zenith Method Statement was Ms Sue Cheshire, Zenith’s Health and Safety Manager, though Mr Chester’s evidence was that he discussed the works with her. It gave the job description as: “Break out area of extended tarmac path and 3 No. retained building slabs, together with demolishing a section of brick wall remaining on site”. There are indications that the Zenith Method Statement was compiled by using a generic document, parts of which were incorporated even though they had no application to the Phase 3 Works. The Zenith Method Statement contained the following provisions *inter alia* regarding asbestos:

“Staff will only be allowed to work with asbestos containing products providing they have received asbestos awareness training and that the products are asbestos containing cement products, textured coating and floor tiles. Any other asbestos containing materials must only be dealt with by HSE licensed operatives.

... A copy of the RAMS must be signed by all employees when working with asbestos. ...

Staff working on asbestos materials will wear suitable disposable PPE and a mask rated to FFP3 as a minimum. Any waste, including PPE, will be double bagged and labelled as asbestos and removed to a licensed site.

Any staff who come across any material they believe to contain asbestos are instructed to stop work until it has been established exactly what the material is.

Any survey reports must be provided by the duty holder, the site foreman must ensure that the findings of the report are passed on to all who are working on the contract.”

In cross-examination, Mr Chester accepted that “asbestos awareness training” was not a sufficient level of training to permit work on the removal of asbestos. However, he said that Walsgrave Contractors’ workmen on the Site would have had the necessary

qualifications. He accepted that he had not seen documentary evidence of those qualifications, but he said that he would have asked for the documents to be sent to Zenith's offices and would have been advised that they had been received; though he had no specific recollection of dealing with the matter and could name none of the workmen on site apart from the foreman.

69. The risk assessment referred to in clause 3.2.1 was also produced by Zenith ("the Zenith Risk Assessment"). Among its provisions relating to asbestos were:

“→ All asbestos containing materials—ACMs—will be double-bagged and sealed.

→ All ACMs will be removed by licensed waste contractors.”

70. Both the Zenith Method Statement and the Zenith Risk Assessment were prepared with a view to being signed by those who carried out the Phase 3 Works. The copies in evidence are unsigned. Mr Chester said that signed copies should be contained within Zenith's records, though he could not confirm that there were any signed copies. It seems to me unlikely that Zenith insisted on receiving signed copies of either document or documentary evidence that Walsgrave Contractors' workmen had sufficient training to be qualified to remove asbestos. It is inherently likely, albeit not certain, that the best documentation would have been obtained and produced for the purpose of these proceedings, given the attention to detail that has been evident throughout the litigation. Moreover, it appears that Zenith was on notice from BFS of the possibility that a contribution or indemnity might be sought in the event of a finding of liability in these proceedings; therefore it is reasonable to suppose that Zenith will have made its own investigations with a view to showing, as best it might, that it was without reproach.

71. Zenith commenced the Phase 3 Works on 27 July and completed them on 6 August 2015. Mr Chester instructed Walsgrave Contractors' ground workers to cut the concrete slab "with jackhammers as close to the known asbestos [that is, the shuttering asbestos] as they could, which generally would be within 50 millimetres and 70 millimetres because of the width of the tool used" (statement, paragraph 29). In fact, the Zenith Method Statement provided that the slab be cut near the shuttering asbestos with a floor saw, not with a jackhammer; though the concrete generally was to be broken up with jackhammers. Mr Chester accepted in cross-examination that a floor saw would be preferable for use in cutting out the asbestos and that the ground workers had floor saws. He was unable to explain why he gave an instruction directly contrary to the Method Statement. I consider that this indicates a lack of rigour in Zenith's approach to the Phase 3 Works.

72. On 7 August 2015 Mr Russell informed Mr Kaminaris that the works had been completed. Mr Kaminaris replied by email on 10 August 2015:

“We will look to carry out an inspection this week. I am advised that there appears to be a significant amount of rubbish, polystyrene, debris and metal left over the site. If this is the case we would want this removed but can confirm after our inspection.

I have not received the asbestos certificate which you need to provide. Can you advise when we can expect to receive this?"

73. Among those who were copied in on that email was Mr Chester. He promptly sent an email to Mr Russell:

"For info we were asked to crush three hardstandings, demolish a wall and part of the path to the site boundary. There are a few bits of steel bar on site, and some torn polythene sheeting.

I have not been asked to provide any asbestos certification so I can only assume this is being dealt with elsewhere."

74. On 14 August 2015 Mr Burgess carried out a site inspection for the Welsh Government. He reported his findings in an email to Mr Kaminaris on 17 August 2015:

"The site has not been left secured, the crushed material is not acceptable, all foam, reinforcement, cable and plastic should be removed and not spread over the site as at present. The petrol interceptor should be emptied and removed, at present this is unsafe given that the site is not secured.

I would also ensure that you obtain a certificate from a qualified person that there is no asbestos present in the crushed material. Also I would ask for copies of the asbestos transmittal notices from the contractor who carried out the crushing works.

At present WG will incur costs to clean up the site."

75. A report produced by Arcadis in December 2015 contains a collection of photographs taken on 17 August 2015. The photographs show demolition rubble spread across the surface of the Site. The rubble appears to comprise concrete and brick. The expert witnesses (see below) agree that the photographs are not sufficiently detailed to show whether asbestos was present or not.

76. Mr Kaminaris spoke to Mr Russell about the condition of the Site on 24 August 2015, and the following day he sent him an email:

"Further to our discussion yesterday on the above we are still waiting to hear from Paul/your contractor that the works to remove the polystyrene, plastic, metal etc have taken place and the petrol interceptor has been filled in and the site secured.

It was agreed between us that once this is received we will inspect the site. You will also provide the WG with the transmittal notices to ensure that asbestos was removed from the site on the second demolition contract carried out by Solace. You will also provide us with copies of the analysis information on the tiles which were present on the slab. We

will also want you to issue a statement saying that all asbestos encountered during demolition has been removed from site.

The WG will then take a view as to whether it deems the demolition works complete or not.”

Having received no substantive reply to that email, Mr Kaminaris sent the email again on 7 September 2015 and forwarded it to Mr Macnamara, who took matters up with Mr Chester.

77. On 15 September 2015 Mr Chester sent an email to Mr Macnamara setting out the position:

“Further to our telephone conversation, I am pleased to attach the following information as requested:

1. Consignment Note for removal of asbestos identified on site.
2. Consignment Note for hazardous waste removed from interceptor pits.
3. Consignment Notes for the additional slab removed from site found beneath the existing slabs identified on site.
4. Photograph of the filled pits.

We can confirm that our quotation was revised to include for taking and testing samples of suspected ACM's only which we confirmed could be crushed and left on site due to the low percentage of ACM's relative to the whole. We were subsequently instructed to remove these and we have incurred additional costs amounting to £1,130 to undertake this element of the work.

Also, we were instructed to remove 3 no. existing slabs from site. On doing so a further slab was found beneath one of these which was heavily re-enforced and insulated from the slab above. It was necessary to remove this slab and insulation from site to comply with your requirements. Regrettably as both yourself and I were away from work on Friday 31 July, this was further exasperated [exacerbated?] in our absence by an instruction to clear site that day regardless of the revised and agreed completion date of 6 August. The decision was taken immediately to remove the slab from site over that weekend to ensure site was clear for the Monday morning. In doing so we have incurred additional labour costs of £1,350 and waste removal costs of £1,470.”

78. Mr Chester explained that email in cross-examination. He said that there were two known sources of asbestos on the Site: the floor-tile adhesive, and the shuttering asbestos. The former was to be crushed and spread on the Site. The shuttering asbestos was to be excavated and tested, but Zenith's quotation did not include its removal from the Site. Mr Chester denied that Zenith had intended to crush the shuttering asbestos and spread it over the Site, but he acknowledged that the email might give that impression. I think that it does indeed give that impression; moreover, I think that is what the email shows, because the explanation that Mr Chester gave in cross-examination would imply that Zenith had no initial plan as to what to do with the shuttering asbestos after it had been cut out. In the event, however, Zenith was instructed to remove the shuttering asbestos from the Site. The consignment note was, accordingly, for the disposal of a skip-load of cement-bonded asbestos. Mr Chester also said that, in the light of the Welsh Government's complaints about debris, Zenith returned to the Site and carried out a hand-pick over two days; he himself was present on the second day.
79. On 16 September 2015, Mr Macnamara forwarded to Mr Kaminaris the consignment notes provided by Mr Chester. His email said: "I can now confirm that everything is completed hopefully to your satisfaction."
80. Mr Kaminaris forwarded the consignment notes to Mr Burgess for his comments. Mr Burgess advised that he was not qualified to say that the Site was free of asbestos; as Solace was unwilling to instruct an analyst to provide a certificate in that regard, Mr Burgess recommended that the Welsh Government formally request that Solace provide a statement that all identified asbestos had been removed. Accordingly Mr Kaminaris replied to Mr Macnamara:
- "Thanks for the information. I will liaise with Hyder on the information provided.
- In view of the fact that you are not going to provide the WG with a certificate of Asbestos removal, could you confirm that all identified asbestos has been removed from site[?]"
- Mr Macnamara replied on 18 September 2015:
- "I can confirm that the remaining asbestos as identified when we all met on site (please see the attached plan) has been dealt with as agreed.
- In this regard please see the attached e-mail from Zenith Contract Services Ltd.
- Other than the slab removal no further intrusive investigations have been undertaken in other areas of the site."
81. By email on 22 September 2015 Mr Macnamara asked Mr Kaminaris: "Can you please confirm that you now have everything you need and are happy with the works undertaken?" On 23 September 2015 Mr Kaminaris replied that he would respond once he had spoken to Mr Burgess, who was away until the following week. Having

spoken to Mr Burgess, on 29 September 2015 Mr Kaminaris sent a further response to Mr Macnamara:

“Thanks for confirming that all the visible asbestos has now been removed and disposed of correctly from site and that you have also completed all agreed works.

The WG has no further comments.”

82. Meanwhile, on or about 14 September 2015 contractors engaged by the Welsh Government, Alun Griffiths Civil Engineering (“Alun Griffiths”), came onto the Site to carry out preparatory works for the purpose of Highways Finishing Contract 6. Alun Griffiths established its compound to the south of the Site and made an access into the Site by removing vegetation and fencing from the southern boundary. (Initially only some was removed, for purposes of access, but subsequently everything was removed from the southern boundary.)
83. On 28 and 29 September a total of 42 loads of what may neutrally be called crushed stone were imported onto the Site from the tidal basin area within the larger site of the SA1 Development, to the east of Plots C6 and C7. That material was not stockpiled on the Site but was immediately spread over an area of roughly 600m<sup>2</sup> in the north-west part of the Site to a depth of approximately 600mm. Observations made the following month noted that the ground level at the western boundary of the Site, and off-site to the west, was approximately 1m higher than the ground level at the remainder of the Site.
84. On 30 September Alun Griffiths commenced excavation within the Site for the purpose of the construction of the new link road between Langdon Road to the north and Marina Road to the south. The work involved the removal of the crushed demolition material from the ground and the excavation of the ground to soil level. The excavated material was heaped into three stockpiles on the Site.
85. On 1 October Alun Griffiths found pieces of asbestos in the crushed material in the area of the excavation. Mr Edryd Jones, Alun Griffiths’ site agent, then walked the Site with the foreman and safety manager. His evidence, which I accept, is that they found lots of “rubbish” in the piles of excavated material and that on closer inspection they found that the rubbish included ACMs. (They also found, near to the southern boundary of the Site, a further concrete slab that had not been removed.) Samples were bagged and sent for analysis.
86. That afternoon Mr Edryd Jones gave preliminary notification of the discoveries by telephone and email to Mr Burgess, and on the following day he gave to Mr Burgess a formal Early Warning Notice, which contained the following details:

“This Early Warning is to advise the client of the asbestos found at the location of the old 3663 plot [i.e. the Site], as discussed on site, once the surface of the area had been disturbed clear signs of insulation and rubbish material was found, on further inspection, asbestos pieces are evident, once this was discovered, all works were stopped in this area, with all plant and operatives removed, we have taken a sample to be



tested this morning, and have arranged for a sample to be taken away to identify the amount in the ground. Once carried out the report is expected to take 10 days due to the nature of the quantitative (sic) test.”

87. Mr Burgess sent an email to Mr Kaminaris on 2 October:

“Please see attached photographs showing the slabs left in place, and the asbestos which is in the crushed material. All surface slabs should have been removed under the demolition contract.

There is much more asbestos in the crushed material than expected, this amount of asbestos mixed in with the crushed material is unacceptable and will be very expensive to remove.”

88. Mr Kaminaris instructed Mr Burgess to instruct Alun Griffiths to suspend work and to secure the Site, and sent an email to Mr Russell:

“I am advised that following closer inspection of the [Site] it appears that the slabs have not been removed. Also, a considerable amount of asbestos has not been removed from site but mixed up with the crushed material – please see photos.

This is not acceptable and not what we agreed would constitute the demolition works by your contractor.

We need to meet on site urgently to discuss how you intend to rectify the above and ensure that you return the site back the WG in an acceptable condition.”

89. On 6 October Mr Kaminaris and Mr Russell met on site to discuss the position. The meeting was quickly followed by a letter dated 8 October 2015 from solicitors acting for Pullman, which made it clear that Pullman did not accept responsibility to carry out any further works on the Site.

#### *Post-clearance Investigations*

90. Between 19 and 21 October 2015 Apex Drilling Services Limited (“Apex”), acting on the instructions of Alun Griffiths, carried out a ground investigation of Plot E6; that is, extending over an area comprising the Site and those parts of Plot E6 outside the Site. Details of the investigation and its findings are set out in a report produced by Apex on 17 November 2015 (“the Apex Report”), which describes the investigation as follows:

“The scope of the investigation was developed and agreed with [Alun Griffiths] and comprised excavation of an exploratory sampling grid by shallow trial pitting through the Asbestos Contaminated Made Ground Demolition Rubble to depths of circa 1.5m and deeper where necessary. Representative environmental samples were taken from the Demolition Rubble

to characterise the material. The sampling was terminated at elevations thought to be below the demolition rubble within pre-demolition Made Ground or suspected reworked natural soils.

...

The entire site covers an area circa 100m x 50m, a 10m sample grid was agreed and [Alun Griffiths] surveyed a sampling grid extending 70m x 50m covering an area circa 3500m<sup>2</sup> and encompassing 48 sample points.

...

Trial pits were located on a 10m sampling grid within a 70m x 50m area (3500m<sup>2</sup>), the grid was surveyed and erected by [Alun Griffiths] within the perimeter of the site. Environmental samples were collected at each grid point from at least three discrete sample depths, generally 2 samples were recovered from the demolition rubble and one from the pre-demolition made ground to characterise the materials present.

Under the instruction of [Alun Griffiths] where pre-demolition ground level was found to be obvious, as identified by the presence of pre-existing hard standing and concrete obstructions the sampling was restricted to the Demolition Rubble only and no sample was taken from the horizons below.”

91. The materials found by Apex were classified in the Apex Report as follows:

“Made Ground (MG) Capping generally comprised light brown slightly sandy silty sub-angular to sub-rounded fine to coarse GRAVEL of limestone brick and crushed concrete.

Made Ground (MG) Demolition Rubble generally comprised loose brown to black slightly silty sandy sub angular to sub-rounded fine to coarse GRAVEL of crushed concrete, sandstone and various lithologies with high cobble content and low boulder content and locally with ‘rebar’ present. Cobbles are angular to sub-rounded of concrete, brick and sandstone. Boulders are angular of concrete. Composition varied with increasing silt, clay or sand content at several points and locally contained inclusions of plastic, expanding foam and timber and locally with ACM distributed throughout it.

Made Ground (MG) Pre-Demolition generally comprised soft to firm green grey slightly gravelly sandy SILT/CLAY. Gravel is angular fine to coarse of brick and concrete. Locally Sand was identified at location F3 which is believed to represent a reworked natural deposit.”

I regard the Made Ground Capping as corresponding broadly to the crushed material brought onto the Site by Alun Griffiths on 28 and 29 September 2015, and the Made Ground Demolition Rubble as corresponding broadly to the material that Zenith excavated and crushed and left on site in the course of the Phase 3 Works. The Apex Report recorded that the Made Ground Capping was confined to the western boundary of the Site; it was approximately 0.5m thick at a distance of approximately 15m from the western boundary, increasing to approximately 1m thick at 10m from the western boundary. The report observed that the distinction between Made Ground Demolition Rubble and Pre-Demolition Rubble was not always clear.

92. A total of 48 locations were excavated, and 123 soil samples were taken for screening for asbestos after visible ACMs had been removed on site. Visible suspected ACMs were seen at the surface of 13 of the 48 locations and during excavation at 26 of the 48 locations; all of these were within the Made Ground Demolition Rubble; none were within the Made Ground Capping. Of the 123 soil samples taken, 78 comprised Made Ground Demolition Rubble; of those 78, 30 were found to contain asbestos fibres. Forty-five of the soil samples comprised what was believed to be pre-demolition rubble; of these, one was found to contain asbestos fibres. The report noted: “It is possible that this fragment represents either an earlier asbestos distribution within the pre-demolition made ground or mixing of the MG Demolition Rubble with the pre-existing MG during demolition.” One may note with the Welsh Government’s expert evidence (report of Mr Brian Robinson, paragraph 5.21; see further below) that this single positive result “is approximately in line with the level of contamination to be expected from the previous site investigations reviewed from the surrounding area [i.e. the wider Swansea Waterfront area] at approximately 2% of the samples.”
93. In November 2015 BFS instructed Ramboll Environ UK Limited (“Ramboll”) to carry out historical investigation and an intrusive site investigation at the Site. Details of the investigations are contained in a report dated 17 December 2015 (“the Ramboll Report”). The intrusive site investigation was carried out on 3 and 4 November 2015. Thirteen trial pits were dug to a maximum depth of 3m and soil samples were collected and sent for analysis. Paragraph 5.3 of the Ramboll Report summarised the “field observations”:

“The area of the site previously occupied by buildings was surfaced with a thin dressing of crushed demolition material; this was absent in the east of the site, where the ground surface appeared to have remained unchanged during the demolition process. Made Ground was encountered below the surface dressing (where present) across the site, containing significant amounts of concrete and brick. Suspected asbestos containing material (ACM) was observed in two of the 13 trial pits (TP9 at a depth of up to 0.5m bgl and TP10 at a depth of up to 0.6m bgl) as fragments of cement bonded asbestos sheet. Suspected ACM was also observed within the stockpiles of soil at the centre of the site; this stockpile is reportedly formed of excavated material from the planned on-site roadway. All suspected ACM observed during the on-site works was in the form of corrugated cement sheet fragments, up to

approximately 200mm in length. Gross asbestos contamination, bundles of fibrous asbestos material, or caches of buried ACM were not observed during the investigation.”

Paragraph 6.1 summarised the “analytical results”:

“Laboratory analysis has confirmed the presence of asbestos in soil at the site. Potential asbestos was identified in 10 of the 21 samples submitted to the laboratory for asbestos screening. In each case asbestos was identified in the form of chrysotile; in addition, amosite was also identified in four samples. Of the ten samples that were scheduled for quantification analysis, asbestos was confirmed to be present in eight samples, ranging from <0.001% in TP2 and TP7 to 0.097% in TP8 (asbestos by weight of total dried sample).

The asbestos fibre types were identified by the laboratory as being chrysotile and amosite in the form of cement, insulating board and free fibres. Fibres, assumed by the laboratory (in a conservative scenario) to represent asbestos amphiboles, were present within the fine material (<2mm) in five of the quantified samples.

With the exception of trial pit TP13 at 0.4-0.6m bgl [below ground level], all analysed samples collected from the uppermost layer of Made Ground at depths of up to 0.7m bgl contained asbestos. Asbestos was identified in samples collected from deeper layers of Made Ground in trial pits TP1 at 1.0-1.2m bgl and TP13 at 2.0-2.2m bgl.”

94. The executive summary set out the main points in the report and stated the following conclusions:

“In conclusion, the historical research has identified a number of land uses, prior to the occupation of the site by [Pullman] that may have used ACMs in building materials or involved importation of fill materials. It is known that buildings constructed with asbestos roofs were present adjacent to the site in 1929, and that these buildings were demolished.

The Ramboll Environ ground investigation has identified ACMs present at varying depths in the Made Ground underlying the site, including Made Ground materials beneath the former floor slab of the building previously occupied by [Pullman]. On the basis of these investigations we believe that it is reasonable to conclude that ACMs were present in soil at the site prior to [Pullman’s] occupation of the site.”

I note the careful way in which the final sentence of those conclusions is expressed.

*Events after site clearance*

95. In late October 2015 Alun Griffiths, through Apex, commissioned an Asbestos Management Plan from Core Surveys Limited (“Core”). Core recommended that control measures, involving fencing of the Site, dampening the ground with water and regular perimeter air-monitoring, be put in place to minimise the risk that asbestos fibres would be released. Those measures were implemented; as ground conditions became dryer in the spring a more robust system of dampening was introduced and was maintained thereafter until remediation was complete. On 5 February 2016 Core wrote to Alun Griffiths:

“The results of the air monitoring (perimeter background monitoring) that has been undertaken each week has indicated that the level of asbestos fibres in the air is below the level of detection (<0.010 f/ml air) and this indicates that the control measures are satisfactory and the asbestos that is on the site poses no significant risk to adjacent residents.

It should be noted however that it is still recommended that the asbestos is removed from site as soon as practicable to reduce the risk to zero.”

96. The condition of the Site was of concern to the Welsh Government not only for environmental reasons but because it threatened to affect its plans for the commercial use of the Site. In September 2014 the Welsh Government had entered into a fairly complex agreement to grant to UWTSD a lease of part of various parts of the SA1 Development, including Plot E6. The agreement contained a condition precedent that the Welsh Government should give vacant possession of the land to be demised, and it further provided in clause 2.1.2:

“In the case of E6, E7 and E8 the failure of the pre-existing tenant to demolish the building which as at the date of this Agreement is erected on part of E6, E7 and E8 the Vacant Possession Pre-Condition shall not prevent the Vacant Possession Pre-Condition from being satisfied and the Landlord shall as soon as possible following vacation by the pre-existing tenant procure that the building is demolished by the pre-existing tenant in accordance with clause 2 (10) of the lease of that part of E6, E7 and E8 known as E6 dated 8th November 1972 made between (1) British Transport Docks Board and (2) Abertawe Fresh and Frozen Foods Limited and in any event prior to the Completion Date Provided That if the pre-existing tenant does not so demolish the building in accordance with this clause 2.1.2 then the Landlord shall demolish the building itself and at its own expense prior to the Completion Date.”

That provision did not (contrary to what appeared to be put to Mr Kaminaris in cross-examination) strictly make compliance with the tenant’s covenant in clause 2(10) of the Lease a condition precedent to completion by UWTSD; rather it expressly provided that compliance was *not* a condition precedent. However, in the event of non-compliance by the tenant, clause 2.1.2 obliged the Welsh Government to carry out the necessary works; and clearly breach of that obligation might itself have significant contractual implications.

97. By late 2015 discussions were under way to vary the agreement with UWTSD in various respects. On 18 January 2016 a meeting took place between representatives of both parties; Mr Kaminaris was present. The minutes record:

“The issue with plot E7 [this should read E6], i.e. asbestos having an adverse cost impact on the University, will not be revisited as the cost for WG to resolve is already too substantial, the valuation will not be reduced given level of remediation already incurred by WG.”

The issue concerning the Site did not go away, however, and would resurface later in the year.

98. In April 2016, the Welsh Government instructed Redhill Analysts Limited (“Redhills”) to review the Apex Report and to conduct a site walkthrough and surface examination. Redhills produced a report (“the Redhills Report”) on 6 May 2016. In respect of the Apex Report, it stated (para 2.4, section 4, and section 5 respectively):

“The review of the Apex Drilling Services report identifies that visible ACMs were removed prior to laboratory analysis at the time of sampling. Therefore, the results issued by ALcontrol are not representative to the current site conditions—they are representative following the removal of visible ACMs.”

“It is arguable that if the visible ACM was not removed prior to sampling and analysis a greater number of samples would have tested positive for asbestos.”

“Although visible ACMs were picked from the samples themselves before they were sent for analysis, which would have decreased the percentage of samples which tested positive, it is unlikely that this would have affected whether free asbestos fibres were present in the samples.

No samples out of the ones quantified exceeded the Hazardous Waste threshold of 0.1% of asbestos w/w based on free fibres or bundles.

We would conclude therefore that the site contamination issue for the demolition rubble present on site is with the visible ACMs rather than free fibres.”

In respect of the site walkthrough, the Redhills Report stated (section 4):

“During the walkthrough and visible inspection of the site area, visual ACMs were identifiable throughout the ground surface. All of the material observed was asbestos cement, apart from 1 location where a small fragment of Asbestos Insulating Board was identified. A total of 4 samples were taken, 2 of which tested positive for asbestos.”

99. The Redhills Report set out alternative strategies:

*“Land remediation – Soil screening and picking of visible ACMs from the demolition rubble under suitably controlled conditions using a specialist asbestos removal contractor. The remaining demolition rubble would require validation for the presence of asbestos in soils through further inspections and testing. Following completion of a successful remediation strategy, we envisage that the waste should be able to be sent to landfill or removed as non-hazardous waste.*

*Alternatively, depending on any planning agreements for the proposed end use of the site, both the hazardous or non-hazardous material could be re-used on site. Any movement of hazardous waste around the site will require the use of a specialist asbestos contractor. Additionally, re-use of hazardous waste material on site would undoubtedly require restrictions on the depth buried and methods of sealing it to allow for safe future use of the land. For potential re-use a materials management plan validated by a qualified person would be required following CL:AIRE Development Industry Code of Practice.”*

100. The Welsh Government procured from Redhills a Specification and Method Statement for the former alternative (“screening and picking”), and Alun Griffiths obtained competitive quotations from four contractors. The Welsh Government obtained a Tender Report on those quotations from Arcadis Consulting in June 2016, which tentatively recommended acceptance of a quotation of £180,658 inclusive of disposal of the waste but warned: “[T]here is no guarantee that this process will remove the asbestos to a level that will render the area safe. A technical assessment of the approach proposed by each of the four tenderers, by your asbestos consultants, is essential before committing to this expenditure.”

101. On 20 June 2016 Mr Kaminaris made a written submission to the Property Leadership Team, seeking approval for an estimated budget of £575,000 for site remediation works to remove asbestos from Plot E6. (It is unclear where the figure of £575,000 came from, and Mr Kaminaris was unable to remember how it had been arrived at.) Section 1 of the submission summarised the recommendation and the reasons for it:

*“A specialist asbestos consultant has recommended WG initially completes a soil screening and pick of the visible asbestos under suitably controlled conditions using a specialist asbestos removal contractor. However, there is no guarantee that this will remediate the site to an acceptable level and a further budget will be required if test results following the remediation work indicates that further asbestos picks are required, or an alternative method of remediation is necessary to try and provide a ‘clean site’.*

An alternative method of remediation that has been investigated would be to remove an estimated 5000 m<sup>3</sup> of contaminated soil to a specialist asbestos tip at an estimated cost of circa £1.85m.

The asbestos should have been removed by former tenant BFS Group Ltd under a demolition contract that they procured when they vacated the site. However, they are currently refusing to admit responsibility for its removal. WG has instructed lawyers to commence legal proceedings against the company to recover costs in dealing with the asbestos. Since this work will potentially be subject to litigation and insurance claims WG's approach to the remediation will demonstrate that it has tried to mitigate the cost of dealing with the asbestos.

This site is part of a larger land sale transaction to UWTSD and contracts have exchanged to dispose of the site. Once suitably remediated Plot E6 will be sold to the University at a consideration of £700,000 plus VAT. Until the remediation works are completed UWTSD will not complete on the land sale.”

102. In cross-examination, Mr Kaminaris was in effect accused of misleading the Property Leadership Team, on the grounds that when he wrote his submission he knew that completion of the lease was to be unconditional on UWTSD's part. That accusation was unfair and its premise inaccurate. Satisfactory remediation of the Site was clearly expected under the September 2014 agreement for a lease. And the subsequent variation of the agreement, which was the basis of the accusation and which is discussed below, had the effect that UWTSD was not obliged to take a lease of Plot E6 if it was not satisfied with the remediation works. I see no reason to think Mr Kaminaris's remarks at the end of the passage quoted above anything other than fair and accurate.
103. Section 2 of Mr Kaminaris's submission set out more detail regarding his proposal and included the following passage:

“WG has informed both Natural Resource Wales (NRW) and the Health & Safety Executive (HSE) of the asbestos found and immediately commenced containment works to ensure that no asbestos dust fibres are released into the air. This is currently costing WG circa £5.5k per month. ...

External asbestos specialist consultant Redhills has undertaken a review of the soil testing contamination report. They advise that none of the samples out of the ones quantified exceed the Hazardous Waste threshold of 0.1% of asbestos w/w based on free fibres or bundles. They have concluded therefore that the site contamination issue for the demolition rubble present on site is with the visible ACM's rather than free fibres. Based on this analysis, they recommend that WG undertakes a soil screening and pick of visible asbestos under suitably controlled conditions using a specialist asbestos removal contractor.



Redhills envisage that following the asbestos pick the soil should be able to be sent to landfill or removed as non-hazardous waste, or alternatively could be re-used on site. It should be noted that there is no guarantee that this method of remediation will provide WG with a 'clean site', and further validation for the presence of asbestos in soils through further inspections and testing will be required that may result in the need for further remediation work. A further paper will be submitted to PLT advising of the proposed next steps should the initial asbestos pick not prove successful and where necessary request further Ministerial approval.

Plot E6 is located in the residential Eastern Quarter of SA1. WG is concerned that whilst all necessary containment measures are being undertaken by WG to protect surrounding residents, continued delays in dealing with BFS Group Ltd could result in a significant period of time before the asbestos is finally removed. It is imperative that the contaminated material is removed from site at the earliest opportunity."

104. At a site meeting in mid-July 2016, Redhills advised that the quotations discussed in the Tender Report were unacceptable, because they had not included the costs of screening, only those of handpicking. The issue was referred back to Arcadis Consulting, which produced a Second Tender Report in August 2016. The Second Tender Report referred to earlier quotations from a different contractor, which indicated that the cost of screening and picking might be about £900,000 and the cost of complete removal of the rubble might be about £1,600,000. However, the report identified certain additional costs that would be incurred if screening and picking were adopted, and it concluded:

"The final cost of the screening option is therefore likely to exceed £1.3million.

Advice from other specialists suggests that the screening and picking method will not guarantee that the resultant material will comply with the safe level of asbestos due to the volume of fines released by the screening process. This approach therefore carries significant risk that the complete removal of the material may also be required.

**Conclusions:** On the basis of the comparative prices available, there is a potential saving of £300k against a risk of increasing costs by approximately £1.6m if the works included costs for complete removal. Complete removal offers certainty that the area will meet the necessary standard but there can be no such certainty that screening and picking will deliver the same result. It is also worth noting that no contractor will provide a fixed price for this work as certain elements are outside their control."

105. Meanwhile, on 27 July 2016 the Welsh Government and UWTSD executed a deed of variation of the September 2014 agreement for a lease. It was put to Mr Kaminaris that, whereas the original agreement had been conditional as regards Plot E6, the variation made the agreement unconditional. That was not entirely accurate in respect of the original agreement (see above), and it is wrong in respect of the deed of variation. Clause 2.3 of the deed of variation provided in part:

“2.3.2 The Landlord is carrying out certain remediation works to Plot E6 and will serve notice on the Tenant (‘the Landlord’s Notice’) once those works have been completed.

2.3.3 The Tenant has a period of 40 Working Days from the date of service of the Landlord’s Notice to undertake a site soil survey (which survey shall include (if appropriate) soil borings) and other trials and investigations in respect of Plot E6 making good all damage caused to Plot E6.

2.3.4 The Landlord shall use reasonable endeavours to procure that the contractor it has employed to undertake the remediation works referred to in clause 2.3.2 shall by no later than the Phase 2 Completion Date for Plot E6 provides a warranty to the Tenant in respect of those works.”

Clause 7 of the deed of variation dealt with termination and provided in part:

“7.2 Following the expiry of the Phase 2 Draw Down Period [10 April 2017] either party will be entitled to end this Agreement in respect of Plot E6 if the Tenant has not served a Phase 2 Draw Down Notice [a notice confirming that the Tenant wants to complete the Plot Lease for the Plot] in respect of Plot E6 within the Phase 2 Draw Down Period by serving not less than 20 working days’ written notice on the other. The provisions of this Agreement in respect of Plot E6 will then terminate and all liabilities of each party in relation thereto will end on the expiry of the notice period unless within the notice period the Tenant serves a Phase 2 Draw Down Notice in respect of Plot E6 on the Landlord. If the Tenant serves a Phase 2 Draw Down Notice in respect of Plot E6 on the Landlord pursuant to this clause the Completion Date for Plot E6 will be the date which is 21 days after the service of the Phase 2 Draw Down Notice in respect of Plot E6 or (in the event of the notice being served on the Landlord prior to the 10<sup>th</sup> April 2017) the 10<sup>th</sup> April 2017 whichever is the earlier and the Tenant will pay to the Landlord that part of the Phase 2 Purchase Price apportioned to Plot E6 on the Completion Date for Plot

E6 or the Deferred Payment Date whichever is the later and if the Completion Date for Plot E6 is earlier than the Deferred Payment Date the Tenant will enter into a Legal Charge with the Landlord on that date in respect of Plot E6 only. The Legal Charge to be amended accordingly. Termination pursuant to this clause is without prejudice to any liability of the Tenant existing at the date of termination.

- 7.3 If the Lease of Plot E6 has not completed or a Phase 2 Draw Down Notice in respect of Plot E6 has not been served or if the provisions in this Agreement in respect of Plot E6 have not been terminated in accordance with clause 7.2 above the provisions of this Agreement in respect of Plot E6 will automatically terminate on 10 March 2018. Termination pursuant to this clause is without prejudice to any liability of the Tenant existing at the date of termination.”

Accordingly, UWTSD was not unconditionally bound to take a lease of Plot E6. The reason for the special treatment of Plot E6 was clearly because it was known to be contaminated by asbestos and UWTSD wanted to satisfy itself as to the condition of the land before completing. In practical terms, it was up to the Welsh Government to do sufficient works to persuade UWTSD to proceed.

106. In the light of the Second Tender Report, Mr Kaminaris submitted a further Property Leadership Team paper on 26 August 2016, seeking approval of a budget of £1,604,500 plus VAT for complete removal of the rubble. The proposal was justified on the basis of the reasons set out in the Second Tender Report. Section 2 noted:

“Plot E6 is located in the residential Eastern Quarter of SA1. WG is concerned that whilst all necessary containment measures are being undertaken by WG to protect surrounding residents, continued delays in dealing with BFS Group Ltd could result in a significant period of time before the asbestos is finally removed. It is imperative that the contaminated material is removed from site at the earliest opportunity.

The delay in removing the asbestos has also prevented WG from constructing a large section of new highway/infrastructure under the Highway Finishing Contract 6. This has resulted in WG and our contractor reprogramming the Phase 6 Contract and the introduction of new work elements.”

The risks attendant on the preferred remediation method were identified in section 3 of the paper:

“Until the works are complete the final cost can only be estimated at this stage. There is a possibility that costs may have to increase if any unforeseen circumstances arise.

WG will be liable to challenge during the legal process as to why it has not opted to undertake a less expensive option of remediating the site. However, on a risk based approach it is considered appropriate to pay an additional £300,000 plus VAT to ensure a greater certainty that the remediation works will be a success.

WG litigation lawyer has advised that it is acceptable to undertake the more expensive method of remediating the site if it is considered the most appropriate method.”

107. Approval of the budget for total removal was given by the Welsh Government in October 2016. A further tender exercise was held in late 2016, but it had to be abandoned, as did a third tender exercise in early 2017. Eventually, a resubmission exercise was held in the latter part of 2017; the resubmitted tenders were considered by Arcadis Consulting in a Tender Resubmission Report dated 14 November 2017. The three compliant tenders, as corrected where necessary, were for £993,908, £1,451,600, and £2,276,801. In accordance with the recommendation in the Tender Resubmission Report, the contract was awarded to the contractor that had provided the lowest tender, which was Alun Griffiths.
108. The remediation works, which were overseen by Arcadis Consulting, were begun in September 2018 and were completed on 16 November 2018.
109. The completion of the remediation works came after the extended long-stop date for completion of 24 August 2018 that had been agreed with UWTSO. I am not aware of any evidence as to what happened to the Site, but I assume that UWTSO did indeed complete and that the Site is to be incorporated in its Swansea Waterfront Campus.

### **Summary of the Welsh Government’s Counterclaim**

110. The case advanced by the Welsh Government may be summarised very shortly as follows.
  - 1) The probable source of the asbestos contamination identified in October 2015 was the GTA, which had been crushed and spread over the Site with other demolition rubble in the course of the Phase 3 Works.
  - 2) Pullman’s failure to remove the GTA and the concrete slabs (including the shuttering asbestos and the ACM adhesive) was a breach of clause 2(10) of the Lease.
  - 3) BFS’s failure to remove the GTA was a breach of its obligations under the April Licence.
  - 4) BFS’s failure to inform the Welsh Government and/or Zenith of the GTA and/or to fence it off and/or to apply signage to it, and its actions by its

contractors in spreading it over the Site, was a breach both of the April Licence and of the July Licence.

The Welsh Government relies on a number of clauses of the April Licence and the July Licence. It also contends that BFS breached numerous obligations under the Control of Asbestos Regulations 2012 (“the 2012 Regulations”) and that each such breach constituted a breach of the contractual obligation, in clause 3(k) of the April Licence and clause 3.1.11 of the July Licence, to comply with all laws.

- 5) The Welsh Government has incurred costs of £1,388,862.25 in respect of remediation works necessitated by the asbestos contamination.
  - 6) Those costs are recoverable from Pullman and BFS as damages.
  - 7) Those costs are also recoverable from BFS pursuant to the indemnities contained in the April Licence and the July Licence. The Welsh Government contends that questions of mitigation of damage do not arise in respect of the claim to an indemnity.
111. Pullman and BFS do not strongly dispute that the likely source of the asbestos contamination was the GTA, though they do not actually accept that it was. They also do not dispute the costs actually incurred in respect of remediation works. All other aspects of the claim are disputed.
112. I shall discuss in turn the points that seem to require determination.

### **The source of the asbestos contamination**

113. The question as to the source of the asbestos contamination raises three subsidiary questions. First, where did the asbestos contamination come from? Second, did the asbestos come onto the Site before or after the grant of the Lease? Third, how did the asbestos come to be spread over the Site? These questions, distinct but related, all concern matters of fact rather than of opinion, though specialist expert knowledge and opinion on particular aspects are capable of informing the fact-finding process.
114. Expert opinion evidence on the cause of the asbestos contamination of the Site was given for the Welsh Government by Mr Brian Robinson, an asbestos consultant with Whatlington Consulting, and for Pullman/BFS by Ms Lucy Cleverley, a chartered environmentalist with Ramboll UK Limited. I considered that both of them had sufficient expertise to be competent to give opinion evidence and to assist the court. Although the terms of the initial letter of instruction that Mr Robinson received in 2016 were highly partisan and do not reflect well on the solicitor who wrote it, I considered that Mr Robinson gave his evidence fairly and with proper regard to his duties to the court. Ms Cleverley, though highly competent and very comprehensive in her analysis of the materials, seemed to me by contrast to be partisan in the way she approached her evidence, willing to draw factual inferences well outside the scope of expert opinion when it suited her clients but quite unwilling to make what seemed to be obvious concessions when it might be adverse to them. In short, I agree with the

points made in this respect by Mr Emyr Jones in his written submissions. That said, it remains necessary to consider the particular issues and arguments on their own merits.

(i) *Where did the asbestos come from?*

115. Section 4 of Ms Cleverley's and Mr Robinson's Joint Statement dated 6 March 2020 expressed the opinion that the most likely source of the asbestos contamination on the Site was the buried asbestos identified by Mr McLean of Liston in April 2015: that is, the GTA.
116. Towards the end of the trial, BFS sought permission to rely on a supplementary report by Ms Cleverley, in which she modified her position on that conclusion to the extent of suggesting that, although the visible pieces of asbestos probably came from the GTA, some fibres identifiable on analysis might have come from materials imported by Alun Griffiths. So far as concerned the source of the contamination, I refused the application. However, that has not relieved me of the obligation to have regard to all the factual evidence and to form a view on the conclusions that are appropriate to draw from it.
117. Having considered the evidence, I consider that the conclusion expressed in the joint statement is, on the balance of probabilities, the correct one. I find as a fact that the source of the contamination was the GTA. The reasons for that finding are, briefly, as follows.
118. First, the GTA is a *possible* source of the contamination. The experts considered that the evidence concerning the GTA, in particular from Mr McLean, showed that the GTA was *capable* of accounting for the contamination. I consider that conclusion to be a reasonable one, and I agree with it.
119. Second, the works within the specification for the Phase 3 Works are not a plausible source of the contamination. The shuttering asbestos in the floor slab removed by Zenith is unlikely to have been the source, because (a) the quantity of shuttering asbestos was insufficient to account for the widespread contamination and (b) the evidence shows that the shuttering asbestos was removed from the Site, not crushed and spread. The asbestos that was included in the material crushed and spread was in the tile adhesive in the slabs; this was *de minimis*. (On these matters, I refer, for example, to sections 4 and 5 of Ms Cleverley's revised report dated 2 July 2020.)
120. Third, the other possible source of the contamination is the material brought onto the Site by Alun Griffiths in October 2015 ("the imported material"). The evidence of Mr Burgess, confirmed in this regard by that of Mr Edryd Jones, is that the imported material was taken from a stockpile of quarried stone in the tidal bay area. The stockpile was probably created in 2008, some seven years before the imported material was taken to the Site. One possibility (raised by Ms Cleverley in the section of her supplementary report that I disallowed; I consider it on its own terms as a factual possibility) is that the stockpile became contaminated over time, including by the addition of fly-tipped demolition waste, or that there were a number of piles of material in the tidal bay area and that Alun Griffiths imported material from more than one such pile. Some evidence in support of this hypothesis is found in the Apex Report of 17 November 2015, because the "Capping Layer" was said to contain limestone brick and crushed concrete, which is inconsistent with virgin quarried

stone. It is by no means impossible that the material imported by Alun Griffiths contained some asbestos contamination; this was fairly accepted by Mr Robinson. However, the evidence, in particular from the Apex Report, points to the conclusion that the visible pieces of asbestos present on the Site in October 2015 were not in the Capping layer (i.e. the imported material) but in the demolition rubble. (I reject the suggestion, put to Mr Robinson by Mr Hanham, that the Apex Report presupposed this conclusion rather than, as Mr Robinson said, establishing it by testing at appropriate levels.) Further, the asbestos was found on the eastern side of the Site, where Alun Griffiths had not yet worked and where the imported material was not deposited but where demolition rubble had been spread, albeit thinly. Again, Edryd Jones's evidence, which I accept on the point, was that pieces of asbestos were observed not only on the ground but in the three stockpiles of material that, as I find, Alun Griffiths had excavated in order to create the road; this indicates, again, that the imported material is unlikely to be the source of the contamination. It may be noted that, even in the relevant part of her supplementary report (for which I refused permission), Ms Cleverley did not suggest that substantial pieces of asbestos were contained within the imported material; she merely opined that it might have been a source of free fibres.

*(ii) Was the GTA on the Site before the commencement of the Lease?*

121. The experts identified the alternative possibilities in their joint statement. First, Mr Robinson:

“[Mr Robinson] suggests that given the location of the buried material adjacent to the rear corner of the cold store slab and the fact that it was situated close to the surface and covered in plastic sheeting and gravel, it is most likely that it was intentionally placed there after the slab was constructed. The buried sheeting may well have been placed there as off cuts and surplus during construction of the cold store or alternatively during the life of the cold store as damaged sheets were replaced.

The widespread distribution of small pieces of asbestos cement throughout the crushed demolition material spread over the site suggests that the material may well have passed through the crusher. The fact that the asbestos contamination is present in areas of the site where no work was done by Alun Griffiths such as the eastern side would suggest that it had already been spread over the site (by Zenith) prior to the arrival of Alan Griffiths.”

And Ms Cleverley:

“[Ms Cleverley] considers the most likely origin of the partially buried asbestos described above was from historical buildings on or adjacent to the Property, which pre-dated the 1972 lease. The asbestos within building fabric used pre-1970s would unlikely have been treated differently to any other demolition materials at the time. The buildings shown on historical plans

with corrugated asbestos roofs were demolished and the materials likely left within the near vicinity, hence the variety of demolition material identified in Made Ground across the site, including metal, brick, plastic, glass, wood etc.

These buried, asbestos-containing demolition materials were later excavated by Alun Griffiths (Contractors) Ltd, as instructed by the WG, mixed with other demolition materials and spread during the preparatory works within the western portion of the Property in September 2015.”

122. Ms Cleverley’s conclusion rested on the section of her main report (the substance of which was replicated in the joint statement) that considered the use and development of the Site from the nineteenth century onwards. This recorded that there had been a number of buildings on or in close proximity to the Site, including in particular a Tin Plate Warehouse that encroached onto the western boundary until its removal between 1945 and 1949. Many and perhaps most of these structures would have incorporated asbestos, including in some cases roof coverings of asbestos cement sheeting (cf., for example, report, para 3.1.19), and prior to the year 2000 asbestos used in the fabric of buildings would have been treated no differently from other construction materials upon demolition, because the hazardous nature of asbestos was not fully appreciated. I refer in particular to paragraphs 3.1.23 and 3.1.24 of her report.
123. There can be no certainty on this point. Nevertheless, I reject Ms Cleverley’s conclusion and agree with Mr Robinson’s conclusion and find as a fact, on the balance of probabilities, that the GTA was placed on the Site after the grant of the Lease and derives from the buildings erected under the Lease.
124. First, the question is one of fact rather than of expert opinion; though the material presented by Ms Cleverley is entirely proper to put before the court and I have found it both interesting and illuminating.
125. Second, it is in my view significant that the GTA was positioned adjacent to the west and south sides of the floor slab at its south-west corner. There is no evidence that it encroached under the slab, and Ms Cleverley made clear in cross-examination that she did not suggest that it did so. Ms Cleverley said that she regarded it as mere coincidence that the GTA was adjacent to the slab. Although that is of course possible, the far more likely inference, in my view, is that the GTA was put in the ground after the buildings on the Site had been erected. As Mr Robinson observed at paragraph 5.8 of his report:

“Given [the GTA’s] location, proximity and alignment to the slab in the opinion of the author it is very likely that it was placed there after the slab was constructed. It is difficult to imagine how the slab could have been constructed with it so close by without tearing the sheet to pieces and breaking up the cement, mixing it with the soil.”

Although Ms Cleverley suggested that there would be no good reason to bury asbestos debris around the south-west corner of the building, and Mr Hanham submitted that there was no obvious reason to excavate “in such a tight space



(particularly on the western boundary) in order to create the trap”, I see no mystery in the matter: the building was in the south-west corner of the Site, and the area of the GTA was a small strip of dead ground, out of the way of the useful area of the Site.

126. Third, if the GTA was buried after the building had been erected, it is also very probable that the source of the GTA was connected with the buildings erected under the Lease, rather than with earlier buildings that had been removed before the Lease was granted. Of course, it is impossible to know with certainty what was the specific source of the GTA. However, one probable source is asbestos sheeting and cladding that had originally been on the cold stores but had subsequently been replaced by new asbestos. The photographs demonstrate that such replacements had indeed occurred. The probable source of the GTA is, as I find, either the removed and discarded asbestos or, possibly, off-cuts from the cladding and sheeting in the course of construction of the superstructure. My finding of fact is broadly in accord with the conclusion reached by Mr Robinson at paragraph 5.12 of his report.
127. Fourth, though the point is a negative one rather than a positive one, there is no evidence that the GTA extended beyond the southern boundary of the Site. Such evidence might have put in question the hypothesis that the GTA originated after the grant of the Lease. The absence of such evidence means that the evidence that there is as to the position of the GTA is consistent with what, on other grounds, appears to be its likely source.
128. Fifth, the GTA was covered with polythene sheeting. It is inherently probable, albeit not certain, that the sheeting was put down when the asbestos was buried. The mass commercial production of polythene post-dates the Second World War. The only building at the west of the Site from which the asbestos could plausibly have derived, namely the Tin Plate Warehouse, had been removed by 1949. It seems fairly unlikely that asbestos from that building was buried with a covering of polythene sheeting.
129. Sixth, the probable inference from the historical plans is, in my judgment, that the Tin Plate Warehouse had a corrugated metal roof rather than an asbestos roof. The existence of asbestos in the construction of that building is possible but speculative.
130. Seventh, Ms Cleverley’s argument from the historic treatment of asbestos like other waste tends, if anything, against her. As Mr Robinson observes in the continuation of paragraph 5.8 of his report:

“[I]f it [the GTA] had been historical asbestos sheeting from prior to 1972 it is very unlikely that it would have been sheeted over and covered in gravel since at that time asbestos was still in its peak usage and such measures to make it safer would not usually have been taken.”

*(iii) Who spread the GTA?*

131. In accordance with the opinion expressed by Ms Cleverley, Mr Hanham submitted that the GTA was probably excavated and spread by Alun Griffiths. A number of reasons were advanced in support of this conclusion, in particular the following, of which I find the third and fourth to be the most powerful:

- a) Ms Cleverley referred to photographs that she said showed Alun Griffiths excavating in the south-west corner of the Site, the area where the GTA was located. In cross-examination, however, she accepted that the photographs showed not excavations but work for trial pits. Mr Hanham, however, submitted that the evidence showed that Alun Griffiths had carried out excavation works on the western and southern boundaries of the Site.
  - b) Ms Cleverley also observed that Liston and Zenith did not undertake excavations on the Site; their activities were limited to demolishing the buildings, breaking up ground slabs, and crushing concrete.
  - c) It was noted that the observations made at the Site between the completion of the Phase 3 Works and the discovery of asbestos by Alun Griffiths did not identify asbestos present within the demolition rubble, although other unacceptable debris, such as foam, metal and plastic, was identified. In particular, reference was made to Mr Burgess's witness statement, which states that "after a visual inspection with Peter Kaminaris on 14 August 2015, there did not appear to be any asbestos visible on the surface of the site." (Ms Cleverley also refers to Apex's photographic log from 17 August 2015, which she says show no evidence of the presence of asbestos at the surface. This point is not wholly lacking in force, but I bear in mind the agreement in the experts' joint statement that the photographs "are not sufficiently detailed to identify whether asbestos is present or not.")
  - d) Mr Hanham submitted that it was unlikely that Walsgrave's workmen would have disturbed and spread the GTA. If they disturbed it, they would inevitably have noticed the polythene laid over it. They could hardly have failed to notice that they were digging up a quantity of buried rubble, and if they had noticed it they would inevitably have investigated and stopped work. Any notion that they would deliberately have concealed the GTA is incredible.
  - e) Mr Hanham submitted that the size of the pieces of asbestos found in October 2015 was larger than the pieces of the material that had passed through the crusher. He relied on this in support of the conclusion that the asbestos was in the imported material; I have rejected that conclusion. However, the point could be taken to indicate that the asbestos in the GTA had not been crushed by Zenith/Walsgrave and, accordingly, that it was probably spread by Alun Griffiths.
132. Although there are some reasons in favour of the conclusion urged on me by Mr Hanham, I have come to the conclusion that it ought to be rejected. In my judgment, the probability is that Zenith/Walsgrave disturbed the GTA in the course of the Phase 3 Works and spread it over the Site; and I so find as a fact.
133. First, the work done by Alun Griffiths is unlikely to have disturbed the GTA. Alun Griffiths did not carry out excavations in the south-western corner of the Site. His work involved depositing the imported material on the western part of the Site in order to build up the ground level and clearing the ground in the central part of the Site in preparation for the construction of the road. The imported material was not deposited in the area of the GTA; even if it had been, this would not have involved disturbing the GTA. The location of the road was to the east of the GTA. Even if

some or all of the GTA had been excavated by Alun Griffiths in the course of its preparatory works for the road, that excavation would not be a very likely explanation for the widespread contamination of the Site. The material removed from the surface of the Site by Alun Griffiths was heaped into three piles on the Site. However, visible asbestos was found to be present on the ground over a wide area of the Site; it was not limited to the stockpiles.

134. I am ultimately unimpressed by Mr Hanham's reliance on works said to have been done by Alun Griffiths on the southern and western boundaries of the Site. The work on the southern boundary involved the removal of some vegetation and of a post and wire fence. Nothing in the evidence persuades me that the removal of vegetation would have disturbed the GTA. The most disruption that would have been caused by the removal of the fence was simply to pull up, mechanically, any posts that were embedded in concrete; I think it improbable that this would have involved disturbing the GTA at all. I am also unimpressed by the suggestion that Alun Griffiths might have disturbed the GTA as a result of carrying out works to remove a brick wall on the western boundary. This suggestion relies on Mr Burgess's evidence in cross-examination to the effect that there was such a wall on the western boundary. I think that his evidence in that regard was wrong as regards the southern end of the western boundary, though it is likely that there was such a wall at the northern end of the boundary. Mr Hanham referred to three particular photographs that, he said, indicated the presence of the wall at the south-west of the Site. In my view, none of them did. A brick structure is indeed shown in one of them (photo 1 at page 3028); but the structure is beneath ground level and appears to be an exposed excavation at the location of the GTA as seen by Mr McLean in April 2015. As the GTA was not visible in May or July 2015, and as Zenith spread demolition rubble over the Site in July and August 2015, it is unlikely that Alun Griffiths would have had cause to excavate this structure. Whatever the structure in the particular photograph might be, it is clearly not a wall above ground level on a site boundary. It could, possibly, be the footings of a wall; as four courses of regular brickwork can be seen, however, this is unlikely. I think it more likely that the structure is part of an inspection chamber, or some such thing. Whatever it is, I do not think that Alun Griffiths' work touched on it. The definition of "Permitted Use" in the July Licence does indicate that in July 2015 there were indeed "brick boundary walls" somewhere on the Site, but it does not state where they were and, anyway, their removal was expressly stated to be part of the Phase 3 Works. I see no reason to think that any such brick walls were not removed by Zenith/Walsgrave.
135. Second, it was Zenith/Walsgrave that was responsible for spreading demolition rubble over the Site. This necessarily included the slab and the hardstanding that was immediately adjacent to the slab at the south. The removal of the slab and hardstanding was done by means of an excavator with a boom and arm and a bucket attachment. I agree with the view expressed by Mr Robinson, that the use of an excavator to dig out the structures in the south-west corner would have been very likely to involve disturbance of the GTA, because the arm and bucket would tend to be extended beyond and beneath the extremity of the material to be removed. Zenith/Walsgrave would have taken no care not to disturb the GTA, because they were not told of the GTA.

136. Third, there are reasons to suppose that the Phase 3 Works were not carried out with great care, so it would not be altogether surprising if Zenith/Walsgrave had failed to observe or regard the fact that they were introducing the GTA into the crusher and spreading it over the Site. Most significantly, rebar and foam were passed through the crusher. Again, Walsgrave's workforce had to be reminded on site of the need to wear personal protective equipment, after they had been observed working without it. Again, as I have already observed, Zenith displayed a lack of rigour in respect of the preparation of its Method Statement, its instructions as to the removal of the shuttering asbestos, and its collation of documentation from Walsgrave. There is, indeed, still no documentation to show that Walsgrave's employees had the necessary level of training. Mr Chester, for his part, accepted in cross-examination that his own understanding as to the requisite level of training had been incorrect.
137. Fourth, the fact that asbestos was not observed on the surface of the Site between mid-August and the beginning of October 2015 does carry weight in favour of BFS's case and I have given much thought to it. In the end, however, having weighed all the evidence, I conclude that the fact is explicable because the asbestos and the surrounding material would be of a similar appearance; only once the presence of asbestos had first been identified would it become more obvious to the eye.
138. Fifth, I am unpersuaded by Mr Hanham's efforts to mount an argument on the basis that asbestos fragments were too large to have passed through a crusher. Mr Robinson observed that there were pieces of crushed concrete of equal or similar size to the asbestos fragments—this, too, was recorded by Mr Robinson and Ms Cleverley in their joint statement—and, as did he, I see no sufficient reason to think that they had not passed through the same route in the crusher.

### **Pullman: breach of the covenants in the Lease**

139. This aspect of the case received relatively little attention at trial. Nevertheless I must deal with it; and although the claim against Pullman under the Lease is of little relevance in itself, it does have a bearing on the claim against BFS under the Licences. For convenience, I here set out again the lessee's covenant in clause 2(10) of the Lease:

“At the expiration or sooner determination of the said term quietly and peaceably to deliver up the demised premises leaving the same in good and substantial repair and condition to the satisfaction of the [Welsh Government] having first (if required by the [Welsh Government] to do so) removed any buildings or works and having made good to the satisfaction of the [Welsh Government] all damage occasioned to the demised premises by or in such removal.”

140. The landlord's requirement was set out in its letter of 31 October 2013:

“Please also note that the Welsh Ministers (as your Landlord) will require the removal of any buildings on the Property by the

end of the term and all damage to be made good in accordance with clause 2(10) of the Lease.”

141. The failure to remove the concrete slabs was clearly a breach of covenant by Pullman. However, that breach does not appear to have had any consequences that sound in substantive relief in this case. The important questions concern the GTA.
142. For Pullman, Mr Hanham submitted to the following effect. The extent of the obligation under clause 2(10) was defined by the landlord’s request, which related only to the removal of the “buildings”—meaning the cold stores and the office block—and did not mention “works”. The GTA did not constitute “buildings”. Therefore the relevant obligation was to yield up the demised premises in good condition; as there had been no deterioration in the condition of the demised premises, which therefore were not in a state of disrepair, this obligation requires that the premises be in a state that would make them fit for occupation by a reasonably-minded tenant of the class likely, at the termination of the Lease, to take them. The area of the GTA was earmarked for use as a public open space, and there was no need to remove the GTA.
143. I reject that submission and hold that Pullman’s failure to remove the GTA was a breach of the covenant in clause 2(10) of the Lease.
144. First, I consider that the obligation to remove the buildings on the Site included an obligation to remove the GTA. This is a question of the proper construction of clause 2(10). (The relevant principles of construction are considered below.) The GTA comprised components of the buildings that had been removed from the structures and buried adjacent to them. In my view, it makes little sense to suppose that parts of the buildings can be taken outside of the scope of the obligation by being removed first from the main structures and then left on the premises. If such a device could not avail in respect of removal of parts between the date of the landlord’s requirement and the date of the termination of the lease (which is when the obligation is operative), I do not see that it can avail in respect of parts that have been removed from the structures but not from the premises *before* the date of the requirement. Lack of knowledge on the part of the current tenant of the existence of the discarded parts (here, the buried asbestos), might explain a failure to comply with the obligation but cannot excuse it, because the current tenant has stepped into the shoes of its predecessors.
145. Second, in any event, I consider that the obligation to deliver up the Site “in good and substantial repair and condition to the satisfaction of the [Welsh Government]” obliged Pullman to remove the GTA, regardless of whether or not the GTA (a) was properly to be considered components of buildings or (b) was on the Site before the grant of the Lease.
146. In *Dilapidations: The Modern Law and Practice* (6<sup>th</sup> edition, 2018), by Dowding, Reynolds and Oakes (“*Dowding*”), the authors propose a five-part analysis of liability under a covenant to repair and keep in repair:
  - (1) What is the physical subject-matter of the covenant?
  - (2) Is the subject-matter in a damaged or deteriorated condition?

- (3) Is the nature of the damage or deterioration such as to bring the condition of the subject-matter below the standard contemplated by the covenant?
- (4) What work is required in order to put the subject-matter of the covenant into the contemplated condition?
- (5) Is that work nonetheless of such a nature that the parties did not contemplate that it would be the liability of the covenanting party?

The analysis is useful and has been adopted, for example, by HHJ Stephen Davies sitting as a judge of the High Court in *Blue Manchester Ltd v North West Ground Rents Ltd* [2019] EWHC 142 (TCC), 182 Con LR 59; though, as the authors of *Dowding* observe, attention must always be paid to the form of the particular covenant and the facts of the particular case.

147. As to the first part of the analysis, the physical subject-matter of the covenant is defined by the Lease:

“ALL THAT piece of land in the City and County of Swansea situate on the south side of Langdon Road on the Board’s Swansea Dock Estate containing in area FOUR THOUSAND TWO HUNDRED AND FORTY SQUARE METRES or thereabouts as the same is delineated on the plan annexed to these presents and thereon coloured red ... [including *inter alia*] all fixtures drains and other works nor or hereafter thereon and the fences or walls and gates now or hereafter erected on the northern eastern and southern boundaries of the demised premises”.

The plan shows a water main along the northern boundary and a sewer along the western boundary but no other features. The evidence does not indicate that there were any buildings on the Site at the date of the demise, and I find that there were not.

148. As *Dowding* notes at paragraph 6-09, the stages of the analysis are not entirely self-contained and may overlap. For present purposes, it is convenient to take the second, third, fourth and fifth stages together and to cite the short summary remarks in *Dowding* on the respective stages:

“6-05 Before any question of repair arises, it must first be asked whether the premises are in disrepair. This involves asking whether there has been a deterioration from some previous physical state. If the answer is no, there will have been no breach of the general covenant to repair, notwithstanding the fact that the premises may be unsafe or unsuitable for occupation or use for some other reason.

6-06 Not every occasion of physical damage or deterioration will give rise to a liability under the general covenant. It is necessary to ask whether the consequence of such damage or deterioration is that the premises are not in the state and condition that the covenant contemplates they should

be in. This involves first identifying the standard imposed by the covenant, and then comparing it with the actual state of the premises. Again, if the answer to the question is no, there will have been no breach.

6-07 Once it has been ascertained that the state and condition of the premises falls below the standard required by the covenant, the next stage is to identify what work is required to put the premises back into the required state.

6-08 The nature of the work identified as necessary may be such that it goes outside what the covenant obliges the covenantor to carry out. This ‘fact and degree test’ is variously formulated in the authorities ...”

149. As regards the state of repair, *Hill & Redman’s Law of Landlord and Tenant*, paragraph 3267, states (I insert only the main references from the footnotes):

“The concept of ‘repair’ connotes the idea of making good damage so as to leave the subject matter so far as possible as though it had not been damaged: *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716 per Atkin LJ. A state of disrepair connotes deterioration from some previous physical condition: *Post Office v Aquarius Properties Ltd* [1987] 1 All ER 1055. As a matter of the ordinary usage of English, that which requires repair is in a condition worse than it was at some earlier time: *per* Lawton LJ in *Quick v Taff-Ely BC* [1986] QB 809 at 821. Thus, there is no requirement ‘to repair’ until the subject matter of the covenant has deteriorated and purely preventative works are not within the scope of the concept: *Mason v TotalFinaElf UK Ltd* [2003] EWCA Civ 1604 (Ch), [2003] 3 EGLR 91. On the other hand, some prophylactic measures may be undertaken as part of the works to remedy deterioration which has already occurred in order to prevent future deterioration of a similar kind: *McDougall v Easington DC* [1989] 1 EGLR 93, CA at 95H per Mustill LJ.

In deciding whether there has been deterioration one must consider the condition of the subject matter at the time of construction of the premises and not (if different) their condition at the date of the lease: *Post Office v Aquarius Properties Ltd* [1987] 1 All ER 1055, CA; *Gibson Investments Ltd v Chesterton plc* [2002] 2 P & CR 494, Neuberger J. Even where a covenant to repair does not expressly require a party to ‘put’ the subject matter into repair, it will be construed as though it did, since the obligation to ‘keep’ premises in repair involves a duty to put them into repair in so far as they are out of it: *Quick v Taff-Ely BC* [1986] QB 809, *per* Dillon LJ at 818.”

150. The covenant in the Lease went beyond one of repair: it was to deliver up the demised premises “in good and substantial repair and condition to the satisfaction of the [Lessor]”. In my judgment, use of the word “condition” shows that the obligation was capable of extending to doing works that went beyond repair strictly so called: see *Mason v Totalfinaelf UK Ltd* [2003] EWHC 1604 (Ch), [2003] 3 EGLR 91 at [14] – [16]. The mere fact that the demised premises could not be said to be in a state of disrepair would not mean that they were in a good condition. I accept, however, that the factors against which the differing standards of “good repair” and “good condition” are to be judged are likely to be much the same; cf. *Dowding* at paragraph 9-41.
151. Mr Hanham relied on passages in the judgment of Blackburne J in *Mason v Totalfinaelf UK Ltd*. The tenant’s covenant in that case was “to the satisfaction of the Lessor’s Surveyor [to] well and substantially uphold support maintain amend repair decorate and keep in good condition the demised premises”. At [24] the judge said:

“It was common ground that clause 3(4), with its reference to ‘well and substantially’, does not require that the premises be kept in perfect repair. Equally, it was common ground that the standard to be applied should be such as, having regard to the age, character and locality of the premises at the start of the lease, would make the premises reasonably fit for a reasonably minded tenant of a class who would be likely, at that time, to take the premises, and that the appropriate standard does not alter during the term of the lease in the sense that changes in the character of the locality of the premises, or of the class of person likely to take them, do not elevate or depress what would otherwise be the standard: see, generally, *Proudfoot v Hart* (1890) LR 25 QBD 42 and *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716.”

152. The covenant in *Mason v Totalfinaelf UK Ltd* qualified the obligation with the words “to the satisfaction of the Lessor’s Surveyor”. In the present case, the qualification is “to the satisfaction of the [Lessor]”. With regard to the words in the covenant before him, Blackburne J said at [35]:

“The fact that the phrase is unqualified does not give the surveyor carte blanche as to what he may require. The works to be undertaken must be to make good a want of repair or absence of good condition. In stipulating what must be done the surveyor must exercise his own judgment and come to an honest view of what is required. It is plainly implicit that he must act reasonably. He will be acting unreasonably if he seeks to require work that no reasonable surveyor could have required. On the other hand, provided he reaches a decision that a reasonable surveyor could reach, it matters not that the tenant's surveyor favours another cheaper, but no less reasonable, decision as to what should be done.”

An analogous approach seems to me to be appropriate in the present case. The Welsh Government would not have carte blanche in deciding on the appropriate standard of



“good condition” or the works of remediation. But it would be entitled to form its own judgment as to what was required to satisfy the appropriate standard, provided its judgment were within the range of views that could reasonably be held.

153. In my view, upon termination of the Lease the presence of the GTA meant that the Site was in a damaged or deteriorated condition and was not in a good condition; and its removal was reasonably required for purposes of compliance with the covenant in clause 2(10). Assuming for present purposes that the removal of the GTA was not within the scope of the obligation to remove the buildings, nevertheless it is relevant that there was such an obligation; this is properly capable of informing the correct understanding of “good condition”. If the GTA came from the buildings, as discarded and partially buried components of the buildings, it could hardly be consistent with the good condition of the Site on delivery up that the cast-offs were left in the gravel trap. Mr Russell expressed the view that the tenant would have been required by its covenant to remove such “fly-tipping”, and his view was sound common sense. It could make no difference to the good condition of the Site that Pullman did not know of the GTA, because it would stand in the shoes of its predecessors. If it were the case that the GTA had been present even before the grant of the Lease, that could not in my view affect the standard required for compliance with the covenant, unless the GTA could reasonably be supposed to have affected the objective requirements of good condition; which, being buried, it could not. Similarly, the presence of the GTA meant that the Site was not in proper repair. If the GTA was introduced after the grant of the Lease, the deterioration in the condition of the demised premises is clear. However, if the introduction of the GTA after the grant of the Lease would place the demised premises out of repair, the principles stated in the second part of the quotation from *Hill and Redman* and the authorities there cited show that its introduction before the grant of the Lease would constitute a deterioration from the prior state of the Site. I reject the submission that the presence of the GTA was consistent with the legal test for “good repair”.

#### **BFS: breach of obligations under the Licences**

154. The April Licence and the July Licence were made between the Welsh Government and BFS. Rights and liabilities under them arise only as between those parties. The most relevant provisions of the Licences have been set out above.
155. The Welsh Government’s case has been put on numerous specific contractual grounds. The basic allegations that might have causal relevance are the following:
- a) BFS failed to remove the GTA;
  - b) BFS failed to inform the Welsh Government of the GTA;
  - c) BFS failed to inform Zenith/Walsgrave of the GTA;
  - d) BFS, by its contractors, spread the GTA on the Site.

In respect of some of the allegations, the Welsh Government’s case rests simply on terms of the Licences. In respect of some of the allegations, however, the Welsh

Government relies on what it says were breaches of the 2012 Regulations and, for that reason, were breaches of contract. For ease of exposition, I shall first address the allegations that do not rely on the 2012 Regulations and then address those that do so rely.

156. First, however, I should say something briefly about the correct approaches to the construction of contracts and the implication of contractual terms.
157. The general principles of construction give rise to no special difficulty in this case and are not in doubt. They were summarised by Lord Bingham of Cornhill in *Dairy Containers Ltd v Tasman Orient CV* [2005] 1 WLR 215 at [12]:

“The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed.”

The ramifications of that approach have been discussed in detail in many cases. I refer in particular to *Rainy Sky S.A. v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, esp. per Lord Neuberger PSC at [15]-[22]; and *Wood v Capita Insurance Services Limited* [2017] UKSC 24, [2017] AC 1173, esp. per Lord Hodge at [10]-[13]. Lord Hodge’s judgment in *Wood v Capita Insurance* discussed in particular the relationship between text and context. He said:

“10. The court’s task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.”

“12. ... To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.”

Recently, in *First National Trust Co (UK) Ltd v McQuitty* [2020] EWCA Civ 107, Peter Jackson LJ, with whom Asplin LJ and Henderson LJ agreed, summarised the position at [33]:

“When construing a document the court must determine objectively what the parties to the document meant at the time they made it. What they meant will generally appear from what they said, particularly if they said it after a careful process. The

court will not look for reasons to depart from the apparently clear meaning of the words they used, but elements of the wider documentary, factual and commercial context will be taken into account to the extent that they assist in the search for meaning. That wider survey may lead to a construction that departs from even the clearest wording if the wording does not reflect the objectively ascertained intention of the parties.”

158. In the present case, part of the Welsh Government’s argument is that the wording of the Licences, when correctly construed, impliedly imposed on BFS an obligation, not expressly stated, to remove existing asbestos on the Site and to put the demised premises into the condition that they would have been in if Pullman had complied with the covenant in clause 2(10) of the Lease. Here the close relationship between contractual construction and the implication of contractual terms is apparent.
159. In *Marks and Spencer plc v BNP Paribas Services Trust Company (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, the Supreme Court approved the traditional approach to implication of terms. A term will be implied into a contract only if it is necessary to give business efficacy to the contract (in the sense that, without the term, the contract would lack commercial or practical coherence) or—which will often amount to the same thing—if the term is so obvious that it “goes without saying”. A term will not be implied if it is incapable of clear expression, or if it is unreasonable or inequitable, or if it contradicts an express term of the contract. In *AG of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988, Lord Hoffmann had appeared to suggest that the traditional tests for the implication of terms were simply aspects of a unitary exercise of construction, in which the sole question was: “is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?” (see his judgment at [17] to [22]). In the *Marks and Spencer* case, the Supreme Court did not go so far as to say that Lord Hoffmann’s approach had been wrong, but it indicated firmly that his approach, though “quite acceptable”, was open to interpretations contrary to the correct state of the law, should not be regarded as authoritative guidance on the implication of terms, and did not change the pre-existing law. Lord Neuberger (whose reasoning represents the majority in the Court) explained the relationship between construction and interpretation as follows:

“28. In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term. This appeal is just such a case. Further, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied. Having said that, I accept Lord Carnwath’s point in para 71 to the extent that in some cases it could conceivably be appropriate to reconsider the interpretation of the express terms

of a contract once one has decided whether to imply a term, but, even if that is right, it does not alter the fact that the express terms of a contract must be interpreted before one can consider any question of implication.

29. In any event, the process of implication involves a rather different exercise from that of construction. As Sir Thomas Bingham trenchantly explained in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 at p 481:

‘The courts’ usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, *ex hypothesi*, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power.’”

(For recent advocacy of the importance of Lord Carnwarth’s “iterative” approach in the entire exercise, see *Anson’s Law of Contract* (31<sup>st</sup> edition, 2020, by Beatson, Burrows and Cartwright) at p. 162.)

(a) *BFS failed to remove the GTA*

160. The Welsh Government contends that, on its true construction, the April Licence imposed an obligation on BFS to remove the GTA: amended counterclaim, para 28(xi). (No allegation is made that the failure to remove the GTA constituted in itself a breach of the July Licence.) In my judgment, that contention is correct.
161. Two points that might be thought to count against this conclusion. First, the April Licence neither imposes any express obligation concerning the GTA nor even mentions the GTA; of course, the GTA was not known of at the date of the grant of the April Licence. Second, the April Licence does not expressly impose an obligation to achieve compliance with clause 2(10) of the Lease. However, I have regard to the following matters.
- 1) The April Licence must be read in its entirety and in the context of the facts that have been set out above, so far as those facts were within the scope of the knowledge of both the Licensor and the Licensee at the date of the grant of the Licence.
  - 2) Although neither BFS nor the Welsh Government knew of the presence of the GTA at the date of the grant of the April Licence, they both knew that the obligation under clause 2(10) of the Lease was to deliver up the Site (a) in good and substantial repair and condition and (b) clear of any buildings.

- 3) Clause 3(p) of the April Licence imposed on BFS an express obligation to provide a certificate that the Property was free from asbestos. In my view, that can only mean that BFS was under an obligation to make the Site free from asbestos, and that compliance with that obligation was to be demonstrated by the certificate. There was little if any analysis at trial of the scope of this obligation. It could not sensibly be interpreted as requiring proof that the Site was literally free of all asbestos, because the presence of a low level of free fibres would be inevitable and unexceptionable. On the other hand, the required works, as set out in the Method Statement & Plan of Works did not permit the crushing and spreading of any ACMs. Having regard in particular to that document, I interpret the requirement as being one to remove all ACMs. If that were done properly, without illicit crushing and spreading, the asbestos fibre concentrations would be unlikely to exceed 1F/cm<sup>3</sup>, as the Method Statement recognised.
- 4) The GTA both (a) comprised ACMs and (b) was required to be removed in order to achieve compliance with clause 2(10) of the Lease. Further, its existence was discovered during the term of the April Licence; indeed, eight days before it determined. In order to comply with the express obligation in clause 3(p), BFS was obliged to remove the GTA. In circumstances where the GTA was within the scope of the obligation under clause 2(10) of the Lease, I see no reason to construe the express obligation in clause 3(p) of the April Licence in such a manner as to exclude the GTA.
- 5) I also consider that text and context show that the April Licence imposed a positive obligation to carry out the works mentioned in the definition of the Permitted Use. In particular, clause 3(p) is inconsistent with a construction that would make the carrying out of works required to comply with clause 2(10) of the Lease merely optional. Read literally, the only express obligation imposed by clause 3(p) is to provide the certificate (there is no express obligation to complete the works to comply with clause 2(10)) and it might, therefore, be argued that the obligation would be complied with if all the asbestos were removed, even if insufficient works had been done to comply with clause 2(10) of the Lease. Such a construction would, however, fail to cohere with the purpose of the Licence as a whole, and in particular with the definition of “Permitted User”, which shows that BFS had permission to enter the Site only for the purpose of achieving compliance with clause 2(10) of the Lease. Therefore clause 3(p) of the April Licence is properly to be construed as requiring BFS to complete the works required to comply with clause 2(10) of the Lease and to provide a certificate that the Site was free from asbestos.
- 6) There are two possible objections to such a construction of clause 3(p). First, the certificate was required within five working days of the termination of the Licence, even if that date were earlier than the date five working days after completion of the works required to comply with clause 2(10). However, this does not mean that the latter works were optional; the certificate might be forthcoming in advance of completion of the works, if all ACMs had been removed. Further, the provision in respect of time is better seen as an attempt to place a time limit on compliance than as an indication of the relationship between the certificate and the works. Second, clause 3(o) of the April

Licence requires that any works be carried out in accordance with the method statement, which does not of course say anything about the GTA. However, this simply reflects the particular state of knowledge as to the required works at the date of the grant. It can perfectly well be taken to define the way in which identified works were to be carried out, rather than as limiting the scope of the basic obligation to achieve compliance with clause 2(10) of the Lease.

162. Finally, any argument that the omission of an obligation to provide a certificate of freedom from asbestos in the July Licence somehow cancelled liability for breach of the obligation in the April Licence would, in my judgment, be untenable. The only reason why the obligation was not included in the July Licence appears to have been that the Welsh Government had agreed by way of concession that, for the purpose of the Phase 3 Works, some of the debris could be crushed and distributed over the Site. Further, as it had not been informed of the GTA, the Welsh Government could not waive compliance with the primary obligation in the April Licence, save in respect of the asbestos of which it had knowledge.

163. Accordingly, I hold that BFS's failure to remove the GTA was a breach of the April Licence.

*(b) BFS failed to inform the Welsh Government of the GTA*

164. If the effect of the April Licence was to oblige BFS to remove the GTA, this issue does not arise; it suffices that BFS failed to remove the GTA.

165. Although BFS did tell the Welsh Government that partially buried asbestos had been found, it did not do so in a meaningful way or so as to enable the Welsh Government to identify what had been found, and the effect of the site meeting on 12 May 2015 was to negate any information that had previously been given. The Welsh Government contends that this failure to inform was a breach both of the April Licence and of the July Licence because:

a) It was a breach of the implied obligation in the April Licence to inform the Welsh Government of any asbestos found on the Site.

b) It was a breach of clause 3(f) of the April Licence and clause 3.1.6 of the July Licence, because the failure to inform was liable to cause nuisance, annoyance, inconvenience or disturbance to the Welsh Government or to its neighbours.

166. In my judgment, BFS was indeed in breach of an implied obligation to inform the Welsh Government of the existence of the GTA. If the obligation under clause 3(p) of the April Licence did require BFS to remove hitherto unidentified ACMs, BFS would necessarily have to inform the Welsh Government of the unforeseen works it was performing under the Licence. On the other hand, if the April Licence did not require BFS to remove hitherto undiscovered ACMs, it must in my view have been an implied term of the April Licence that newly discovered ACMs that prevented certification of the Site would be brought to the Welsh Government's attention; otherwise BFS would be permitted either (a) to conceal the existence of the newly discovered ACMs when providing the certificate or (b) to fail to provide either a

certificate or an explanation for that failure. The existence of the implied term “that the [Welsh Government] would be informed of the existence and location of any asbestos on the premises” (amended counterclaim, paragraph 28(xii)) is established on both of the traditional tests for implication: it is necessary to give business efficacy to the contract, and it is so obvious that it goes without saying. The causal relevance of the breach is obvious: If the Welsh Government had been told of the GTA, the GTA would have been removed and disposed of and would not have been allowed to contaminate the Site.

167. However, in my judgment, the failure to inform the Welsh Government of the GTA was not a breach of the obligation in clause 3(f) of the April Licence or clause 3.1.6 of the July Licence. That obligation relates to activity on the Site, such as (by way of example only) noise or pollution. Failure to inform the Welsh Government of the GTA was not “anything” “done on the Property”.

*(c) BFS failed to inform Zenith/Walsgrave of the GTA*

168. The allegations here are that BFS failed to fence or otherwise segregate the GTA (amended counterclaim, paragraph 28(xiii)), failed to apply signage to the GTA (amended counterclaim, paragraph 28(xiv)), and failed to inform Zenith/Walsgrave of the presence of the GTA when it instructed Zenith/Walsgrave to carry out the Phase 3 Works (amended counterclaim, paragraphs 28(xv)-(xviii)). Each of these failures is said to be:

- a) A breach of clause 3(f) of the April Licence and of clause 3.1.6 of the July Licence, as being “something which might cause a nuisance, annoyance, inconvenience or disturbance” to the Welsh Government or its neighbours;
- b) A breach of clause 3(g) of the April Licence and of clause 3.1.7 of the July Licence “because it caused damage to the Property”.

169. For the moment, for analytical reasons, I address these allegations on the basis that they focus on BFS’s failure to warn Zenith/Walsgrave, rather than on the conduct of Zenith/Walsgrave in consequence of the lack of a warning. Viewed on that basis, the allegations do not amount to a breach of the April Licence. The reasons for this were given by Mr Hanham: a failure to tell or warn Zenith/Walsgrave about the GTA (by word or fencing or in any other way) was not something done on the Property; similarly, that failure did not cause damage to the Property.

170. However, I agree with Mr Emyr Jones that, viewed in the context of the results of the failure to warn, BFS’s failure does amount to a breach of the April Licence, on the following basis.

*(d) BFS’s agents spread the GTA over the Site*

171. This allegation is contained in the totality of negative and positive complaints in paragraph 28(xiii)-(xix) of the amended counterclaim. The case there advanced comes to this: BFS instructed Zenith/Walsgrave to do the Phase 3 Works; because it had not told Zenith/Walsgrave of the GTA, whether by word or fencing or other means, the carrying out of the Phase 3 Works was liable to result in the disturbance of the GTA and its distribution over the Site; and that is what happened. Again, the

Welsh Government relies on clauses 3(f) and 3(g) of the April Licence and clauses 3.1.6 and 3.1.7 of the July Licence.

172. In my judgment, Mr Emyr Jones was right to submit that the disturbance of the GTA and its distribution over the Site was both “[something] done on the Property ... which may be or become a nuisance (whether actionable or not), annoyance, inconvenience or disturbance to the [Welsh Government] or any owner or occupier of neighbouring property” (clause 3(f) and clause 3.1.6) and something that caused “damage to the Property” (clause 3(g) and clause 3.1.7).
173. In neither case was the thing in question (disturbance and distribution of the GTA) actually done by BFS. This is clear in the case of clause 3(f) and clause 3.1.6: BFS did not itself do those things on the Property. I think it is also clear in the case of clause 3(f) and clause 3.1.7, where the distinction is drawn between causing damage and permitting damage to be caused. I also think that it would be to strain the construction of the relevant clauses to say that BFS “permitted” Zenith/Walsgrave to do the things in question.
174. However, in construing the Licences one must have regard to their Interpretation sections and, in particular, to clause 1.10 in the April Licence and the corresponding provision in clause 1 of the July Licence (see paragraph 22 above). Here there is a clear and logical distinction between “not allowing” and “preventing” a thing to be done. Again, it would strain the construction of the clauses to say that BFS “allowed” Zenith/Walsgrave to disturb and distribute the GTA. The question, accordingly, is whether BFS used its best endeavours to prevent Zenith/Walsgrave from disturbing and distributing the GTA. It is obvious that it did not do so, because it failed to inform Zenith/Walsgrave about the GTA.
175. It therefore follows, from the extended interpretation given by clause 1.10 of the April Licence and the corresponding provision in clause 1 of the July Licence, that BFS is to be regarded as (a) having done something on the Property (namely, the disturbance and distribution of the GTA) that was or might become a nuisance etc and (b) having caused damage to the Property. It was therefore in breach of clauses 3(f) and 3(g) of the April Licence and clauses 3.1.6 and 3.1.7 of the July Licence.

#### *Breaches of the 2012 Regulations*

176. The Welsh Government alleges that BFS was in breach of duty under the 2012 Regulations. It does not rely on those breaches directly, as allegations of breach of statutory duty, but contends that they constitute breaches of the Licences. It relies on two provisions in each Licence:
- a) BFS’s obligation “not to do or permit to be done on the Property anything which is illegal”: clause 3(f) of the April Licence and clause 3.1.6 of the July Licence;
  - b) BFS’s obligation “to comply with all laws”: clause 3(k) of the April Licence and clause 3.1.11 of the July Licence.

Specifically, the Welsh Government alleges that the following matters constituted breaches of the 2012 Regulations (and therefore breaches of contract):



- Failure to inform the Welsh Government of the GTA: regulation 4(6)-(11);
- Failure to fence or segregate the GTA or to identify it with signage; failure to inform Zenith of the GTA; instructing Zenith to carry out the Phase 3 Works in circumstances where it was liable to be disturbed, broken up and distributed: regulations 4(6)-(11), 5, 6, 7, 10, 11, and 16. The illegality or non-compliance with laws on which the Welsh Government relies is alleged breaches of regulations 4(6)-(11), 5, 6, 7, 10, 11 and 16 of the 2012 Regulations.

(In his submissions, Mr Emyr Jones sought to broaden the argument to rely also on guidance from the Health & Safety Executive. But the Welsh Government must be held to the matters it alleged in its amended counterclaim.)

177. I reject the Welsh Government's case insofar as it relies on breach of the 2012 Regulations. In summary:

- 1) I reject BFS's contention that the 2012 Regulations had no application to the works on the Site because they only apply to buildings. They apply to "premises", which is wide enough to cover the Site. Indeed, it would be striking if the work on Site had attracted the statutory duties until the buildings came down to slab level but then ceased to apply.
- 2) I accept that BFS was a "dutyholder" under regulation 4(1)(a) and therefore had the duties relating to assessment in regulation 4. Once it had been notified of the GTA, those duties included the duty to review the risk assessment, pursuant to regulation 4(6), and to make provision in accordance with the reviewed assessment, pursuant to regulation 4(7)-(10). I accept that BFS was in breach of those duties.
- 3) I accept that BFS was an employer carrying out work that was liable to expose its employees, even if only its directors, to asbestos at the Site and that, therefore, it owed both to its employees and to all other persons, whether at work or not, who might be affected by the work (see regulation 3(3)) the duties in regulation 5 (identification of the presence of asbestos), regulation 6 (assessment of work which exposes employees to asbestos), regulation 7 (plans of work), regulation 10 (information, instruction and training), regulation 11 (prevention or reduction of exposure to asbestos), and regulation 16 (prevention or reduction of the spread of asbestos).
- 4) I accept that BFS was in breach of the duties on it as a dutyholder under regulation 4(6)-(10), because when it learned of the GTA it did not review the existing assessment of the presence of asbestos and manage the risk of exposure to asbestos in line with a suitable reviewed assessment.
- 5) I accept that BFS was also in breach of the duties on it as an employer under regulations 5, 6, 7 and 11. I do not accept that there was a breach of regulation 16, as there is no evidence that asbestos was spread outside the Site. I express no view on breach of regulation 10.

- 6) However, for a reason identified succinctly by Mr Hanham, I do not accept the use that the Welsh Government seeks to make of the general provisions in clauses 3(f) and 3(k) of the April Licence and clauses 3.1.6 and 3.1.11 of the July Licence. It is well established that, when considering breach of statutory duty, one must identify the nature of the harm against which the duties are intended to protect and the scope of those persons who are entitled to bring a claim for breach. The 2012 Regulations are health and safety legislation. The statutory duties they impose are owed to employees and to all others who might be exposed to asbestos by the work; they have nothing to do with loss suffered by property owners in connection with remediation works. It is true that the obligation relied on by the Welsh Government is a contractual obligation to comply with the law; the claim is not directly brought for breach of statutory duty. But I do not consider that that the contractual provisions have the effect of turning the statutory duties into the equivalent of duties actionable by the Welsh Government; for that, much more explicit provision would be needed. The relationship between unlawfulness constituted by breach of the 2012 Regulations and loss to the Welsh Government is contingent; it is the matters complained of (failure to inform etc), not the fact of unlawfulness under the 2012 Regulations, that has occasioned loss to the Welsh Government.

178. In the light of my earlier findings and decisions, I do not think it necessary to expand on these summary reasons any further or to set out and analyse in detail the provisions of the 2012 Regulations.

### **Summary on Liability**

179. The main points from the foregoing discussion are the following:

- 1) Pullman was in breach of clause 2(10) of the Lease—both the obligation to remove the buildings and the obligation to leave the Site in good and substantial repair and condition—by reason of (a) its failure to remove the concrete slabs, including the shuttering asbestos and the ACM adhesive, and (b) its failure to remove the GTA.
- 2) BFS was in breach of the April Licence by reason of (a) its failure to remove the concrete slabs, including the shuttering asbestos and the ACM adhesive, and (b) its failure to remove the GTA.
- 3) BFS's failure to inform the Welsh Government of the GTA was in breach of an implied obligation in the April Licence.
- 4) By reason of its failure to inform Walsgrave/Zenith of the GTA, BFS was in breach of its obligation under both the April Licence and the July Licence to use its best endeavours to prevent Walsgrave/Zenith from disturbing the GTA and distributing it over the Site; and it thereby stands in the same case as if it had itself disturbed and distributed the GTA.

## Quantum

180. The amount actually expended by the Welsh Government on remedial works has not been challenged and is established on the evidence. The questions that arise for consideration are the following:
- 1) What is the measure of damages payable by Pullman for breach of its covenant under the Lease?
  - 2) Is the amount expended recoverable from BFS under the indemnity provisions in the April Licence and the July Licence?
  - 3) If the amount expended is not recoverable under the indemnity provisions, has the Welsh Government failed to mitigate its losses?

### *Damages under the Lease*

181. Strictly speaking, the measure of damages payable by Pullman for breach of the covenant in clause 2(10) of the Lease is such sum as would put the premises into the state in which Pullman was bound to leave them at the determination of the Lease; though the amount of such damages is, by reason of section 18(1) of the Landlord and Tenant Act 1927, capped at the diminution in value of the Welsh Government's reversion. In practice, that means in most cases that the diminution in value is the effective measure of damages. See *McGregor on Damages*, 20<sup>th</sup> edition, at paras 28-055ff.
182. The parties sensibly took the view that it was unnecessary, in the circumstances of this case, to call the valuation experts to give evidence at the trial and that any issues requiring determination in that regard could be postponed for further consideration if required. I am content with that course and need not address this matter further at this stage.

### *Indemnity under the Licence*

183. The question is whether the Welsh Government is entitled to an indemnity from BFS or is limited to a claim for damages. In the former case, it is said, the Welsh Government would be entitled to recover its expenditure as a debt, without regard to questions of mitigation of loss; whereas in the latter case it would be open to BFS to limit its liability by establishing that the Welsh Government had failed to take reasonable steps to mitigate its loss.
184. The provisions relied on by the Welsh Government are clause 3(n) of the April Licence and clause 3.1.14 of the July Licence; the provisions are materially identical, and for convenience I set out the text of the former provision again here:

“[The Licensee agrees and undertakes] to indemnify the Licensor and keep the Licensor indemnified against all losses, claims, demands, actions, proceedings, damages, costs, expenses or other liability in any way arising from

- (i) this licence;
- (ii) any breach of the Licensee's undertakings contained in clause 3;
- (iii) the exercise of any rights given in clause 2; and/or
- (iv) the Permitted Use."

185. Mr Emyr Jones relied on the decision of the Court of Appeal in *Royscot Commercial Leasing Ltd v Ismail* (1993, unreported). The plaintiff, a finance company, had leased equipment to a company of which the defendant was a director. The leasing agreement provided that, in the event of termination of the agreement, the company would pay to the plaintiff all arrears of rent and a sum equal to the total of the rentals which would fall due to the end of the term (with a discount for acceleration). The defendant had provided an indemnity to the plaintiff in respect of the leasing agreement; by the indemnity he "agree[d] upon written demand to indemnify you against all loss damage costs and expenses you may sustain [and] agree[d] that the amount of your loss for the purpose of this Guarantee and Indemnity whether or not the Agreement shall have been terminated by any party thereto shall be the amount of the Lessee's liability under the Agreement plus all expenses you may incur in the exercise preservation or enforcement of your rights under the Agreement or in connection with any act done in or proceedings taken for the purpose of obtaining the return or possession of the goods from any person whatsoever". In the county court it was held that the plaintiff had a duty to mitigate its losses. Hirst LJ, with whose judgment Kennedy and Glidewell LJ agreed, held that the judge in the county court was wrong: the contract of indemnity was for the recovery of a debt, not damages, and the principles of mitigation of damage did not apply to claims in debt. Hirst LJ said:

"Mr McGuire, on behalf of the plaintiffs, first approached the case on the issue of principle, without recourse to the actual terms of the indemnity or of the lease agreement. He submitted that a claim under a contract of indemnity, such as this, is not a claim in damages at all, but is a claim in debt for a specified sum due on the happening of an event which has occurred. Accordingly, it should not be open to a person providing an indemnity to challenge his obligation to pay under the contract of indemnity by reference to principles relating to the assessment of damages for breach of contract which have no application to debts. Consequently, he submitted that the learned judge was wrong in principle in his approach as set out in the paragraph of his judgment quoted above.

In my judgment this submission is correct as a matter of law though, for reasons which appear later, I do not think it carries the plaintiff home on the facts of the present case."

186. *Royscot Commercial Leasing Ltd v Ismail* was followed by Warren J in *The Codemasters Software Company Ltd v Automobile Club de l'Ouest* [2009] EWHC 3194 (Ch), (unreported), where he held that the defendant, who had given an

indemnity, had no arguable defence on grounds of mitigation. However, with express reference to an authority relied on by Mr Hanham (see para 189 below), he observed at [33]: “The critical question, it seems to me, in any given case is to ascertain the extent of the defendant's indemnity.”

187. *Royscot Commercial Leasing Ltd v Ismail* was again followed by the High Court in *ABN Amro Commercial Finance Plc v McGinn and others* [2014] EWHC 1674 (Comm), [2014] 2 Lloyd's Rep 333 (Flaux J). The claimant had purchased the debts of an insolvent company, and the directors had given indemnities to the claimant. I need not set out the contractual terms. Having disposed of several defences raised by the defendants, Flaux continued:

“57. The suggestion that the claimant has failed to mitigate its loss or caused its own loss is equally misconceived. Under the Agreement the claimant had purchased and thus owned the entire debt and clause 12(1) made it clear that it was in the claimant's discretion whether and how to enforce any part of the overall debt. In those circumstances, it cannot be said that the claimant was in breach of the Agreement in failing to collect particular debts. Equally, failure to collect debts does not give rise to a defence of failure to mitigate under a contract of indemnity, as Mr Gunaratna recognised: see the decision of the Court of Appeal in *Royscot Commercial Leasing Ltd v Ismail* (29 April 1993) and *Codemasters Software v Automobile Club de L'Ouest* [2009] EWHC 3194 (Ch); [2010] FSR 13 per Warren J at [32]:

‘The law, so far as I am concerned, is therefore that questions of mitigation do not arise under contracts of indemnity so as to give the indemnifier a defence to any part of a claim for which he would otherwise be liable under his indemnity. The line of authority considered is concerned with contractual indemnities. This should not be confused with a case where a claimant seeks to recover, as damages for breach of contract or in tort, his liability to a third party (whether as the result of a case taken to trial and judgment or as a result of a reasonable settlement). I see no reason why, in such a case, a defendant should not say that the liability (whether under the judgment or the settlement) should never have arisen but should have been reduced by reasonable steps in mitigation.’

58. Furthermore, in my judgment, the alternative contention that the claimant had caused its own loss by failing to collect all outstanding debts is not a contention which has any real prospect of success. The contention is entirely circular. Since it was in the complete discretion of the claimant whether and how it collected the outstanding debt, and the contention that by not collecting the debt it caused its own loss is no more than a contention of failure to mitigate by another name. I agree

with the view expressed by Warren J at [37] of *Codemasters* (albeit that he did not decide the point) that such a contention is inconsistent with the decision of the Court of Appeal in *Royscot*, where Hirst LJ, giving the main judgment, accepted that as a matter of law, a party providing an indemnity cannot challenge his obligation to pay under the contract of indemnity which is a claim in debt, by reference to principles relating to the assessment of damages for breach of contract which have no application to debts.”

188. The only other judicial reference to *Royscot Commercial Leasing Ltd v Ismail* of which I am aware is in the judgment of Bryan J in *AXA SA v Genworth Financial International Holdings Inc* [2019] EWHC 3376 (Comm). Having set out the passage that I have quoted from the judgment of Hirst LJ, Bryan J commented at [157] that the issues in the case did not require consideration of the relevance of mitigation, but he continued:

“I only mention the point because, for the avoidance of doubt, I consider that the weight of authority, and the more orthodox view, is that a claim under a contract of indemnity is a claim in unliquidated damages - see the decision of the House of Lords in *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti)* [1991] 2 AC 1, where Lord Goff held at 35G that ‘I accept that, at common law, a contract of indemnity gives rise to an action for unliquidated damages, arising from the failure of the indemnifier to prevent the indemnified person from suffering damage, for example, by having to pay a third party.’”

189. For BFS, Mr Hanham relied on *Total Transport Corporation v Arcadia Petroleum Ltd (The “Eurus”)* [1996] 2 Lloyd’s Rep 408 (Rix J), [1998] 1 Lloyd’s Rep 351, [1998] C.L.C. 90 (Court of Appeal), in support of the submission that the provisions of the Licences in the present case did not entitle the Welsh Government to avoid the rules of causation, remoteness and mitigation applicable to claims for damages for breach of contract.
190. *The “Eurus”* concerned a charter-party. The charterers claimed to recover certain expenses from the owners either as damages for breach of contract or by way of an indemnity pursuant to a clause in the charter, which provided: “Owners shall be responsible for any time, costs, delays, or loss suffered by Charterers due to failure to comply fully with Charterers’ voyage instructions provided such instructions are in accordance with the Charter Party and custom of trade.” At first instance, Rix J held that the clause was not an indemnity: there was no express indemnity; the words “be responsible for” did not imply an indemnity, but simply meant “be answerable for”; and an indemnity could not be implied. Rix J went on to consider the position if his primary conclusion were wrong. He concluded that there was no distinction between the operation of the principles of causation and remoteness in the case of indemnities on the one hand and damages for breach of contract on the other. At 422 he observed that both a claim for an indemnity and a claim in damages for breach of contract require an unbroken chain of causation. At 423 he observed that recovery was

restricted by certain limiting devices, in particular the concepts of “proximate or effective cause” and of “contemplation of the parties”. At 424 he said:

“Just as in the area of damages for breach of contract the law has engrafted limitations on the basic principle of indemnity, so in the context of contractual indemnities the law has been concerned to examine critically the basic notion that the indemnifier is liable for all loss consequent on the stipulated condition, and this is so even where the indemnity clause expressly refers to ‘all consequences’. The basic tool is one of construction, and this inevitably involves reference to the reasonable contemplation of the parties. Thus, in the absence of express language, an indemnity will not cover loss caused or contributed to by the negligence of the party who invokes the indemnity: *The Fiona* [1994] 2 Lloyd’s Rep. 506. Nor will an (implied) employment and indemnity clause cover matters which are an ordinary incident or expense of a voyage and the risk of which rests on the owners, even though they are consequent upon complying with the charterers’ orders: *The Aquacharm* [1980] 2 Lloyd’s Rep. 237 at pp. 244-245. Causation is similarly used, as in the case of damages, to limit the scope of such indemnities, and here too questions of construction cannot be avoided.”

The conclusions summarised by Rix J at 432 included the following:

“First, I have already stated that in my view cl. 36 is not an indemnity clause. If, however, I am wrong about that and it is an indemnity clause, it is nevertheless one which tracks a contractual obligation, so that the same failure which triggers an indemnity would also constitute a breach of contract. In such circumstances one would expect that there should be no difference between the test of causation in the one case, indemnity, and the other, breach of contract. Nor, in my view, should one contemplate a difference in overall responsibility under the clause. It would be odd in such circumstances if owners were legally liable to indemnify a loss which was not recoverable for breach of contract, and vice versa.

Secondly, even assuming that language such as ‘any loss’ etc. has the same effect as ‘all consequences’, it is not in fact ‘all’ consequences that are the subject matter of an indemnity. The indemnity is curtailed by a process of construction. It is only consequences that are proximately caused that are covered. The indemnity, absent express language, will not cover consequences caused or contributed to by the negligence of the party in whose favour the indemnity is given.

Thirdly, I see force in the argument that, as a matter of construction, a fortiori under a clause where the indemnity is triggered by a breach of contract, the indemnity is subject to the

same rules of remoteness as are damages, including the rules under *Hadley v. Baxendale*. Thus ‘all consequences’ would mean ‘all consequences within the reasonable contemplation of the parties’. If the law is prepared to select some consequences as relevant and others not, and in contract to do so in accordance with the reasonable contemplation of the parties, then absent clear language to the contrary I do not see why the parties should not be viewed as intending to cover only consequences which are reasonably foreseeable and not consequences which are wholly unforeseeable. ... In my view, ... at any rate where the indemnity is triggered by a breach of contract, the indemnity as a matter of construction, absent contrary provision of which ‘all consequences’ is not to my mind an example, only covers foreseeable consequences caused by that trigger. I need not decide whether the same is true of an indemnity clause where the indemnity’s trigger is not a breach of contract.

Fourthly, whether or not that point of construction is correct, in my judgment it is always relevant to the issue of causation that the subject matter of a claim for an indemnity is either wholly or in part foreseeable. That is so when the issue of causation arises in a claim for breach of contract (*Monarch*), and I do not see why it should not be so when the issue of causation arises in a claim for an indemnity.

Fifthly, the relevance of the unforeseeability of the subject matter of a claim for an indemnity remains even though the reason for the unforeseeable loss predates what is relied on as the trigger of the indemnity.”

191. In the Court of Appeal, Staughton LJ, with whose judgment Auld LJ agreed (Sir John Balcombe delivered a short concurring judgment), considered at 96 that the issue before the Court was one of contractual interpretation, namely whether the clause was an “indemnity” in the sense of providing for recovery of “all loss suffered which is attributable to a specified cause, whether or not it was in the reasonable contemplation of the parties”. (It was common ground that the clause imported a test of causation: see 98.) At 101 he approved the following statement of the law in *Halsbury’s Laws of England* (4<sup>th</sup> edition), vol. 20, para 345:

“The extent of a person’s liability under an indemnity depends on the nature and terms of the contract, and each case must be governed, in general, by its own facts and circumstances.”

Staughton LJ went on to hold that the clause in the charter did not, on its true construction, permit recovery of losses that were too remote to be recoverable as damages.

192. Staughton LJ also commented briefly on issues of causation; his remarks in that regard were not necessary to the determination of the appeal. At 103 he said:



“It is common to refer to a chain of causation between the wrongful act and the plaintiff’s loss, and to an intervening act which may or may not break the chain. If that is always the appropriate metaphor, of course it must follow that an event occurring before the wrongful act cannot break the chain. It is as simple as that. But I for my part do not accept that the chain metaphor is an appropriate one for causation in contract. Instead one has to ask whether in common sense the wrongful act was a cause of the plaintiff’s loss, or whether something else was.”

193. Many different issues potentially arise from the cases referred to; perhaps the judgment of Rix J in *The “Eurus”* is of particular interest for the range and learning of its discussion. However, I do not need to attempt to negotiate all of the deep waters (cf. Rix J at 417). I shall set out my views as shortly as possible.
194. First, the words “indemnity” and “indemnify” are used in different ways. As Staughton LJ observed in *The “Eurus”* at 96, they may refer to a liability to pay damages (for convenience, I shall call this a damages indemnity) or to a liability to make good all the loss attributable to a specified cause, whether or not in was in the reasonable contemplation of the parties (for convenience, I shall call this a true indemnity). Even within the class of the true indemnity, there may be differences: for example, the kind of indemnity that, though a primary obligation, is analogous to a guarantee of payment of a debt by a third party (the kind that fell for consideration in *Royscot Commercial Leasing Ltd v Ismail*) is more obviously in the nature of a debt than is the kind of indemnity that obliges a party to make good the unliquidated losses (such as costs, expenses and outlay) of another but disapples the remoteness rules applicable to damages.
195. Second, what ultimately matters is the correct construction of the contractual provision in question: see *The “Eurus”*, per Staughton LJ at 101.
196. Third, in the case of a damages indemnity, of course, the normal contractual rules of mitigation apply. However, in the case of a true indemnity, which is in essence an obligation to pay x in event y, those rules of mitigation do not apply. This is not, however, some arbitrary rule applied on the basis of categorisation; it is because the true interpretation of the contract renders the rules of mitigation inapplicable to the obligation.
197. Fourth, the significance of causation will also be a matter of construction. The kind of indemnity in *Royscot Commercial Leasing Ltd v Ismail* leaves only the narrowest room for causation arguments: the third party owed a debt; the indemnifier has a liability to pay if the third party does not; the only question concerns causation, namely the satisfaction of the condition giving rise to the indemnifier’s liability. Whether or not that liability is to be analysed at a high level as a liability in damages (cf. *AXA SA v Genworth Financial International Holdings Inc*, above), at a practical level it is considered to be a debt (as in *Royscot Commercial Leasing Ltd v Ismail*). Where the indemnity extends, for example, to costs and expenses incurred, issues of causation, and indeed of quantification, are likely to be more factually complex, but there does not seem to me to be a relevant difference of principle.

198. Fifth, in my judgment the indemnity provisions in the Licences have the effect of excluding the contractual remoteness rules, because they cover not only the consequences of breaches of the Licences but also costs and expenses attributable to conduct that is consistent with the lawful exercise of the Licences. However, even if I were wrong about this, it would make no difference to my conclusion on the facts of the case. Mr Hanham submitted that, although the disturbance of the GTA might have been reasonably foreseeable given the extent of BFS's knowledge, the crushing of the material and its distribution across the Site were not a foreseeable consequence of the disturbance. I reject that submission. It seems to me that it was plainly foreseeable that, if BFS told no one about the GTA before Zenith/Walsgrave carried out the Phase 3 Works, the GTA would end up being spread around and the Site would be contaminated. It may be that the *extent* of the damage was not reasonably foreseeable; the *type* of the damage, however, was entirely foreseeable.
199. Sixth, the obligation to indemnify against losses and liabilities "in any way arising from" the specified matters imports a requirement of causation into the Licences. In the present case, the Welsh Government claims payment of moneys that it spent on remediation works. The question is whether that expenditure arose from the matters complained of against BFS. Causation is to be considered in a common-sense way: see *The "Eurus"*, per Staughton LJ at 103, and the still pertinent observations of Rix J at first instance in that case at 424.
200. Seventh, as the remoteness rules do not apply, and this is a true indemnity rather than a damages indemnity, mitigation of damage does not itself seem to me to be a relevant qualification to liability under the indemnity. However, in my view this makes only an analytical but not a practical difference on the facts of the particular case. I see nothing in the wording of the relevant clauses that would justify construing them to mean that the Welsh Government could recover costs that were unreasonably incurred, just because the occasion for incurring them arose out of BFS's conduct. In such circumstances (if they existed), then applying the approach to causation in *The "Eurus"* I should consider that the costs had not been caused by BFS and did not fall within the scope of the indemnity provisions.
201. Accordingly, I turn to the issue of causation. This involves two aspects: first, events occurring (or not occurring) *before* the disturbance and spread of the GTA; second, the Welsh Government's response to the disturbance and spread of the GTA.

Causation: prior events

202. In reliance on Staughton LJ's remarks on causation at 103 in *The "Eurus"* (para 192 above), Mr Hanham submitted that the true cause in law of the contamination of the Site was not the disturbance and distribution of the GTA by Walsgrave/Zenith or any act or omission of BFS that led to that disturbance and distribution, but the prior failure of the Welsh Government, as a dutyholder under the 2012 Regulations, to comply with its duty under regulation 4(6). The relevant provisions are as follows:

"(3) In order to manage the risk from asbestos in non-domestic premises, the dutyholder must ensure that a suitable and sufficient assessment is carried out as to whether asbestos is or is liable to be present in the premises.

- (4) In making the assessment—
  - (a) such steps as are reasonable in the circumstances must be taken; and
  - (b) the condition of any asbestos which is, or has been assumed to be, present in the premises must be considered.
- ...
- (6) The dutyholder must ensure that the assessment is reviewed without delay if—
  - (a) there is reason to suspect that the assessment is no longer valid; or
  - (b) there has been a significant change in the premises to which the assessment relates.”

203. This submission seems to me, with respect, to be rather desperate. The Welsh Government was told that partially buried asbestos had been discovered, but BFS and its representatives never told them what it was or where it was and, in circumstances that I have already mentioned at some length, caused the Welsh Government to believe that the partially buried asbestos was nothing that had not already been known of. The cause of the contamination was nothing done or not done by the Welsh Government; it was the acts and omissions of BFS and its representatives, as set out above.

#### Causation: the scope of remediation works

204. BFS contends that the cost of the remediation works was in large measure not incurred because of the matters complained of by the Welsh Government but because the Welsh Government implemented an inappropriate and unnecessary remediation strategy. The contention is advanced principally as an allegation of failure to mitigate loss; however, as I have mentioned, it can also be considered in terms of the causation test contained in the indemnity provisions (cf. para 98 of Mr Hanham’s written submission); on the facts of the case I see no practical difference between the two ways of looking at the matter.
205. One point can be cleared out of the way at the outset. Mr Hanham submitted (written submissions, para 94.1) that the Welsh Government wrongly pursued a strategy that it had committed to UWTSD to pursue, even though it had an unconditional agreement with UWTSD in respect of the Site. As I have explained, it is materially incorrect to say that its agreement with UWTSD was unconditional. Therefore the remediation strategy can be considered on its own terms, without reference to commitments to UWTSD.
206. The facts relating to remediation have been set out in paragraphs 95 to 108 above.
207. Expert opinion evidence on the nature and cost of necessary remediation work was given by Ms Cleverley for Pullman/BFS and by Ms Jo Strange, a Chartered Civil

Engineer and Chartered Environmentalist, of Card Geotechnics Limited for the Welsh Government. Their Joint Statement dated 15 January 2020 discloses no areas of disagreement between them. I have had regard to the contents of the expert reports as well as the entire text of the joint statement; here, however, I select in summary form some points appearing in the joint statement.

- The concentrations and distribution of asbestos across the Site indicate a potential environmental (that is, human health) risk, from the presence of ACMs, associated with development of the Site.
  - The Environment Agency’s guidance applicable in 2015 indicated that only the top 100mm of soil influenced the dust generation pathway, so that only free asbestos fibres in the top 100mm would be of concern. Even significant concentrations of hazardous fibres would be acceptable under playing fields, parks and amenity areas, provided (a) that they were undisturbed and (b) that well established and properly maintained vegetation could provide adequate protection from disturbance.
  - The area set aside for public open space would in any event (that is, regardless of the presence of asbestos) require a capping layer or growth medium.
  - In selecting the optimum remediation strategy in terms of sustainability, the appropriate approach is that set out in “Contaminated Land: Applications in Real Environments” (“CL:AIRE”) (2010). Sustainable remediation is a balance of three factors—economic/political, social and environmental—over the life-time of a project. Selection of the optimum strategy “should be based on a robust options appraisal, taking account of technical, financial, commercial, political and sustainability elements”, and the balance of those factors may vary with time.
  - “It was less acceptable to stakeholders back in 2015 to have left asbestos in situ than it is now (2019), considering we (that is, the technical community, having benefited from extensive technical research and developments in asbestos risk management undertaken by the Society of Brownfield Risk Assessment in 2015) are now overall more informed and experienced in assessing risks from asbestos which is commonly present at brownfield sites.”
208. The experts identified six possible remediation strategies, with likely approximate costings, and made agreed comments on each strategy.
- 1) Option 1: £50,000 to £60,000: This was a *de minimis* approach, leaving asbestos on site unless it were excavated in the course of development. This strategy would have been “feasible in respect of breaking the pathway between asbestos in situ and human receptors”, and it would have been “the most sustainable and cost-effective approach”. However, it would have been “unlikely to be acceptable perceptually, politically, commercially and historically where there are more factors than simple technical issues being considered” and “may have resulted in a negative perception of the land by a potential purchaser”. Importantly: “This option would typically only be acceptable for a development on land owned by the developer where current and future risks can be understood and managed during construction and long

term operation, with recognition of potential future legacy liabilities.” In their oral evidence, the experts confirmed that they had discounted Option 1 at the outset, although Ms Cleverley sought at trial to revive it in heavily modified form.

- 2) Option 2: £1.1m to £1.2m: This was the strategy adopted by the Welsh Government: excavation of all impacted materials and disposal off-site, without picking or removing ACMs, with import of replacement unimpacted fill. It was the option that would be “most attractive to a risk-averse landowner with potential purchaser with high risk perception associated with a sensitive proposed land use.” It was the option that best minimised the risk from asbestos, “therefore best addressing perceptual, political and commercial risks”, and it was the option that rendered the site most attractive for a potential purchaser or developer. However, it was the least sustainable and “the last resort in terms of waste management options according to what is best for the environment”. It was also the most expensive option.
- 3) Option 3: £725,000 to £810,000: This involved excavation of all impacted material and then a pick-and-sort exercise, with the waste disposed of according to its classification. Imported fill would replace waste materials. This strategy reflected the advice of Terra Firma Wales Limited, attached as Annex A to the Apex Report, that “if the ACM can be effectively isolated from the soil, there is scope to generate some non-hazardous soils.” The joint statement commented: “It was considered that the risks associated with Option 3 would be the same as Option 2 as all asbestos impacted material is removed off site. However, the disposal costs would be reduced due to the sorting of ACMs and more extensive waste segregation.”
- 4) Option 4: £610,000 to £700,000: This was essentially similar to Option 3, save that landfill tax would be avoided by the disposal of sorted material to a waste transfer treatment facility and a soil treatment facility. The joint statement commented: “Risks for Option 4 are as Option 3, but the feasibility is reliant on there being a waste-receiving facility with appropriate permit, which is understood to currently be feasible in South Wales. Therefore, this is potentially a lesser cost option than Options 2 and 3 for the same risk profile.”
- 5) Option 5: £550,000 to £625,000: This was: “Pick and sort impacted materials by licensed contractor to remove ACMs, retain hard core / gravel materials for re-use on site, dispose of fines containing residual asbestos fibres.” The experts considered that this option would “address” operational risks and “reduce” the construction and maintenance risk. “The acceptability of [the latter] risk would depend on the landowner, developer and proposed purchaser/occupier (sic) perception of risk. However, based on 2019 industry knowledge and experience, such risks are typical of those expected on any brownfield field site, especially where a construction platform has been imported.” Option 5 would also be a sustainable approach.
- 6) Option 6: £425,000 to £480,000: This was: “Pick and sort impacted materials, using a licensed contractor. Retain hard core and soils with residual asbestos fibres where possible under development. (Capping layer / growth medium over public open space area.) Removal of impacted materials around service

runs (assume road construction area).” It was noted that this was the solution that Ramboll recommended in 2018. The experts considered that it “would address the operational risks and, by replacing the Made Ground in the highway corridor, further reduce the construction and maintenance risks. There would still be a small residual risk due to residual but low level asbestos fibres in the sorted soil/hardcore matrix ... [but] [t]his residual risk is likely to be of a similar level as expected from a brownfield development site in a historical industrial setting and/or with a construction platform.” “This option is in greatest compliance with the waste hierarchy, [and] the most sustainable and cost effective.”

209. The conclusion of the joint statement was:

“Options 5 and 6 are the current most acceptable remediation methodologies and most compliant with the waste hierarchy. The selection of the preferred option is likely to be a function of the political and future commercial risks and risk perception and appetite of the purchaser.”

210. Despite a complete absence of disagreement in the joint statement, both experts on remediation were called to give evidence at trial. Indeed, at the commencement of the trial Ms Cleverley produced a supplemental report; insofar as the report related to remediation, I gave permission to BFS to rely on it.

211. Ms Cleverley’s supplemental report offered some support for a modified form of Option 1. It noted that the bill of quantities in Highways Finishing Contract 6 provided for the importation to the Site of 5,524m<sup>3</sup> of fill, which was required to be placed across the entire Site to depths ranging from 0.25m to 1.76m. Ms Cleverley concluded:

“The importation of this material would have effectively ‘capped’ the asbestos. According to Environment Agency guidance, ‘only the top 100mm of soil influences the dust generation pathway’, i.e. the pathway between asbestos in soil and human receptors. By capping the site with imported fill (assuming this fill did not contain any contaminants), the pathway would have been broken. A picking exercise would likely still have been needed to prevent vehicle movements from breaking up the asbestos fragments that were visible at surface.”

212. In cross-examination, Ms Cleverley accepted that most of the quantity of fill mentioned in her supplemental report would have been deposited in areas off the Site; however, she maintained the view that the deposits on the Site itself would have provided an adequate capping. Ms Cleverley accepted that the Site remained undeveloped and that the nature of any construction works—involving, potentially, both erection of structures and surfaces over the ground and excavation of the ground—would depend on the intentions of developers and the terms of the grant of any planning permissions. Of Option 1, she said:

“It would have been practical in terms of remediating the site. In terms of doing an options appraisal—if you were just considering a remediation options appraisal (which is what myself and Jo Strange did) to remedy the situation—that would have been tenable. In terms of the proposed use later on it might have been tenable. It depends exactly what was intended to be done and what foundations were required for the structure more than anything—the building for the university campus. I haven’t looked into those options; I don’t know if anybody has at this stage. Whether they were going to be raft foundations or pile foundations: yes, that would affect essentially what was going to happen.”

She said that, though the foundations would have been likely to go below the level of any cap, the building itself would break the pathway. Her conclusion was that any of the six options would be “tenable”, but that the best solution would be a combination of Option 1 and Option 5 (transcript, day 6, page 86) or maybe of Option 1 and Option 6 (transcript, day 6, page 92). The cost of such a combination would be somewhere between £100,000 and the figure for Option 5 or Option 6; she had not undertaken a costing exercise.

213. When Ms Strange was cross-examined, she said that the research into asbestos disposal carried out in 2015 meant that in 2016, when the remediation decisions were taken, the approach to risk was closer to that in 2019 than to that in 2015 (that is, that decisions on remediation had become less risk-averse by 2016). It was for that reason that the experts had favoured Options 5 and 6. When asked about the importation of fill, Ms Strange said that capping of 0.5m would be sufficient to break the pathway: “Providing nothing else happens on the site to disturb it.” If the capping were less than 0.5m, “there was still the potential for burrowing animals or other processes—natural processes—to actually bring asbestos material into the upper layer where it could then be disturbed and be broken down to create asbestos dust.”
214. In my judgment, having regard to the evidence as a whole, the remediation costs incurred by the Welsh Government did arise from (that is, were caused by) the default of BFS; they are not to be attributed to unreasonable conduct on the part of the Welsh Government.
215. First, although the conclusion on this issue must be informed by the evidence, including the expert evidence, it is ultimately a matter for the judgment of the court.
216. Second, there is no evidence that could justify the conclusion that the control measures implemented pending final remediation (cf. para 95 above) were unreasonable; indeed, Ms Cleverley accepted that they were reasonable and appropriate. Similarly, the fees for project management are not challenged as being unreasonable. The issue concerns the final remediation strategy.
217. Third, in my judgment the experts were correct in their view that there was no single “correct” response to the contamination and that the decision as to remedial strategy would properly include a range of factors—social, political, environmental—in addition to purely commercial considerations. The Welsh Government, like its predecessor the Welsh Development Agency, was not in the position of a purely

commercial landowner. As Mr Emyr Jones observed, it was a national government, holding land for the purpose of making that land available as part of a scheme of redevelopment and regeneration of an important area of Swansea. The land was also adjacent to a residential area. None of these matters gave the Welsh Government carte blanche to act unreasonably at others' expense. However, I regard them as relevant matters to be taken into account when considering the Welsh Government's response to the contamination of the Site and informing a view as to the range of reasonable responses.

218. Fourth, the Welsh Government sought professional and technical advice and made judgements consistent with that advice (see the narrative above, which sets out the relevant considerations). The decision to adopt Option 2 was reasonable in the light of the advice received, and it has not been established that the advice was negligent. The Welsh Government then ran a competitive tender process on the basis of the advice received.
219. Fifth, the matters raised by BFS to support the contention that the Welsh Government behaved unreasonably are unpersuasive. The position set out in Ms Cleverley's supplemental report could, in my view, have been advanced earlier (I do not accept that it resulted from any materially new information); the fact that it was not tends to undermine any idea that the Welsh Government was unreasonable in not acting in accordance with it. Any strategy that relied on ground levels and capping has the disadvantage that it depends on the planning permissions that might be granted in respect of the land and on the use to which the land is ultimately put. The material brought onto the Site by Alun Griffiths had not been imported for use as a capping layer, and as Ms Strange observed there would have been some mixing of it with the demolition rubble. Capping on top of the resultant ground levels would have raised them too high; it would therefore have been necessary to remove a significant quantity of material in any event. As for Ms Strange's acceptance that the state of professional knowledge in 2016 was closer to that in 2019 than to that in 2015, it may be observed: first, that there was no evidence that it was the same in 2016 as in 2019; second, that public perception of risk lagged behind professional awareness, which is not an irrelevant factor for the Welsh Government's decision-making; third, that the best evidence of the actual state of professional awareness and opinion in 2016 is to be found in the advice actually given to the Welsh Government in 2016; fourth, that, apart from what I consider to be a misguided criticism of his remarks regarding UWTSD's plans for the Site, Mr Kaminaris was not subjected to challenge on the reasonableness of his approach to remediation.
220. I have considered this matter on the basis of the contractual requirement of causation in the relevant indemnity provisions, rather than in terms of the requirement to mitigate one's losses (cf. *Chitty on Contracts*, 33<sup>rd</sup> edition, paras 26-087 to 26-089; cf. also *McGregor on Damages*, 20<sup>th</sup> edition, para 9-004: "The first and most important rule is that the claimant must take all reasonable steps to mitigate his or her loss consequent upon the defendant's wrong and cannot recover damages for any such loss which he or she failed, through unreasonable action or inaction, to avoid"). Although the two approaches are analytically distinct, in a case such as the present, when the issue is whether the innocent party acted reasonably in incurring expenditure in response to the breach of contract, they are liable to be much the same in practice. In my view, they would give the same result in the present case.



## **Conclusion**

221. BFS is liable to the Welsh Government for the full costs of remediation of the Site. Pullman is liable for damages for breach of the covenant in clause 2(10) of the Lease; the amount of those damages will be determined hereafter, if it cannot be agreed.