Neutral Citation Number: [2023] EWHC 672 (KB)

Case No: QB-2016-003684

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 March 2023

Before:
GERAINT WEBB KC
(sitting as a deputy High Court Judge)

- -

Between:

(1) REGINALD DEAN HYDE
(2) NICHOLAS STANDEVEN
(as executors of the Estate of Mr Stephen Hyde, deceased)
(3) ITR GLOBAL LIMITED

Claimants

- and –

(1) SIMPLE SKIPS LIMITED
(2) JOHN CORNEY
(3) KEITH STILES

Defendants

- -

Paul Mitchell KC (instructed by **Navigo Law** under the licensed access scheme) for the **Claimants**
Charles Apthorp (instructed by **Robert Simmons**) for the **Second Defendant**

Hearing dates: 13 to 16 February 2023

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APPROVED JUDGMENT

This judgment was handed down remotely on 24 March 2023 by circulation to parties and their representatives by e-mail and release to the National Archives

Geraint Webb KC sitting as a deputy High Court Judge:

The Parties

1. Stephen Hyde was the owner of Oakfield Farm, Wells Lane, Ascot, Berkshire ("**the site**") from 2008 until his death in May 2014. The First and Second Claimants, Reginald Hyde and Nicholas Standeven, are the executors of the will of Stephen Hyde. The Third Claimant, ITR Global Limited, had a tenancy of part of the site which it licensed to the Defendants in May 2014 for use as a waste disposal site.

2. The First Defendant, Simple Skips Limited, held an environmental permit for waste activities at the site from 6 October 2014 to 2 February 2017 when the permit was revoked by the Environment Agency. The Third Defendant, Keith Stiles, was the sole director and shareholder of Simple Skips. He entered into a business arrangement with the Second Defendant, John Corney, to operate a recycling business at the site.

Background

3. The Claimants brought proceedings against the Defendants for trespass in respect of unlawful deposits of waste on part of the site, unpaid licence fees, damages for clearing the waste and for lost income. Those claims were the subject of a five day trial in October 2017 before Justine Thornton QC (as she then was) sitting as a Deputy Judge of the High Court. By a reserved judgment dated 30 November 2017 [2017] EWHC 3087 (QB) ("**the Judgment**") the Defendants were found to be jointly and severally liable to the Claimants for damages in the sum of £942,620.

4. The total damages in respect of trespass amounted to £605,840. This figure was calculated on the basis of the estimated costs of clearing up the waste which had been unlawful dumped by the Defendants in two areas on the site:

    i) Damages of £241,600 were awarded in respect of trespass to the area described in the Judgment as "the Mound" and which has subsequently been described by the parties as "**Mound 1**".

    ii) Damages of £364,240 were awarded in respect of trespass to the area identified in the Judgment as "Wood Pile B and behind the bays"; the parties have subsequently described Wood Pile B as "**Mound 2**".

5. Following the Judgment the Defendants entered into separate settlement agreements with the Claimants. By a Consent Order in the form of a Tomlin Order, sealed on 13 December 2017 ("**the Consent Order**"), John Corney consented to judgment being entered against him in the sum of £300,000 with all further proceedings stayed, including in respect of the judgment, save for the purpose of carrying into effect the terms of the confidential settlement agreement dated 8 December 2017 ("**the Settlement Agreement**"). Pursuant to clause 6 of the Settlement Agreement John Corney agreed to clear all waste from the area of the site known as Mound 2 and the rear of the bays. Keith Stiles and Simple Skips entered into a separate settlement agreement which included an obligation to clear a quantity of waste from Mound 1.

6. On 17 March 2021 the Claimants issued an application to lift the stay imposed by the Consent Order for the purpose of enforcing the judgment, contending that the Second Defendant had breached the terms of the Settlement Agreement by failing to clear all of the waste from Mound 2. In response, John Corney asserted that he had discharged his obligations under the agreement and alleged that the Claimants are in breach of the agreement for wrongly adding waste to Mound 2 and attempting to require him to clear more waste than he had agreed to clear under the Settlement Agreement.

7. By an Order sealed on 25 October 2021 Mrs Justice Thornton determined that there was a triable issue as to whether the Second Defendant was in breach of the Consent Order and directed that there be a trial of four specific issues. This judgment concerns the trial of those four issues.

The Judgment

8. The factual background to the original claims is set out in detail in the Judgment. The site had a long history of use for waste disposal, going back to about 1997. Stephen Hyde had granted a tenancy of part of the site to a company called Recyle Recycle Ltd, the director of which was a Mr Kaz Ali, who subsequently became a director of the Third Claimant. The Environment Agency granted an environmental permit to Recycle Recycle Ltd to operate the site as a commercial and industrial waste transfer station in June 2010. An enforcement notice was served by the Environment Agency in March 2014 and Mr Ali was prosecuted for unlawful activity on the site. The permit for the site was transferred to Simple Skips Limited on 6 October 2014.

9. For present purposes, the relevant parts of the Judgment relate to the findings made in respect of trespass for unlawful dumping on Mounds 1 and 2.

Damages for trespass in respect of Mound 1

10. Mound 1 was found, at [58], to contain historically dumped waste which was identified in a Planning Inspector's decision of 2010 as several meters high by that date. Two surveys were subsequently carried out by SV Surveying Limited ("**SV**") on 16 April 2015 ("**the 2015 survey**") and 25 July 2016 ("**the 2016 survey**"). The Judge found, at [62], that 4661m^3 of waste was dumped on Mound 1 between the dates of these two surveys.

11. The Claimants' quantification of damages was based on the evidence of Michael Edmund, a factual witness called by the Claimants. Mr Edmund's evidence, summarised at [45], was that the 4661m^3 of waste could be converted to an estimated tonnage, that it would cost £120 per tonne to remove the waste, and that the total costs of removing the waste would be £241,600. That estimate was accepted by the Judge and awarded as damages in respect of the trespass relating to Mound 1.

Damages for trespass in respect of Mound 2

12. The Judge noted, at [40], that photographs showed waste in the area of Mound 2 as at 2014. The Judge found, at [65], that between the 2015 survey and the 2016 survey some 8,363m^3 of waste was deposited on Mound 2.

13. Mr Edmund's evidence, summarised at [45], was that a bulking factor of 25% should be applied to the estimated volume of 8,363m^3 to account for the likely compression of the material *in situ*. Accordingly, his view was that the total volume for removal from site following excavation should be treated as being 10,454m^3. This volume was then converted by Mr Edmund to a tonnage and he estimated the total costs of removing this quantity of waste to be £364,240. That figure was accepted by the Judge and awarded as damages.

The Consent Order

14. The Consent Order of Master Eastman sealed on 13 December 2017 is in the form of a Tomlin Order and provides as follows.

> "UPON the parties hereto, and other parties, having agreed the terms of settlement set out in the Schedule hereto (being the Confidential Settlement Agreement).
>
> IT IS ORDERED BY CONSENT that:
>
> 1. There be judgment for the Claimants against the Second Defendant in the sum of £300,000.
> 2. All further proceedings in this claim, including the judgment at paragraphs l above, be stayed upon the terms set out in the Schedule hereto SAVE for the purpose of carrying such terms into effect and for that purpose, the parties hereto have permission to apply.
>
> SCHEDULE
> CONFIDENTIAL SETTLEMENT AGREEMENT
>
> Dated 8th December 2017
>
> Between
>
> (1) REGINALD DEAN HYDE of …
> (2) NICHOLAS ROBERT CROSSLEY STADEVEN of …
> (3) ITR GLOBAL LIMITED of …
> (hereinafter compendiously referred to as "the Schyde Parties")
>
> and
> (1) JOHN CORNEY of ….
> (2) MRS ELIZABETH CORNEY of …
> (hereinafter referred to individually by their names or compendiously as "the Corney Parties")
>
> IT IS HEREBY AGREED as follows
>
> 1. The Judgment in paragraphs 1 of the Order embodying this agreement ("the Order"), being referred to hereafter as the Judgment shall be stayed, PROVIDED there be strict and complete compliance with all of the terms set out below, by each and every one of the Corney Parties. In the event of any non compliance, of any term, then the stay in paragraph 2 of the Order shall cease to have effect, and the Judgment shall be enforceable.

2. All times, not otherwise specified herein, shall be calculated from the date of issue by the Environment Agency of a Local Enforcement Position ("the Operative Date") in favour of the entity nominated by the Schyde Parties for that purpose enabling them to operate the waste transfer station at Oakfield Farm, Wells Lane, Ascot, Berkshire, SLS 7DY (Title nos BK22131 and BK423386) ("the Site") the subject of case no HQ16X03022 ("the Proceedings")

3. Terms used herein, and not otherwise defined, shall bear the definitions given to them in the Proceedings.

4. All times specified in this Agreement are of the essence.

5. Mr and Mrs Corney, (Mrs Corney being separately legally advised as evidenced by an independent solicitor's certification produced to the Schyde Parties) shall by 8 December 2017 charge [residential property address] in favour of the Schyde Parties, in the sum of £300,000.00 as security for the Judgment.

6. Mr Corney will within 6 months of the Operative Date clear all waste from the area of the Site known as Mound 2 and the rear of the Bays, and correctly and lawfully remove the same from the Site.

7. The Corney Parties may perform their obligations under paragraph 6 above by a duly licensed waste removal sub-contractor, including the Wembley Waste Group Limited.

8. These terms are confidential to the parties to this Agreement, and to their legal advisers."

15. The Settlement Agreement was signed by David John Simmons, solicitor, for John Corney and by Neal Turk Rochfort Solicitors for Mrs Corney, it being noted in the signature block that Mrs Corney was separately legally advised.

16. The corresponding consent order made in respect of the liability of Simple Skips and Keith Stiles ("**the Stiles's Settlement Agreement**") provided for judgment in a specified sum, which sum included an amount identified as being in respect of the costs of the proceedings, a sum in respect of the cost of clearing Mound 1, as well as a sum in respect of licence fees and rent. The obligation relating to Mound 1 at paragraph 6 of that agreement included the following:

> "*Within 6 months of the Operative Date, Simple Skips and Mr Stiles will:*
>
> *6.1 Clear the Compound Area of the Site…; and*
>
> *6.2 Remove 40 bulker lorry loads of waste from the area of the Site known as Mound 1, such removal to be evidence only by a certificate of its removal signed at the time of removal by either*

Reginald Hyde, Dean Hyde or Alfred Hyde on behalf of the Schyde Parties, and not otherwise taken into account".

Events following the Consent Order

17. The Claimants' position is that the Environment Agency required Mound 1 to be cleared before work on Mound 2 could commence. Mr Stiles engaged ME Waste Services Limited ("**ME Waste**"), a business run by Alfred Hyde, to undertake the clearing of Mound 1. The Claimants' say that Mound 1 was cleared before the end of July 2019 and that on 29 July 2019 John Corney was informed that he could start clearing Mound 2.

18. John Corney started work on site on or about 9 October 2019. Initially this work involved sorting waste materials. He says that, subsequently, Covid lockdowns intervened and he was not able to return to site until June 2020. Waste began to be moved off site from Mound 2 in September 2020. He left site on 3 February 2021. By that date he had moved 630 lorry loads of waste from Mound 2, but a substantial volume of waste still remained. He relies on the fact that Mr Edmund's evidence during the first trial was that Mound 2 could be cleared by 630 lorry loads. His position is that the Claimants must have moved more material onto Mound 2 since the trial. He maintains that, having removed 630 lorry loads, he has fulfilled his contractual responsibilities.

19. After John Corney left site, the Claimants contracted with ME Waste to complete the removal of waste from Mound 2 and behind the bays. They say that the remaining waste was removed between 23 March 2021 and 15 November 2021 in a further 545 lorry loads.

<u>The Issues</u>

20. The Order of Thornton J sealed on 25 October 2021, setting out the four issues to be tried, contained the following recitals:

> And Upon the Judge determining that there is a triable issue as to whether the Second Defendant has strictly and completely complied with paragraph 6 of the Schedule to the Consent Order ….
>
> And Upon it being agreed by the Claimants and the Second Defendant that the Second Defendant has removed between 628 and 631 loads of waste from Mound 2 and the rear of the Bays
>
> And Upon it being recorded that it is the Second Defendant's contention that his ability to comply with paragraph 6 of the Schedule to the Consent Order has been hindered by the addition of further waste to Mound 2

21. The four issues to be tried, as varied by the Order of Soole J sealed on 2 December 2022, are as follows:

> (1) Whether the waste to be removed by the Second Defendant, pursuant to Clause 6 of the Schedule to the Consent Order, was that in existence as at the date of the SV Topo Survey (25 July 2016), or the date of the Consent

Order (8 December 2017), or the "Operative Date" as defined in Clause 2 of the Schedule, or some other date.

(2) Whether, when the Second Defendant left the Site (as defined in paragraph 2 of the Schedule to the Consent Order) on about 3 February 2021, he had cleared all waste from the area of the Site known as Mound 2 and the rear of the Bays.

(3) Whether additional waste was moved onto Mound 2 after 25 July 2016 and/ or 13 December 2017 or at a later date.

(4) How is the amount of waste removed by the Second Defendant to be measured? By weight or by volume?

22. Paragraph 2 of the Order of Soole J also provide that: "Any party wishing to add to or further amend the list of issues must make an application supported by evidence." No further application to amend the list of issues has been made.

Issue 1 – Proper Construction of the Settlement Agreement

Whether the waste to be removed by the Second Defendant, pursuant to Clause 6 of the Schedule to the Consent Order, was that in existence as at the date of the SV Topo Survey (25 July 2016), or the date of the Consent Order (8 December 2017), or the "Operative Date" as defined in Clause 2 of the Schedule, or some other date.

The competing contentions

23. Clause 6 of the Settlement Agreement reads "Mr Corney will within 6 months of the Operative Date clear all waste from the area of the Site known as Mound 2 and the rear of the Bays, and correctly and lawfully remove the same from the Site".

24. Although clause 3 of the Settlement Agreement provides that the terms used shall bear the definitions given in the Proceedings, it was common ground that there was no particular definition of "Mound 2" or "the rear of the bays" used in the proceedings. There was no dispute as to the geographical location of those areas.

25. The position advanced on behalf of the Second Defendant is that the words "the area of the Site known as Mound 2 and the rear of the Bays" should be understood as meaning the area shown, and identified as having a "fill volume" of 8,363m^3, on the 2016 survey. It is said that this is what the parties had in contemplation when describing Mr Corney's obligations. The Second Defendant's position is that after Simple Skips left site on 21 July 2016 no waste should have been added to Mound 2 and that he was not obliged to remove any waste that may have been added to Mound 2 since that survey.

26. The Claimant's primary position, as set out in its opening submissions, is that clause 6 required the Second Defendant to clear away all the waste known as Mound 2 and the rear of the Bays which existed on the Operative Date, which it says was 29 July 2019. There was no limit stipulated as to the volume of waste present in the relevant locations. It is also said that, in any event, there is no evidence that the volume of the material was any more or less on the Operative Date than in July 2016.

The legal principles applicable to the construction of the Settlement Agreement

27. The parties were agreed that the Settlement Agreement attached to the Consent Order falls to be construed in accordance with the general principles applicable to the construction of contracts. I was referred by the parties to the judgment of HHJ Pelling QC in ***TAQA Bratani Limited v Rockrose*** [2020] EWHC 58 (Comm) which, at [26], provides a convenient summary of the well-known principles of contractual interpretation following ***Rainy Sky SA v Kookim Bank*** [2011] UKSC 50, [2011] 1 WLR 2900 ***Arnold v Britton*** [2015] UKSC 36, [2015] AC 1619, and ***Wood v Capita Insurance Services Limited*** [2017] UKSC 24. I repeat and adopt that summary here:

> "i) The court construes the relevant words of a contract in its documentary, factual and commercial context, assessed in the light of (a) the natural and ordinary meaning of the provision being construed, (b) any other relevant provisions of the contract being construed, (c) the overall purpose of the provision being construed and the contract in which it is contained, (d) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (e) commercial common sense, but (f) disregarding subjective evidence of any party's intentions – see ***Arnold v Britton*** …per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;
>
> ii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made - see ***Arnold v. Britton*** … per Lord Neuberger PSC at paragraph 21;
>
> iii) In arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract; and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see ***Arnold v Britton*** …per Lord Neuberger PSC at paragraph 17;
>
> iv) Where the parties have used unambiguous language, the court must apply it – see ***Rainy Sky SA v. Kookmin Ban***k … per Lord Clarke JSC at paragraph 23;
>
> v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see ***Arnold v. Britton*** … per Lord Neuberger PSC at paragraph 18;
>
> vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see ***Rainy Sky SA v. Kookmin Bank*** …per Lord Clarke JSC at paragraph 21 - but commercial common sense is relevant only to

> the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see ***Arnold v. Britton*** …per Lord Neuberger PSC at paragraph 19;
>
> vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see ***Wood v. Capita Insurance Services Limited*** … per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent– see ***Wood v. Capita Insurance Services Limited*** …per Lord Hodge JSC at paragraph 13…; and
>
> viii) A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see ***Arnold v. Britton*** …per Lord Neuberger PSC at paragraph 20 and ***Wood v. Capita Insurance Services Limited*** …per Lord Hodge JSC at paragraph 11."

The meaning and effect of the Settlement Agreement

28. Applying those principles, in my judgment clause 6 imposed an obligation on John Corney to clear all the waste from the area of the site known as Mound 2 and the rear of the bays which was present as at the date of the Settlement Agreement, being 8 December 2017.

29. In light of the submissions of the parties, it is also important to state what the obligation did *not* entail. It was not an obligation to clear such waste as was present in the relevant areas as at some previous date (whether the date of the 2016 survey or otherwise), nor to clear any waste which might be added after the date of the Settlement Agreement and prior to some future date (whether the Operative Date or otherwise). Equally, in my judgment, the obligation was not limited to the removal of any quantified volume of waste (whether 8,363m^3 or otherwise), nor any quantified number of lorry loads (whether 630 or otherwise), nor any particular tonnage.

30. I reach the above conclusions for the following reasons. The starting point is the natural and ordinary meaning of the language used in clause 6. The Claimants and John Corney were business-people experienced in waste management and were represented by solicitors. The parties had control over the language which they used to record their agreement and can be taken to have been specifically focusing on the issues covered by clause 6 when agreeing the wording; clause 6 is the main operative clause of a short contract and contains the heart of the obligation assumed by John Corney. In my judgment, the language used is clear and unambiguous. Where, as here, the parties have used clear and unambiguous language, the court must apply it.

31. It is relevant to consider the commercial context, the purpose of clause 6 and the facts and circumstances known by the parties at the time. The Judgment records (a) that the

site had been used for waste disposal since 1997 (at [7]), (b) that waste existed in the vicinity of Mound 2 in 2014 (at [40]) and (c) the 2016 survey drawing estimated the volume of waste deposited on Mound 2 and the rear of the bays since the 2015 survey (at [44] and [65]); it is not suggested that the 2016 survey shows the *total* volume of waste deposited in those areas. Accordingly, the facts set out in the Judgment itself enabled the parties to anticipate the possibility that Mound 2 might contain more waste than the 8,363m^3 estimate contained on the 2016 survey drawing.

32. In such circumstances, there were various options open to the parties, as experienced business-people operating in the field of waste management, when it came to defining the nature and extent of the cleaning-up obligation. One option would have been to agree that Mr Corney's obligation should be limited to removing waste from the relevant area by reference to a certain quantified measurement of waste (whether by reference to a particular volume, tonnage, lorry load or by reference to a baseline set by a survey). Another option would have been for the parties to agree that the obligation would be to remove *all* waste in the relevant area, without any such quantified limits. The language used by the parties in clause 6 clearly indicates that the second of these options was agreed by the parties.

33. I note, as an example of a quantitative form of agreement, that the Stiles's Settlement Agreement required Mr Stiles to "remove 40 bulker loads of waste" from Mound 1 (see [16] above). In contrast, the Claimants and John Corney did not agree to limit the obligation imposed on Mr Corney to a defined quantity of waste in respect of Mound 2. Rather, the agreement was to remove *all* waste from the relevant areas.

34. Similarly, it would have been open to the parties to define the obligation by reference to waste which was present in the relevant area as at a particular date in the past (whether the date of the 2016 survey or otherwise) or in the future (whether as at the Operative Date or otherwise). Again, the parties did not do this. The absence of any such date indicates, in my judgment, that the nature and extent of the obligation agreed by the parties was that Mr Corney would remove such waste as was present in the relevant areas as at the date of the agreement. The nature and extent of that obligation was known and/or readily ascertainable by the parties by inspection; any uncertainty could have been resolved by a survey if necessary.

35. By way of written opening (but not pursued vigorously in oral submissions) it was submitted by Mr Mitchell KC on behalf of the Claimants that there was nothing in the agreement to suggest that the parties had agreed that the size of Mound 2 could not change between the date of the agreement and the Operative Date and that John Corney's obligation was to remove whatever was in existence on the Operative Date. I reject that submission. It is not the natural and ordinary meaning of the words used and such a construction would be contrary to commercial common sense:

    i) On such a construction John Corney would have been obliged to remove any further waste which the Claimants' unilaterally elected to add to Mound 2 after the agreement. On this basis the Claimants could have added the entirety of Mound 1 to Mound 2 and required Mr Corney to remove the total. Clear words would have been required to provide for such an onerous and uncertain obligation. No such words were used. The natural meaning of the words used cannot sensibly be construed as imposing such an uncertain obligation.

ii) The reference to the Operative Date in clause 6, in my view, marks the beginning of the running of the six-month period permitted for the clean-up operation. It cannot sensibly be read as being the date on which the size and extent of Mound 2 crystallises, not least for the reasons set out in (i) above.

36. I also do not accept the submission advanced by Mr Apthorp on behalf of John Corney that clause 6 should be read as if it defined the size and extent of Mound 2 by reference to the waste volumes identified in the 2016 survey. The clause does not contain words which would permit such a construction and, further, such a construction would be contrary to the natural meaning of the words which were used.

37. It may be that John Corney envisaged that the volume of waste on Mound 2 and the rear of the Bays would not have changed to any material degree between 25 July 2016 and 8 December 2017, not least because of the restrictions imposed on the site by the Environment Agency. However, the parties did not elect to particularise the obligation imposed on John Corney by reference to the 2016 survey (or any other survey); rather the obligation was to remove whatever waste was present in the identified areas as at the time of the agreement. This was in circumstances in which, as set out at [31] above, the Judgment indicated, at the very least, the possibility that there might be more waste in the vicinity of Mound 2 then indicated on the 2016 survey.

38. It is important to keep in mind the overall purpose and context of the Settlement Agreement. The Judge had found that the Defendants were jointly and severally liable to the Claimants in the sum of £942,620. It is likely that costs would also have followed the event. The effect of the Settlement Agreement was to limit John Corney's liabilities to clearing the waste on Mound 2 and the rear of the Bays or, in default, to judgment in the sum of £300,000. Keith Stiles and Simple Skips shouldered responsibility for the greater part of the quantified damages and for all costs. Thus, whilst the Settlement Agreement was relatively generous towards John Corney in certain respects, including in respect of costs, the wording of clause 6 was strict: John Corney was required to remove *all* waste present at the time of the agreement from the identified areas.

39. For the sake of completeness, I should note that the Second Defendant placed some reliance upon an email from Mr Edmund to Mr Corney dated 16 October 2020 as informing the scope of the obligations imposed on Mr Corney by the Settlement Agreement. The email post-dates the Settlement Agreement by almost three years. At most, that email might indicate Mr Edmund's subjective understanding of the agreement, but that does not assist with the proper construction of the agreement. It was not suggested that the email modified the obligations assumed by the Second Defendant pursuant to the Settlement Agreement and nor, in my view, did it do so.

40. For the same reasons, I do not place any weight on the fact that when the meaning and effect of the Settlement Agreement was first raised by John Corney's solicitors, by letters dated 27 January 2021 and 3 February 2021, their position was that the obligation on Mr Corney was to remove all waste which was present as at the date of the Settlement Agreement in the relevant areas. Similarly, I have not taken into account John Corney's evidence in cross-examination as to his subjective understanding of the agreement and his acceptance that it imposed an obligation upon him to remove such waste as was present as at the date of the Settlement Agreement in the relevant areas.

Issue 2: Whether, when the Second Defendant left the Site …on about 3 February 2021, he had cleared all waste from the area of the Site known as Mound 2 and the rear of the Bays.

41. John Corney accepts that when he left site on about 3 February 2021 he had not cleared all of the waste which was, at that time, in the area known as Mound 2 and the rear of the Bays. The issue between the parties is as to whether additional waste had been added to Mound 2 since John Corney entered into the Settlement Agreement, which is addressed in Issue 3 below.

42. The documentary evidence as to the perceived extent of the waste on Mound 2 and behind the bays which remained on site as at 3 February 2021 includes:

    i) On 26 January 2021, a few days before John Corney left site, solicitors acting for the Claimants stated in an email to Mr Corney's solicitors that he was "at best 50% of the way through what he undertook to do in the Tomlin Order…".

    ii) On 1 March 2021 solicitors acting for the Claimants contended that John Corney had left approximately 4,265m^3 of waste on site in the relevant areas.

    iii) In his second witness statement, dated 16 March 2021, Reginal Hyde estimated that John Corney had left about 50% of the relevant waste.

    iv) In his second witness statement, dated 30 March 2021 John Corney stated (at paragraph 87): "I believe that if a topographical survey were undertaken today there would be significantly more than 4,265 cubic metres of what remains on Mound 2 to remove to ground level". In other words, far from disputing that a substantial quantity of waste was left on site, John Corney's evidence, shortly after he left site, was that he estimated that in excess of 4,265m^3 of waste remained on site in the relevant areas; this belief informed his assertion that the Claimants had added to the size of Mound 2 since the 2016 survey.

43. It is now known that SV carried out a further survey of the site and produced a topographical drawing dated 22 February 2021. The drawing is difficult to interpret (see [68] below). Dr Cox's interpretation is that it shows that some 2,441m^3 of material remaining on site as at this date in the area of Mound 2 and the rear of the bays compared to the baseline set by the 2016 survey.

44. For the reasons set out above, I find that the Second Defendant had not cleared all waste from the area known as Mound 2 and the rear of the bays when he left site on about 3 February 2021 and that a substantial quantity of waste remained on site in those areas at that date. I address the issue as to the likely quantities of waste which remained on site at that time in Issue 3 below.

Issue 3: Whether additional waste was moved onto Mound 2 after 25 July 2016 and/ or 13 December 2017 or at a later date.

The background to the allegation of further waste being added to Mound 2

45. The allegation that additional waste was added to Mound 2 since the date of the Settlement Agreement was first made by John Corney's solicitors in their letter to the Claimants' then solicitors dated 27 January 2021 as summarised below:

i) It was said that John Corney was responsible for removing all waste from Mound 2 "that was there at that time" (i.e. at the time of the Settlement Agreement), but that he was not responsible for further waste having been deposited since that date.

ii) The witness statement of Michael Edmund for the first trial was relied upon. Mr Edmund had applied a 25% bulking factor to the 8,363m^3 volume shown on the 2016 survey, giving a figure of 10,454m^3. He had estimated that this equated to 12,545 tonnes, being 628 lorry loads at 20 tonnes per lorry.

iii) The letter continues: *"At your clients' request my client did not attend site for nearly two years and during that time more waste was deposited on the mound … Mr John Corney is in no way responsible for the removal of waste that your client has relocated within the site nor imported from elsewhere. My client is now close to removing the waste equivalent stated by your clients Mr Edmund to be at the site. My client should be released from the terms of the Tomlin Order and he is more than willing to discuss commercial terms as to the removal of the rest of the waste your clients have deposited since 2017".*

46. By a letter dated 1 March 2021, the Claimants' then solicitors responded to state, amongst other things, that the Consent Order required all waste to be removed from Mound 2, rather than any particular number of lorry loads, and that it was estimated that Mr Corney had removed 6,189m^3 of waste from the site, leaving 4,265m^3 behind (i.e. the balance of the 10,454m^3 figure). These figures were based on calculations provided by Mr Falcon. It was denied that any new waste had been brought onto site.

47. Mr Falcon's calculations were set out in a letter dated 23 February 2021. His analysis at that time was that Mr Corney had removed approximately 10,000 tonnes of waste in 631 lorry loads and that this consisted of wet soil, hardcore, and mixed materials. He estimated weights of 1800kg/m^3 for the first two and 800kg/m^3 for the third, giving, in total, an estimated volume of 6,189m^3.

48. John Corney's solicitors wrote to the Claimants on 11 March 2021, to Michael Edmund on 12 March 2021 and to Kas Ali on 15th March 2021. Each of those letters provided a copy of a report from an organisation called Ecopia dated 9 March 2021. It was said that the Ecopia report showed, from satellite data, that additional waste had been added to Mound 2 since the 2016 survey. As noted at [74] below, the Ecopia report is no longer relied upon by John Corney.

Factual witness evidence

49. In total, six factual witnesses were called to give evidence, four by the Claimants and 2 by the Second Defendant. Each of the witnesses gave evidence in a straightforward manner, attempting to answer the questions and to assist the court. In general, the witnesses did not significantly change their position during cross-examination. I summarise below certain aspects of the evidence provided by the factual witnesses.

50. **Mr Reginald Hyde**, the First Claimant, was on site from time to time when Mound 1 and Mound 2 were being cleared. He had some, albeit limited, knowledge of the activities taking place on site during this period. In his third statement, dated 10 October 2021, Reginal Hyde denied (at paragraph 10) the allegation that the

Claimants had dumped additional waste on Mound 2. He stated that at no stage had John Corney raised any concerns about any dumping of additional material on Mound 2 until the letter from his solicitor dated 27 January 2021, a few days before John Corney left site. He contended that he would have expected John Corney, as an experienced waste management expert, to have raised concerns about addition of waste to Mound 2 at a much earlier stage if he had believed them to be true.

51. **Mr Alfred Hyde**, a director of ME Waste, explained that ME Waste was contracted by Mr Stiles to clear Mound 1. His evidence was that the Environment Agency required Mound 1, which had been the subject of a prosecution, to be removed first. He sub-contracted the waste removal to four firms. ME Waste was also engaged to clear the remainder of Mound 2 and the rear of the bays after John Corney left site in February 2021. He was on site on a regular basis throughout the relevant period. He denied the allegation that any additional waste was dumped on Mound 2.

52. In his second statement, dated 12 May 2022, Alfred Hyde stated that in about June 2019 Mound 2 collapsed onto the access road to Mound 1 and that he arranged for the collapsed material to be pulled back onto Mound 2 and then terraced and angled the mound to prevent further collapses; he repeated his position that no additional waste added. In cross-examination it was suggested that various photographs evidenced that the terracing work had taken place before June 2019; Alfred Hyde's response was to assert that material had to be pushed back up on to Mound 2 more than once.

53. **Mr Michael Edmund**, a building surveyor and the sole Director of Schyde Investments Limited, oversaw the obtaining of planning permission for the re-development of the site for residential development.

54. He explained that in his evidence for the first trial he had not known the composition of Mound 2 and so had applied a mid-range weight of 1,200kg/m^3, giving 12,545 tonnes. He then divided this by 20 tonnes to estimate that Mound 2 could be moved by 628 lorry loads. In fact, the waste on Mound 2 may have been substantially heavier. He now thought that for the first trial he had underestimated the density of the material comprising Mound 2. Further, John Corney was only able to remove an average of about 17 tonnes, not 20 tonnes, per lorry, which would result in 738 lorry loads being required even on his original estimate as to tonnage.

55. He said that he visited the site during the relevant period and he never saw any material being added to Mound 2 and at no stage did he think that Mound 2 had increased in size or shape.

56. **Mr Robert Collard**, a managing director of the Collard Group Limited, one of the companies sub-contracted by ME Waste to clear waste from Mound 1, explained that a tipper lorry with a 15m^3 capacity will be able to carry 15m^3 of sand, because of the lack of air voids, but only around 8m^3 of soil and stones, 9m^3 of hardcore and 10m^3 of mixed waste because of the voids created by such materials.

57. **Mr John Corney**, the Second Defendant, explained that when he attended the site in August 2019 Mound 2 was covered in grass and he presumed that it was unchanged since the July 2016 survey. He confirmed in cross-examination that he understood that his obligation was to remove Mound 2, that he wanted to get the job done and

release the charge on his house. He stated that he would have cleared Mound 2 provided that Mr Edmund's estimate (630 lorry loads) had been reasonably accurate.

58. Having started the work, it became clear in October 2019 that Mound 2 was not comprised of only soils and stones, but there was mixed waste, which he assumed must have been added by Simple Skips. This meant that the waste had to be separated, adding to the time and cost. The extra financial strain meant that work had to be halted towards the end of 2019. Work was due to recommence in March 2020 but the Covid lockdowns prevented this. He re-attend site in the summer of 2020 and the first waste was removed from site in September 2020. It was at the end of January 2021, after he had cleared almost 630 lorry loads, that he formed the view that Mound 2 must have been added to by the Claimants.

59. His conclusion that material must have been added was based, in particular, on the evidence of Michael Edmund at the first trial as to the likely number of lorry loads that it would take to clear Mound 2. He also contended that given their visits to site, Alfie Hyde, Reginald Hyde and Michael Edmund would all have been aware that further waste had been added to Mound 2. He said that, in hindsight, he should have obtained a topographical survey of Mound 2 prior to starting work in September 2019. In cross-examination he confirmed that he had not been prevented by the Claimants from undertaking a survey of the site.

60. In his fourth witness statement, dated 12 July 2022, John Corney provided comments on various photographs taken by the Environment Agency on different dates from 14 December 2016 to 13 February 2019. His position was that the photographs demonstrate that material was added to Mound 2 during this period.

61. **Ms Jacqueline Gale**: Ms Gale is a book-keeper with a qualification from the Waste Management Industry Training and Advisory Board and worked on site first for Mr Ali and then for Simple Skips. She collated information about waste arriving and leaving the site. She had been called by the Claimants to give evidence at the trial of the main proceedings as to the weight of excess waste brought onto site by the Defendants. In the present trial she was called by the Second Defendant to give evidence as to the weight of material removed from the site following the Consent Order.

62. From waste transfer notes, invoices and other sources she calculated that 1,522 tonnes of waste was removed by ME Waste between September 2019 and October 2019, that 10,874 tonnes was then removed by John Corney and that a further 10,576 tonnes was removed between March and November 2021 by ME Waste.

The topographical survey evidence

63. ***The 2016 survey:*** A note on the survey drawing of 25 July 2016 identifies Mound 1 as having a volume of 4661m^3 and Mound 2 and the rear of the bays as having a volume of 8,363m^3. The drawing does not state what baseline is used for the calculations (i.e. whether the volumes were calculated to ground level or some other baseline). As noted at [31] above, the Judgment indicates that the 2016 survey depicts the volume of waste deposited in the relevant areas since the 2015 survey. This is also the explanation set out by Mr Edmund at paragraph 58 of his witness statement for the first trial.

64. SV also produced a drawing dated 13 March 2017. The contours appear to be identical to the 2016 survey; I accept Dr Cox's evidence (which appeared to be common ground between the experts) that it is unlikely that a new full survey was undertaken at this date.

65. ***The October 2019 survey:*** This drawing, dated 21 October 2019, appears to be of a survey of the Mound 1 site only and contains the words "2010 model". It contains contours and spot heights in two colours, presumably being 2010 and 2019 heights.

66. ***The 2016 vs 2019 drawing for Mound 1:*** A further drawing from SV was disclosed by the Claimants, but only after the expert joint statements were finalised. This compares the 2019 survey against the 2016 survey. It contains a note stating: *"Calculated to a base model of the existing ground base Fill volume: 1220m^3"*. It was common ground between the experts that this drawing showed that 1220m^3 of waste (of the original 4661m^3) from Mound 1 still remained on site after the clearance work by ME Waste.

67. ***The 2021 survey:*** The Claimants disclosed a survey drawing by SV dated 22nd February 2021, together with a letter from SV dated 31 January 2022 providing a brief description of the survey process. The drawing states "volume to 14314-16-07-25 base", which is a refence to the 2016 survey drawing and the letter confirms that the 2016 survey was used as a base model. The drawing shows parts of Mound 2 in different colours, but provides no key to the colour coding.

68. Dr Cox described the drawing as "difficult to interpret". He notes that the top contour is labelled as 60.0 meters and explains that this is 4 meters lower than the top level of Mound 2 shown in the 2016 survey. The drawing does not provide all the contour values. Dr Cox's understanding of the survey was that it showed that 2,441m^3 of the Mound 2 remained on site as at the date of the 2021 survey by reference to the 2016 survey. He noted that other interpretations of the drawing are possible because of the uncertain interpretation of the contours and the colour coding, but his interpretation appeared to be common ground. On this analysis, approximately 5,922m^3 (71%) of the volume of Mound 2 identified in the 2016 survey was removed by John Corney and 2,441m^3 (29%) of this 8,363m^3 remained after Mr Corney left site on 3 February 2021.

69. ***Data files in respect of the 2021 survey:*** By paragraph 2(1)(a) of the Order dated 22 October 2021 the Claimants had been ordered to disclose the data file from the 2021 survey. An issue was raised by Mr Apthorp towards the end of the trial as to non-disclosure of data relating to the survey. Insofar as the point was pursued, I am satisfied that the Claimants confirmed well before trial (by a witness statement dated 28 June 2022) that they did not possess any three-dimensional data in respect of the 2021 survey and that the Second Defendant accepted that the Claimants had discharged their disclosure obligations (this was recorded in a recital to the Order of 5 July 2022).

70. ***Virtual tour of the site:*** A video of a virtual tour of the site was produced using laser scanning on or about 4 September 2017 on behalf of a company that wished to develop the site. The video has been considered by the experts and I have viewed it.

The expert evidence

71. The Claimants called the following individuals to give expert evidence:

i) **Mr Roger Falcon**, Member of the Royal Institute of Chartered Surveyors, Fellow of the Chartered Institute of Building, Chartered Quantity Surveyor.

ii) **Dr Raymond Anthony Cox**, MA (Cantab), PhD (Imperial College), Chartered Engineer, Fellow of the Institute of Mechanical Engineers, Fellow of the International Institute of Risk and Safety Management, Consulting Engineer.

iii) **Ms Christine Cox**, BA, MA, Member of the Chartered Institute for Archaeologists and an expert in the interpretation of aerial imagery.

72. The Second Defendant called the following individuals to give expert evidence:

i) **Mr Philip Speak**, Member of the Chartered Institute of Arbitrators, Member of the Chartered Institute of Building, Quantity Surveyor, Project Manager, Construction Consultant.

ii) **Mr Rhys Coombs** of CCH Hydrodynamics, MA, Chartered Engineer, Member of the Institute of Engineering and Technology. Mr Coombs co-authored a report on behalf of CCH Hydrodynamics, with his colleague **Mr Mark Cramman**, BA, Member of the Institute of Engineering and Technology. Mr Cramman was not required to give evidence as relevant questions had been put to Mr Coombs.

73. There were two expert Joint Statement, both dated 18 July 2022.

i) **The expert joint statement on weight and density of the waste removed ("the first joint statement")**: This recorded the views of Dr Cox, Mr Falcon and Mr Speak in respect of the weight of waste removed from site and the likely densities of waste removed.

ii) **The expert joint statement on the volumes, shapes and sizes of the Mounds ("the second joint statement"):** This recorded the views of Dr Cox, Ms Cox, Mr Coombs and Mr Cramman in relation to the interpretation of aerial photographic surveys, ground photographs and topographic data concerning the volumes, shapes and sizes of Mound 1 and Mound 2.

74. A firm called Ecopia, instructed on behalf of the Second Defendant, had previously provided an expert report in respect of the alleged increase in the size of Mound 2. For whatever reason (and different explanations were put forward by the parties) the Second Defendant ceased to rely on the report from Ecopia. The fourth recital to the Order sealed on 5 July 2022 recorded that it was agreed that all references in the reports of Mr Speak to the Ecopia Report would be redacted. I therefore have had no regard to those sections of the expert reports which relate to the Ecopia Report.

75. ***The weight of material removed from site in respect of Mound 1:*** The experts agreed that the weighbridge and other documentation demonstrated that approximately 1,500 tonnes of waste from Mound 1 was cleared by ME Waste by August 2019.

76. ***The weight of material removed from site in respect of Mound 2:*** The evidence from the weighbridge tickets was considered by the two quantity surveyors, Mr Falcon and Mr Speak, to be preferred as more accurate than the records of weights contained in the invoices. From an analysis of the weighbridge tickets, the experts agreed that Mr Corney had removed 630 lorry loads of waste. The material was mainly soil and hardcore with a small proportion of mixed waste. Mr Falcon had been through the weighbridge tickets and calculated that 10,0000.23 tonnes had been removed by John Corney. Mr Speak, relying on Ms Gale's spreadsheets, had put forward the figure of 10,873.67 tonnes. Mr Speak accepted that Mr Falcon's estimate was likely to be correct.

77. I consider that Mr Falcon's analysis of the weighbridge tickets is the best evidence before me as to the likely weight of material removed by John Corney. On this basis, I am satisfied that Mr Corney is likely to have removed approximately 10,000 tonnes of material from Mound 2 between September 2020 and 3 February 2021.

78. The quantity surveyors were also agreed that a total of 545 loads of material were removed by ME Waste after John Corney left site in February 2021 and that this amounted to approximately 9,707 tonnes. Again, I accept this estimate as accurate.

79. Thus, if all the material removed by John Corney and by ME Waste after February 2021 originated from Mound 2 and the rear of the bays then this suggests that the weight of material in those areas was approximately 19,707 tonnes.

80. ***The volume of material removed from site in respect of Mound 1:*** The three experts agreed, that "it is not possible to ascertain an accurate density for the material that left site as we do not know precisely what it was. Because of that we are unable to say with any certainty what volume of material was removed from site from either Mound 1 or Mound 2".

81. The experts involved in the first joint statement identified an anomaly in the evidence, namely that the volume of Mound 1 had been calculated, on the 2016 survey, as being 4661m^3 which was 1335m^3 more than the total volume of waste accounted for on Mr Falcon's calculations as having been removed from Mound 1 by ME Waste.

82. As noted at [66] above, following the joint statement the Claimants disclosed the 2016 vs 2019 drawing which identified that 1220m^3 of the Mound 1 waste remained *in situ* on site after the ME Waste clearance operation.

83. The evidence of Mr Alfred Hyde was that he believed that he had cleared Mound 1 back to ground level. The evidence from Mr Falcon, who visited the site, was that the general topography of the site was undulating, not that of a flat and level field, which made visual assessments difficult, but that from a visual inspection it appeared that Mound 1 had been cleared to ground level. It was only when a full survey was undertaken that it was possible to identify that material remained on site in the vicinity of Mound 1. Dr Cox's evidence was to similar effect.

84. I am satisfied that the estimated shortfall of 1335m^3 in respect of waste removed from Mound 1 agreed by the experts is explained by the fact that approximately 1220m^3 of waste in the region of Mound 1 was not removed from site by ME Waste. The relatively small difference of 115m^3 between these figures is not significant in my

view given the likely margins of error in respect of calculations of this nature. If anything, the fact that the experts identified a shortfall and that the vast majority of that shortfall has now been accounted for by the subsequent analysis provides a degree of comfort that the estimates of the experts are tolerably accurate in respect of Mound 1.

85. For the sake of completeness, I should add that in closing submissions Mr Apthorp, on behalf of Mr Corney, challenged Mr Falcon's use of a figure of 425kg/m^3 for mixed waste for Mound 1 noting that the experts had agreed a figure of 800kgm^3 for the mixed waste contained in Mound 2. However, this challenge had not been put to Mr Falcon during cross-examination and so I do not have Mr Falcon's explanation as to why he selected different density figures for the type of mixed waste he understood to be present on Mound 1 versus that which he understood to be present on Mound 2.

86. ***The volume of material removed from site in respect of Mound 2:*** Mr Falcon's analysis is that (a) John Corney removed in the region of 10,000 tonnes of material in 630 lorry loads meaning that the average weight of each load was 15.87 tonnes and (b) at a density of 1,800kg/m^3 this would suggest that each load occupied 8.8m^3 and (c) this is consistent with Robert Collard's evidence that one might expect a standard tipper vehicle with a 15m^3 carrying capacity to carry 8m^3 of soil and stones, 9m^3 of hard core and 10m^3 of mixed waste.

87. Mr Speak did not disagree with the assessment that the weight of the material on Mound 2 could be 1,800kg/m^3; he considered that this was likely to be at the high end of the range, but agreed, as set out in the joint statement, that the range was between 1,200kg/m^3 and 2,000kg/m^3.

88. Taking a figure of approximately 20,000 tonnes removed in total (10,000 tonnes of material removed by John Corney and 9,707 tonnes removed by ME Waste), the total volume of material removed in respect of Mound 2 (assuming all the weighbridge tickets related to waste removed from Mound 2) was estimated by the experts (paragraph 5.12 of the joint statement) to be somewhere between 11,000m^3 and 16,677m^3 depending on the density of the material removed.

89. On Mr Falcon's revised analysis (paragraph 5.9.1 of his report) the 10,000 tonnes of waste removed by Mr Corney from Mound 2 amounted to approximately 5883m^3. Mr Falcon estimated that the 9,707 tonnes removed by ME Waste after February 2021 would equate to approximately 4,917m^3 of material. Mr Falcon's combined figures total 10,800m^3 (5883 + 4917); this is a slightly higher figure than the total volume of Mound 2 estimated from the 2016 survey of 10,454m^3 (applying a 25% bulking factor). This difference is not significant, in my judgment, given the variables and margins of error necessarily inherent in these estimates. On the basis of Mr Falcon's analysis, Mr Corney removed approximately 55% by volume of the waste in Mound 2 and the rear of the bays before he left site. ME Waste then removed waste amounting to the remaining 45% by volume.

90. One issue of potential significance arose from this analysis as follows. On Dr Cox's reading of the 2021 survey drawing then approximately 2441m^3 of waste remained on Mound 2 and the rear of the bays after Mr Corney left site in February 2021; this was inconsistent with ME Waste apparently removing 9,707 tonnes in 545 loads from this area after February 2021. It was common ground between the experts that 9,707

tonnes could not sensibly relate to only 2441m^3 of waste as that would require the relevant waste to have a density of approximately 4,000kg/m^3 – being twice as heavy as the top end of the estimated weight range for waste of this nature. This issue is discussed further below (see [107] to [116] and [122] to [131]).

91. ***The expert evidence in respect of photographic and aerial images:*** The experts who signed the second joint statement, Dr Cox, Ms Cox, Mr Cramman and Mr Coombs, agreed that conventional surveying is the gold standard as far as the measurement of individual point elevations is concerned and they accepted the SV calculation of volumes for Mound 2 as at the time of the 2016 survey.

92. The experts also agreed that data did not exist to undertake a post-processed LIDAR (aerial laser sounding) model yielding a Digital Terrain Model ("**DTM"**) which excludes surface vegetation. Mr Cramman and Mr Coombs noted that the Digital Surface Model ("**DSM"**) data, which includes all surface vegetation, was able to indicate broad features of mound shapes, but was not accurate enough to estimate mound volumes to the precision required to enable comparison with other methods of quantification, such as surveys or weighbridge tickets, of material removed.

93. CCH had plotted two cross-sections across the terraced areas of Mound 2 from an aerial image of 29 June 2019 along lines which appeared to be relatively clear of vegetation. The first cross-section showed that the surface elevation of Mound 2 had increased in the order of 1.36m +/- 0.35m across the cross-section. The second cross-section showed a change in height of 1.44m +/- 0.35m across the cross-section. Both cross-sections also showed an extended toe to Mound 2. CCH also produced a three-dimensional model with an overlay showing the changes in shape of Mound 2 since the 2016 survey. In cross-examination Mr Coombs repeated and confirmed that the Bluesky DSM data could only be used to show changes to the shape of the mound, but could not demonstrate whether there had been any change to the volume of Mound 2.

94. The experts considered various aerial images taken at different times.

    i) The first image was dated 25 March 2017, over 8 months before the date of the Settlement Agreement. It was agreed that the northern part of the surface showed homogenous soil-like material with evidence of recent vehicle tracking over the surface, and the surface was generally free from vegetation, consistent with recent use. There was also an area to the south of Mound 2 which showed atypical material with bright spots (i.e. not soil-type material). Mound 1 was very different in appearance to Mound 2, with more reflective material. The contours of the 2016 survey had been overlaid on the image and the experts agreed that the contours had not significantly changed.

    ii) The second image was dated 15 May 2018, 5 months after the Settlement Agreement, and showed vehicle tracks on the top of Mound 2, but it was not possible to say whether any new material had been added. The mixed material in the southern part of Mound 2 appeared to have been significantly reduced. The surface was generally bare ground without vegetation. Had the surface been left alone since the first image then vegetation would have been visible.

iii) The third image was dated 23 June 2018 and showed vegetation growth over the surface of Mound 2, but with no other evidence of any work having been done to move or add material to the Mound.

iv) The fourth image was dated 9 October 2018 and showed evidence of vegetation growth over Mound 2, with no other relevant changes.

v) The fifth image, dated 29 June 2019, showed that terracing had been undertaken on Mound 2 with the middles of the two flat terraces appearing to be clear of vegetation. The experts agreed that Mound 2 was modified at some stage between October 2018 and June 2019 when distinct terraces were introduced.

vi) The sixth image was dated 21 September 2019 and showed no non-natural change to Mound 2 since June 2019; vegetation now covered the terraced areas.

95. The experts also considered Environment Agency photographs. These showed that the toe of Mound 2 was free of vegetation in photographs of 22 November 2017 and 13 February 2019 and that the latter photograph indicated that the toe had been graded and reprofiled between those dates.

Burden and standard of proof

96. I was not addressed by the parties in any detail on the incidence of the burden of proof, but I summarise below the approach I have adopted.

97. The burden of proof rests on the Claimants to establish that the Second Defendant has acted in breach of the Settlement Agreement by failing to discharge his obligation to clear the waste which was present in the relevant areas as at the date of the Settlement Agreement. I will therefore approach issue 3 on the basis that the legal burden rests with the Claimants to establish that the quantity of waste on Mound 2 and the rear of the bays did not materially increase after the date of the Settlement Agreement.

98. I have adopted the above approach in the absence of argument on the point and notwithstanding the fact that I recognise that, if the point were fully argued, the Claimants might seek to contend that the Second Defendant bears at least an evidential burden in respect of the allegation that the Claimants have wrongly added waste to Mound 2 and the associated allegations of dishonesty. Such an approach would generally apply, for example, where a defendant alleges that he has been released from his contractual obligations as a result of frustration (see the summary of the principles in Zuckerman on Civil Procedure: Principles of Practice, 4th edition, Ch 22.50).

99. As to the standard of proof in respect of the allegations that the Claimants have acted dishonestly by adding waste to Mound 2, Mr Apthorp accepts, on the behalf of the Second Defendant, that the court should not reach serious findings of dishonesty without a firm evidential basis and has referred me to the analysis of the law relating to dishonesty in ***Ivey v Genting Casinos (UK) Limited (trading as Crockfords Club)*** [2017] UKSC 67, [2018] A.C. 391.

100. The standard of proof to be applied, however, remains the balance of probabilities. The position was summarised in ***Secretary of State for the Home Department v Rehman*** [2001] UKHL 47, [2003] 1 A.C. 153, at [55], per Lord Hoffmann:

> "…The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in ***In re H (Minors) (Sexual Abuse: Standard of Proof)*** [1996] AC 563, 586 , some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not."

Analysis

101. Mr Apthorp advanced a number of arguments, some of which overlapped, in respect of issue 3; I have grouped those arguments into four main submissions. First, he submits that the Claimants have engaged in systematic dishonesty such that the application should be struck out as an abuse of process, or alternatively no weight should be placed on their evidence that no waste was added to Mound 2. Second, reliance is placed on the fact that more waste has been removed from site than the Judge found to have been brought onto site by the Defendants. Third, it is submitted that various photographs show that material was added to Mound 2. Fourth, reliance is placed on the CCH analysis as showing significant changes to Mound 2. I shall set out my analysis of the evidence before addressing each of these points in turn.

102. The evidence, which I accept, is that Mr Corney removed 630 lorry loads of material from Mound 2 and the rear of the bays before he left site on 3 February 2021 and that thereafter ME Waste moved 545 lorry loads of material from the site, making a total of 1,175 lorry loads.

103. The evidence of the Reginald Hyde and of Alfred Hyde is that all waste was removed from Mound 2 and the rear of the bays and that no new material was moved onto Mound 2 at any material time. Mr Edmund also attended site from time to time and saw no evidence of any material being added to Mound 2.

104. The effect of the expert evidence of Mr Falcon, supported by Dr Cox, is that if Mound 2 consisted of 8,363m^3 of waste (bulked up to 10454m^3) then it is likely that somewhere in the region 1,175 lorry loads would be required to clear Mound 2. This assessment (see [89] above) is based upon the likely densities of the different materials comprising Mound 2 and the volumetric capacity of each lorry load, based on Mr Collard's evidence. Mr Speak accepted the density ranges put forward by Mr Falcon and Dr Cox as reasonable, albeit that he considered them to be towards the top end of the range. Beyond this, Mr Speak's evidence does not, in my view, take matters further forward in respect of the core issues.

105. The analysis of Mr Falcon and Dr Cox, if correct, means that Mr Edmund's estimates for the first trial as to the number of lorry loads required to clear Mound 2 were wrong. They were wrong because he underestimated the average density of the waste and he over-estimated how much each lorry would carry in practice. On this analysis, the damages claimed in the first trial were lower than the true clean-up costs.

106. The evidence of Mr Falcon and Dr Cox is broadly consistent with the contemporaneous estimates of both the Claimants that, as at 3 February 2021, Mr Corney had cleared approximately 50% of the waste on Mound 2. It is also broadly consistent with the contemporaneous estimate of Mr Corney himself that, when he left site, at least 4,265m^3 of waste remained on site, albeit that he considered that the true figure would be greater than this. On Mr Falcon's revised analysis (see [89] above), Mr Corney left approximately 4,917m^3 of material on site, being about 45% of the original total.

107. The 2021 survey, however, does not appear to "fit" with the analysis of Mr Falcon and Dr Cox. As explained at [68] above, Dr Cox's understanding of that drawing is that, by reference to the 2016 survey, it appears to show that 2,441m^3 of waste remained on site in the vicinity of Mound 2 and the rear of the bays as at that date. On the face of it, this appears to be at odds with the fact that the waste tickets disclosed by ME Waste indicate that a significantly larger quantity of material was removed from site after this date. Mr Falcon's assessment was that ME Waste removed approximately 9,707 tonnes after this date, which he estimates to equate to approximately 4,916m^3 of waste, so over double the 2,441m^3 figure.

108. The 2021 survey, however, also does not fit with the contemporaneous assessment of the Claimants that approximately 50% of the waste remained on Mound 2 as at February 2021 (see [42(i) and (iii)] above).

109. The 2021 survey also does not fit with John Corney's own contemporaneous estimate that in excess of 4,265m^3 of waste remained on site at this date (see [42(iv)] above

110. I agree with Dr Cox's characterisation of the 2021 survey as difficult to interpret. It is in a very different format to the 2019 survey which shows a detailed analysis, based on a large numbers of spot measurements, recording changes between two dates.

111. Furthermore, the evidence before me does not suggest that the 2021 survey was intended to establish the *total* volume of waste remaining on site in the relevant areas; rather, Dr Cox's analysis is that it appears to be concerned with the volume of waste remaining as calculated against the 2016 survey volumes.

112. It is clear from the Judgment that waste was present in the area of Mound 2 in 2014. It is also clear from the Judgment that the 2016 survey calculated the volume of additional waste added in the relevant areas since 2015 (see [31] above). Thus, if the 2021 survey was showing changes since the 2016 survey then it is possible that further waste (pre-existing the 2015 survey) existed in the relevant areas which was not taken into account on the 2021 survey. I say that this is possible because the limited evidence available as to what the 2021 survey was purporting to show does not permit any greater degree of certainty.

113. Alfred Hyde's evidence (paragraph 26 of his first statement) was that ME Waste continued to clear Mound 2 until Alfred Hyde was satisfied that the waste was cleared. He did not attempt to clear Mound 2 back to any particular baseline used in any particular survey. ME Waste was not under an obligation to clear Mound 2 to any particular survey baseline. Rather, they were engaged to discharge Mr Corney's obligation to remove *all* waste from the relevant area, even if this required excavations below a particular survey baseline.

114. The absence of any survey of the area since ME Waste cleared the site makes it impossible to establish, on the evidence before me, whether the site of Mound 2 was cleared back to the 2016 survey baseline or whether additional layers of waste were unearthed and cleared below the 2016 survey baseline. I note that it is now apparent that Mound 1 was not cleared back to the 2016 survey baseline and I accept that this was not appreciated until a full survey was undertaken.

115. The other point to note about the 2021 survey is that, if it is accurate, then it appears to show that, at the very least, some 2,441m^3 of waste remained when Mr Corney left site on 3 February 2021. To this extent, it therefore supports the position of the Claimants that a large volume of material remained on site at that time.

116. Given the above points, including the difficulties in interpreting the 2021 survey, the limited evidence as to what the 2021 survey volume is purporting to show and precisely how that volume was calculated, I do not consider that the 2021 survey provides a sound or sufficient evidential basis for concluding that the Claimants, or Alfred Hyde, have mislead the Court as to the quantity of waste removed by ME Waste from Mound 2 after February 2021 and/or in respect of their denial of the allegation that more waste was added to Mound 2.

117. The photographic evidence shows some works being carried out on and around Mound 2, including terracing, at various points in time. The Claimants accept that work was carried out, including terracing, but deny that any new waste was added. None of those photographs, in my judgment, show any new material being added to Mound 2. The opinions of the experts set out in the second joint statement do not suggest otherwise.

118. The evidence of CCH shows that the shape and size of Mound 2 changed over the relevant period, but it cannot show (and does not purport to show) whether there were any changes in respect of the volume of waste on Mound 2. Again, therefore, CCH's work does not show that new material was added to Mound 2.

119. I address each of the points made by Mr Althorp below. In summary, I do not consider that any of those points undermine the evidence of the Claimants that they did not add waste to Mound 2, nor the expert evidence of Mr Falcon and Dr Cox.

120. Having regard to the totality of the evidence before me, I accept the Claimants' evidence that additional waste was not moved onto Mound 2 after the relevant date, namely the date of the Settlement Agreement of 8 December 2017. I also accept Mr Falcon's analysis, summarised at [89] above, as to the likely quantities of waste removed by John Corney and ME Waste (see, further, [152] below).

121. **Alleged dishonesty on the part of the Claimants:** The full extent of the Second Defendant's case on dishonesty did not emerge until written closing submissions. Mr Mitchell KC noted, correctly in my view, that certain of the allegations of dishonesty had not been put squarely to the relevant witnesses in cross-examination. I shall deal with the submissions advanced notwithstanding this reservation.

122. Mr Apthorp's primary submission on dishonesty relies on the 2021 survey, which I have considered at [107] to [116] above. Mr Apthorp submits that this survey shows that the case against Mr Corney is advanced on a false basis, supported by false documents, in respect of the sums removed by ME Waste. I have given careful consideration to the submission of Mr Apthorp. I reject that submission for the following reasons.

123. First, the allegations now advanced on behalf of Mr Corney are inconsistent with the contemporaneous assessment of Mr Corney himself that in excess of 4,265m^3 of waste remained on site in February 2021 (see [42] above). Mr Corney is a businessperson with considerable experience of waste management and who had just removed 630 lorry loads of material from Mound 2. That figure of 4,265m^3 was, itself, based on the contemporaneous professional assessment of Mr Falcon.

124. Second, the allegation now advanced is also inconsistent with the contemporaneous assessment of the Claimants in February 2021 that Mr Corney had removed approximately 50% of Mound 2. Conversely, that contemporaneous estimate is strikingly consistent with the evidence now available as to the quantities of waste removed from site before and after February 2021:

    i) It is common ground that Mr Corney removed 630 lorry loads by 3 February 2021 and that the documentary evidence shows that ME Waste removed 545 lorry loads thereafter. In the crude terms of lorry loads, therefore, Mr Corney removed approximately 54%.

    ii) In terms of tonnage, the experts agree that Mr Corney removed approximately 10,000 tonnes. Mr Falcon's estimate, agreed by Mr Speak as likely to be correct, is that ME Waste subsequently cleared approximately 9,707 tonnes. In terms of tonnage, therefore, Mr Corney removed approximately 51% of the total tonnage attributed by the Claimants to Mound 2 and behind the Bays.

    iii) In terms of volume, Mr Falcon's estimate ([89] above) is that Mr Corney removed approximately 55% of the waste and that ME Waste thereafter removed te remaining 45%.

125. It is also notable, in my view, that Mr Corney, with all his experience of waste removal in general and his particular experience of removing 630 lorry loads of waste from Mound 2, did not raise any quibble, contemporaneously, with the Claimants' estimate that he had only removed about 50% of Mound 2.

126. Third, the effect of Mr Apthorp's submission as to dishonesty is that the Claimants either (i) fabricated a substantial quantity of documentary evidence relating to the removal of waste from site by ME Waste; or (ii) moved large volumes of waste onto site and then off site; or (iii) moved large volumes of waste off site from other parts of the site and passed those off as originating from Mound 2. Yet the experts, who have

had access to the waste tickets and supporting documentation, have not detected any such fabrication of documents. Nor have any of the experts, who have had access to the ground-level and aerial photographs taken over time, identified any clear evidence of any such illicit movements of large volumes of waste (see further [117] above and [137] below).

127. Mr Apthorp submitted that the scale of the dishonesty was "breathtakingly bold". The reality, in my view, is that the scale of the dishonesty alleged by the Second Defendant is so great that it seems inherently improbable that it could have been achieved without any of the experts instructed identifying fabrication of the waste removal documentation and/or clear evidence of illicit movements of large volumes of waste around the site.

128. Fourth, it is by no means clear to me how the alleged fabrication of evidence as to the quantity of waste removed after February 2021 would advance the Claimants' case. The Claimants' claim is that Mr Corney was in breach of his contractual obligation to remove *all* of the waste from Mound 2 and that, as a result of such breach, judgment should be entered in the agreed judgment sum of £300,000. The Claimants' case in this regard is unaffected by whether ME Waste removed 2,441m^3 or 4,900m^3 of waste. The Claimants are not advancing a claim for damages based upon the cost of removing the waste left *in situ*. Again, it strikes me as inherently implausible that the Claimants would have gone to such lengths to act dishonestly in circumstances in which the alleged dishonest conduct would not materially advance their claim or provide them with any other obvious benefit.

129. Finally, as set out at [112] above, it is possible that the 2021 survey calculation may have failed to take into account any waste present on site below the baseline it adopted.

130. In opening submissions it had been submitted by Mr Apthorp that Mr Corney had been prevented from carrying out a survey of the site following his departure from site in February 2021, but this submission appears to have been based on a misunderstanding. Mr Corney was clear in his oral evidence that he had not been prevented from carrying out a survey of the site at any stage. The absence of any survey of the site after the clearance operation conducted by ME Waste means that it is not known whether ME Waste removed waste to, or below, whatever baseline was used in the 2021 survey.

131. In the circumstances, and as set out at [116] above, the fact that the documentation disclosed by ME Waste indicates that more material was removed from site after February 2021 than is indicated as present on Mound 2 on the 2021 survey drawing (by reference to the 2016 survey) does not, on the evidence before me, provide a sound basis for rejecting the evidence of the Claimants and Alfred Hyde that no additional waste was added to Mound 2. Nor does it support the allegation that the Claimants, or Alfred Hyde, have attempted to mislead the court in this regard.

132. The second point advanced by the Second Defendant in support of the submission of systematic dishonesty is that Alfred Hyde and Reginald Hyde must have known that not all of Mound 1 had been removed from the site (see [82] above) and that they deliberately withheld this evidence. It is said that it was only after the identification of

this anomaly by the experts that the Claimants disclosed the 2016 v 2019 drawing showing that ME Waste had left 1,220m^3 of material on site in the area of Mound 1.

133. I accept the evidence (see [83] above) of Mr Falcon and Dr Cox, who both attended site, that the undulating nature of the site meant that it was not apparent from a visual inspection that excess material remained in situ on Mound 1 and that this was only identified following a full topographical survey. I also note that it was, of course, the Claimants who commissioned and disclosed the 2016 v 2019 drawing. Had they been engaging in systematic dishonesty as alleged, then it is very difficult to understand why this drawing would have been commissioned and disclosed.

134. In all the circumstances, I accept the evidence of the Claimants that they believed that Mound 1 had been cleared back to its natural ground level. Accordingly, I reject the submission that there has been any dishonesty on the part of Mr Alfred Hyde or Mr Reginald Hyde in respect of the failure to remove all waste from Mound 1.

135. The third point advanced in support of the systematic dishonesty submission is that Alfred Hyde was deliberately misleading the court by claiming that the terracing of Mound 2 took place in June 2019, that he only changed tack on this issue during cross-examination when shown photographs demonstrating that the date was incorrect and that it was only then that he asserted that work was carried out to re-shape Mound 2 on several occasions.

136. The experts agreed that the terracing had taken place at some stage between October 2018 and June 2019. It my judgment some of the photographs do indicate that the terracing is likely to have taken place before June 2019 and that Alfred Hyde was therefore mistaken as to the date on which the terracing took place. He appears to have taken the date from a photograph taken on his mobile phone showing other work to Mound 2 in June 2019. It is difficult to see what material advantage could possibly have been gained by Alfred Hyde, or by the Claimants, in advancing a date of June 2019 for the terracing rather than a date a few months earlier. Alfred Hyde, in my judgment, made a mistaken as to the chronology in his statement written over two years after the relevant events. The fact of the error does not give rise to an inference, in my judgment, that Alfred Hyde was deliberately misleading the court in this regard.

137. The fourth point relied on in support of the allegation of dishonesty is that various photographs and aerial images are said to show movement of waste around the site and changes to Mound 2 during the relevant period, contrary to the evidence of the Claimants. I accept the agreed expert evidence, set out in the second joint statement and summarised at [94] and [95] above, as to what can be gleaned from the photographic and aerial images. It is clear that some work was undertaken in respect of Mound 2 by the Claimants at various points in time from 2017 onwards. Alfred Hyde's position was that work was carried out to Mound 2 on various occasions to stop slippage. As set out at [117] above, in my judgment, the available photographic evidence does not support a conclusion that new material was added to Mound 2 during that period and nor does it support the allegation of dishonesty on the part of the Claimants or Alfred Hyde in respect of their evidence as to the activities undertaken on site.

138. **The quantity of waste brought onto site as against that removed:** It was submitted on behalf of Mr Corney that the Judge found, at [50], that a total of 12,007 tonnes of

excess waste was brought onto site by the Defendants, not all of which necessarily ended up on either Mound 1 or Mound 2. In contrast, the evidence of the waste tickets showed that somewhere in the region of 19,707 tonnes of waste were removed by Mr Corney and ME Waste from Mound 2. In addition, waste was also removed from Mound 1.

139. It is submitted by Mr Apthorp that this indicates that the ME Waste tickets for Mound 2 are wrong and/or that it evidences that material was added to Mound 2. Further, Mr Apthorp's submission is that, on any view, Mr Corney removed at least his share of the excess material found to have been brought onto site by the Defendants in the Judgment.

140. The Judge's determination was concerned with the *excess* waste (see, for example, at [50]) brought onto site by the Claimants by way of trespass, not the total amount dumped on site by the Defendants, let alone the total amounts on site in the region of Mounds 1 and 2 and behind the bays. The Judgment also makes clear, at [40], that Mound 2 was already in existence in 2014 when the Defendants arrived on site.

141. I also note that Mr Edmund's calculations for the first trial (paragraph 60(b) of his first statement) envisaged that Mound 2 might weigh 12,545 tonnes even on the basis of an assumed density of only 1,200kg/m^3. Thus, it was anticipated at the time of the trial that the total weight on Mound 2 alone (i.e. not taking into account Mound 1) might exceed the total weight of material said to have been brought onto site by the Defendants.

142. By the Consent Order Mr Corney assumed an obligation to clear Mound 2; he did not assume an obligation to move a particular number of lorry loads or a particular tonnage or volume. The fact that Mound 2 had been in existence prior to 2014 might well explain why the total weight of waste on Mound 2 might be greater than the weight of excess waste found by the Judge to have been moved onto site by the Defendants. The Judge also made clear, at [76], that she anticipated that the amount claimed was likely to underestimate the waste deposited by the Defendants.

143. Accordingly, this argument does not, in my judgment, assist the Second Defendant in his contention that the Claimants must have added waste to Mound 2 or otherwise mislead the court. Nor does it support the Second Defendant's case that he must be taken to have discharged his obligations under the Settlement Agreement.

144. **The photographic evidence:** It is said that the available photographs show track marks on the top of Mound 2 at various times, including in early 2017, and that an Environment Agency photograph of 16 February 2017 shows material being moved onto Mound 2 at that time. As set out at [117] and [137] above, I do not consider that either the photographic evidence of track marks on the top of Mound 2 at various times, nor the other photographs described by the experts in the second joint statement, provide any evidence to support a conclusion that additional waste was added to Mound 2 at any relevant time.

145. **The Second Defendant's reliance on the CCH report:** The CCH report shows changes in the extent and shape and vegetation of Mound 2. It is said on behalf of Mr Corney that the cross sections produced by CCH show significant changes in the appearance of Mound 2. The Claimants accept that Mound 2 was terraced in 2019 and

that it changed shape, but they deny that any new waste material was added. As set out at [118] above, in my judgment, the CCH analysis does not take matters further forward in circumstances in which the analysis is unable to provide any assistance on the issue as to whether the volume of Mound 2 (as opposed to its shape) changed over the relevant period.

146. **Conclusion on Issue 3:** Having regard to the totality of the evidence before me, I accept the Claimants' evidence that no additional waste was not moved onto Mound 2 after the relevant date, namely the date of the Settlement Agreement of 8 December 2017. In case it is of any relevance hereafter, I also accept the Claimants' evidence that no additional waste was moved onto Mound 2 after 25 July 2016. I also accept Mr Falcon's analysis, summarised at [89] above, as to the likely quantities of waste removed by John Corney and ME Waste (see, further, [152] below).

147. For the reasons set out above I also reject the allegations that the Claimants have acted dishonestly or materially misled the court in respect of the waste on Mound 2 and/or the volumes of waste removed from Mound 2 or otherwise. I reject the abuse of process argument advanced on the part of the Second Defendant.

Issue 4: How is the amount of waste removed by the Second Defendant to be measured? By weight or by volume?

148. In light of my findings as to the proper construction of the Consent Order, the obligation on the Second Defendant was to clear all the waste from the area of the site known as Mound 2 and the rear of the bays. The obligation was not expressed to be confined to the removal of any particular weight or any particular volume of material.

149. In particular, I emphasise that Mr Corney's obligation was to remove all waste from the relevant area and was not limited to removing 8,363m^3 (or any other specified volume) of waste from site. There are three particular points to note in this regard.

i) First, the 2016 survey drawing was merely an estimation of the volume of material comprising Mound 2 and the rear of the bays as against a baseline. That baseline appears, from the Judgment, to have been the 2015 survey. The true volume of material needed to be removed in order to remove all waste from the relevant area might have been great than that estimate, not least given the possibility that there may have been waste below the relevant baseline (see [112] above).

ii) Second, it was common ground between the experts that the waste forming Mound 2 was in a compressed state and that the process of excavating, sorting and transferring that waste to a lorry would result in the material being "bulked up" by some factor. The relevant bulking factor to apply was estimated, but only estimated, to be about 25%. In order to have removed the volume of waste identified in the 2016 survey it was estimated by the experts that it would have been necessary to remove 10,454m^3 of material. This was only an estimate and, as above, it was only an estimate as against whatever baseline was used for the 2016 survey.

iii) On any view, Mr Corney did not remove 100% of the waste by volume. A substantial quantity of waste remained when he left site.

150. Both the volume and the weight of material removed from site by Mr Corney can be estimated, and has been estimated, by reference to the number of lorry loads removed and the likely tonnage removed; but again, these are only estimates.

151. For the reasons given above, it would not be possible to determine that Mr Corney had discharged his obligations under the Settlement Agreement solely by reference to the removal of an estimated volume or weight of material from site. The position would have been very different had the parties agreed to limit Mr Corney's obligation under the Settlement Agreement to the removal of a certain volume or weight of material from the site, but this is not what the parties agreed; in contrast, the Settlement Agreement entered into by Mr Stiles did contain a volumetric limit to his obligation.

152. I accept the expert evidence of Mr Falcon as to the likely quantities of waste removed by John Corney and ME Waste (see [89] above). I find that Mr Corney removed approximately 10,000 tonnes of waste from the site. I consider that Mr Falcon's estimate that this equated to approximately 5,883m^3 of waste by volume to be a reasonable estimate. I also find that ME Waste removed approximately 9,707 tonnes of waste from site in respect of Mound 2 and the rear of the bays. I consider that Mr Falcon's estimate that this equated to approximately 4,917m^3 of waste by volume to be a reasonable estimate.

Conclusion

153. The findings I have made can be summarised as set out below.

Issue 1: Whether the waste to be removed by the Second Defendant, pursuant to Clause 6 of the Schedule to the Consent Order, was that in existence as at the date of the SV Topo Survey (25 July 2016), or the date of the Consent Order (8 December 2017), or the "Operative Date" as defined in Clause 2 of the Schedule, or some other date.

154. The waste to be removed by the Second Defendant pursuant to the Settlement Agreement was that in existence in the relevant areas of the site (Mound 2 and the rear of the bays) as at the date of the Settlement Agreement (8 December 2017). The obligation was not circumscribed by the volume identified on the 2016 survey drawing; if waste existed below the baseline used for the 2016 survey then the Second Defendant would have been obliged to remove any such waste.

Issue 2: Whether, when the Second Defendant left the Site …on about 3 February 2021, he had cleared all waste from the area of the Site known as Mound 2 and the rear of the Bays.

155. The Second Defendant did not clear all relevant waste from the relevant areas. A substantial volume of waste was left in the relevant areas. As noted above, the obligation required all waste to be removed from the relevant areas. I have found that ME Waste cleared approximately 9,707 tonnes of waste from the relevant areas of the site, all of which had been left by Mr Corney.

Issue 3: Whether additional waste was moved onto Mound 2 after 25 July 2016 and/ or 13 December 2017 or at a later date.

156. On the evidence before me, I find that no material volume of waste was added to Mound 2 and/or the rear of the bays after the relevant date, being the date of the Settlement Agreement (8 December 2017). In case it is of relevance, I also find, on the evidence before me, that no material volume of waste was added after 25 July 2016.

Issue 4: How is the amount of waste removed by the Second Defendant to be measured? By weight or by volume?

157. This issue falls away in light of the findings I have made above. The obligation was to remove all waste in the relevant areas. It was not an obligation which was limited to the removal of any particular volume or tonnage of waste. I have set out the figures as to the likely quantities of waste removed, at [152] above, by both weight and volume.

Form of order

158. This trial was set down as a trial of four specific issues. It necessarily follows from the findings which I have made on those issues that Mr John Corney did not discharge the obligations which he assumed pursuant to the Settlement Agreement to clear all waste from the area of the site known as Mound 2 and the rear of the bays. A substantial quantity of waste remained when he left site on 3 February 2021. John Corney therefore breached clause 6 of the Settlement Agreement.

159. Mr Mitchell's position at trial was that if the court finds Mr Corney to be in breach of clause 6 then it follows, by reason of clause 1 of the Settlement Agreement and paragraphs 1 and 2 of the Consent Order, that the Claimants must succeed on their application and are entitled to enforce judgment in the sum of £300,000. Mr Apthorp, on behalf of the Second Defendant, requested time to reflect on the appropriate form of order having regard to the actual findings made in respect of the four issues identified for trial.

160. I invite Counsel to agree a form of order in light of the findings I have made on each of the four issues. I will hear submissions on any issue of disagreement and on any other consequential matters at a convenient date.