Neutral Citation Number: [2016] EWHC 1087 (QB)

Case No: A90SA054

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MOLD DISTRICT REGISTRY
MERCANTILE COURT

The Law Courts, Bodhyfryd,
Wrexham, LL12 7BP

Date: 10 May 2016

Before :

His Honour Judge Keyser Q.C.
sitting as a Judge of the High Court

- -

Between:

PERMA-SOIL UK LIMITED	**Claimant**
- and -	
(1) KEITH WILLIAMS	
(2) FLINTSHIRE COUNTY COUNCIL	**Defendants**

- -
- -

Mark Spackman (instructed by **Douglas-Jones Mercer**) for the **Claimant**
Paul Stagg (instructed by **Weightmans LLP**) for the **Defendants**

Hearing dates: 3, 4, 5 February, 4 March 2016

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Judgment

H.H. Judge Keyser Q.C. :

Introduction

1. This case concerns a claim for damages for misfeasance in public office. It is best approached by way of a relatively short statement of the relevant history.

2. The claimant ("the Company"), which is based in Swansea, carries on the business of the manufacture and supply of a soil stabiliser called Perma-soil. A soil stabiliser is a powder that, when mixed manually or mechanically with the waste materials excavated in the course of highway construction and similar engineering activities, binds those materials to form a substance sufficiently hard to be used as the surface of a highway or other hard area. One of the advantages of soil stabilisers is that their use is considered to be environmentally friendly.

3. The Company is owned by its managing director, David Holloway, and his wife, Ivy Holloway. Mrs Holloway is also a director of the Company but has only limited involvement in its operations. Although Mr Holloway, who is now aged 73 years, exercises control of the Company, he has in more recent years had relatively little to do with its day to day business, which until the matters giving rise to this case in 2010 was largely carried on by the Holloways' son-in-law, Russell Thomas, who was the

Company's sales manager. Mr Thomas did not give evidence at trial, having made clear to the parties that he would not be willing to do so.

4. The Company had no intellectual property rights in Perma-soil. However, until 2010 its only competitor for the supply of soil stabilisers was SMR Limited ("SMR"), which had been formed by Mr Holloway's stepson, Clive Holloway, after a family disagreement. SMR's product was substantially identical to Perma-soil.

5. The use of soil stabilisers in highway works in Flintshire fell within the oversight and authority of the second defendant ("the Council") as the local highway authority. The first defendant ("Mr Williams") commenced employment in the Council's Street Works Department in about 1994 as a Street Works Inspector and as such was answerable to the Regulatory Services Manager, Garry Hughes. By 2009 Mr Williams was employed as the Senior Street Works Engineer, still answerable to Mr Hughes.

6. By 1996 Mr Hughes and Mr Williams had begun to consider the use of soil stabilisers in highway works in Flintshire, and in or about that year they on behalf of the Council began to approve the use of Perma-soil. The decision to approve the use of Perma-soil was informal rather than pursuant to any formal procedure, but no similar approval was given by the Council for the use of any other soil stabiliser and a deliberate decision was made that, although the products supplied by the Company and by SMR were substantially identical, undertakers and contractors would be required to use Perma-soil. Mr Williams explains this selectivity on the basis of the Company's greater professionalism, though it remained unexplained how that distinction was relevant to the decision to give exclusive approval for one of two materially identical products by statutory undertakers and their contractors. Mr Williams had formed a friendship with Mr Thomas, who was his contact with the Company. At all events, from about 1996 onwards any utility undertakers and contractors who wanted to use soil stabilisers in works on highways within Flintshire were required to use Perma-soil.

7. With effect from 24 January 2007, statutory guidance entitled *Specification for the Reinstatement of Openings in Highways 2nd edition 2006*, ("the Code"), issued by the National Assembly for Wales under sections 71 and 104(3) of the New Roads and Street Works Act 1991 ("the 1991 Act"), stipulated the specification of materials to be used, and the standard of workmanship to be observed, by utility undertakers in reinstating streets, for the purpose of achieving uniform standards for the reinstatement of streets in Wales. (A substantially similar document was approved by the Secretary of State in England.) Appendix 9 of the Code provided an approval regime ("Appendix 9 approval") for the use of Alternative Reinstatement Materials ("ARMs"), which fell outside the specification. ARMs were categorised into two generic groups: Structural Materials for Reinstatements ("SMRs") and Stabilised Materials for Fills ("SMFs"). Soil stabilisers such as Perma-soil were SMFs. Appendix 9 provided that SMFs might only be used on an approved trial basis by prior agreement with the undertaker and the local authority. Upon successful completion of an approved trial under Appendix 9, a local authority would have power to approve the use of the SMF as a variation of the permitted specification pursuant to paragraph S1.6 of the Code.

8. When the trial of this claim commenced in front of me, the parties were proceeding on the basis that the provisions of Appendix 9 were merely advisory. They now correctly accept that the effect of section 71 of the 1991 Act, regulations 4 and 7 of the Street Works (Reinstatement) Regulations 1992 and paragraph S1.6 of the Code is that compliance with Appendix 9 is mandatory. However, by October 2010 the Council had not engaged at all with Appendix 9; insofar as it was aware of it at all, it appears not to have understood that it contained mandatory provisions regulating the use of ARMs. Accordingly, Perma-soil continued to be used in Flintshire, but it was not used pursuant to any approved trial under Appendix 9 and never achieved approved status under the Code. Interestingly, this means that its use was unlawful.

9. The year 2009 saw the commencement of a major infrastructure initiative ("the Interconnector Project" or, sometimes, simply "the Project") that involved running high-voltage electrical cables from the Republic of Ireland under the Irish Sea to Prestatyn and thence along the A458 and adjoining highways to the convertor site at Shotton. The project owner was EirGrid, the state-owned company that operated the national grid in Ireland. Before the commencement of the Interconnector Project, EirGrid and the Council agreed that EirGrid had the status of a statutory undertaker for the purposes of the Project; it therefore had a statutory duty to reinstate the streets in accordance with the applicable regulations and the Code, and the Council had a statutory duty to monitor the reinstatement: sections 70 – 72 of the 1991 Act. The main contractor for the supply and installation of the electric cables for the Interconnector Project was VolkerInfra Systems. VolkerInfra Systems in turn engaged a civil engineering company, Welch Civils Limited ("Welch"), to carry out the excavation, installation and reinstatement works on the highways. Welch was based in Newtown, Powys, and was owned and run by its two directors, Philip Jones and John O'Connor.

10. EirGrid was keen to make use of a soil stabiliser for the reinstatement works on the Interconnector Project. Mr Williams made EirGrid aware of Perma-soil and, after receiving a presentation from Mr Thomas, EirGrid decided to use it. In February 2010 the Council authorised EirGrid "to use recycled arisings with the addition of Perma-soil or similar approved stabiliser within its Highway Infrastructure". In accordance with that authority and pursuant to the decision made by EirGrid, from the commencement of works on the highway in March 2010 until October 2010 the soil stabiliser that was used on the Interconnector Project was Perma-soil. The Company sold and delivered Perma-soil to Welch as and when it received orders; the Company now accepts that Welch was not under any obligation to place orders or to buy any quantity of Perma-soil other than such quantity as it contracted to buy from time to time. The Perma-soil was mixed by a machine specially built by Clayton Wheatway Solutions ("Clayton Engineering") of Knighton, Powys.

11. Neither the Company nor the Council initiated an approved trial of Perma-soil, within the terms of Appendix 9, for its use on the Interconnector Project.

12. Because of the scale of the Interconnector Project, in October 2009 the Council seconded Mr Williams to EirGrid for the duration of the project for the purpose of monitoring and supervising the works on the highway and ensuring that they were carried out in accordance with the approved specification. During the period of secondment his salary was paid by EirGrid. (Mr Sam Tulley took over as Senior Street Works Engineer at this point.) During his secondment, Mr Williams had an

office in a portacabin on a site at Greenfield Business Park, Holywell, that had been leased by Welch from the Council for the duration of the Project. He shared the portacabin with Philip Jones and John O'Connor.

13. In late April or early May, Mr Williams made a telephone call to Mr Holloway's grandson, Michael Harris, who worked in the family businesses. The main purpose of the call was to discuss an issue that had arisen concerning the machine that mixed the Perma-soil. But, having discussed the machine, Mr Williams asked whether Mr Harris thought that Mr Holloway would be interested in selling the business of the Company. Mr Harris replied that he would have to speak to Mr Holloway about it. About one week later, Mr Williams made a further telephone call to Mr Harris and asked him whether he had spoken to Mr Holloway. Mr Harris said that he had not mentioned it; in fact, he had done so. On 19 May 2010 Mr Williams, Mr Holloway and Mr Harris met at the Greenfield site—Mr Jones was present for part of the meeting—and on that occasion Mr Williams asked Mr Holloway directly whether he would be willing to sell the Company or, alternatively, to grant a licence to manufacture Perma-soil. Mr Holloway put him off by saying that he would need to speak to his wife about the matter. One week later, on Wednesday 26 May 2010, Mr Williams made a telephone call to Mr Holloway and asked him whether he had discussed the proposal with his wife. Mr Holloway said that he had done so (although in fact he had not and had never intended to) and that the answer was in the negative.

14. Mr Williams' evidence was that Mr Thomas had made him aware that Mr Holloway might be thinking of selling the Company, and that he made the approach to Mr Holloway on behalf of himself and Mr Thomas; Mr Thomas' involvement was not disclosed to Mr Holloway, who it was believed would never agree to sell his business to his son-in-law. Mr Williams stated that, if his approach had met with a favourable response, he would have taken early retirement from the Council's employment and run the business in a quasi-partnership with Mr Thomas; however, when Mr Holloway made it clear that he would not sell the business, he "thought no more about it". In cross-examination Mr Williams denied that his approach to Mr Holloway was made on behalf of Mr Jones and Mr O'Connor, and Mr Jones also denied any involvement in the approach. As I shall explain later, however, Mr Williams has previously claimed that he was acting as an intermediary for Mr Jones and Mr O'Connor.

15. It was shortly after the rebuff of Mr Williams' approach to Mr Holloway that cracks appeared in the relationship between the Company and Welch. On Friday 4 June 2010 Mr Jones wrote a letter to the Company's directors. The letter was not put in evidence at trial, but it is possible to infer that it dealt with the matters mentioned in the message that Mr Jones sent on 9 June 2010 to Mr and Mrs Holloway, via the email accounts of Mr Harris and Mr Thomas:

> "Ivy and David—When would it be possible to prioritise a meeting with myself, John O'Connor (Welch Civils partner) and David White at Clayton Engineering[?] The aim of the meeting would be to resolve the following issues:
>
> 1) Obtaining assurances from yourselves as to the availability of your Permasoil products, not only on our current contract,

> but also in the future, when hopefully Welch Civils will be operating a number of these Suremix machines.
>
> 2) To be assured that the cost of Permasoil is not going to increase dramatically. If this were to happen, we would have to look at other alternatives.
>
> ... Your immediate attention would be appreciated."

16. A meeting was duly arranged to take place at Clayton Engineering's premises on 25 June 2010. The meeting went ahead, but neither Mr Holloway nor Mrs Holloway was in attendance; Mr Thomas alone represented the Company. The minutes record that Mr Thomas told the meeting that Mr Holloway had been set to attend the meeting but that they had had a last-minute disagreement about travel arrangements; he (Mr Thomas) had therefore driven to Knighton alone, and it appeared that Mr Holloway had stayed in Swansea. In his evidence Mr Holloway said that the account given to the meeting was incorrect: he had indeed been ready to attend, but Mr Thomas had told him that he could manage by himself and, as Mr Thomas normally attended meetings at Clayton Engineering's premises alone, he (Mr Holloway) was content to stay behind. These two accounts are not formally contradictory and I think that the truth is that, in the course of a last-minute disagreement, Mr Holloway expressed an unwillingness to travel to the meeting with Mr Thomas and Mr Thomas made it clear that he did not need Mr Holloway there anyway. That the account in the minutes is substantially correct is indicated by the facts that it was given at a minuted meeting and that Mr Holloway took no steps to correct a false account when he received the minutes, as he accepts that he did.

17. The important points concerning this trivial incident are, first, that Mr Holloway knew (as I find) that Mr Jones wanted to meet him—they had in fact met only once, on 19 May 2010 at the Greenfield site; that was probably also the only time they had ever spoken—and, second, that Mr Jones expressed displeasure at his non-attendance. The minutes contain the following passage:

> "PJ [Mr Jones] stated that the meeting was at an impasse, as he needed specific responses to his letter dated 4th June 2010 from a director of [the Company]. These responses relate to assured supply of product, and product pricing in the future. RT [Mr Thomas] stated that a buffer stock of 24 tonnes of material has been created, and that parts availability for the production machinery is within 24 hours. RT also stated that David Holloway had indicated that he had been willing to guarantee prices based on any change being driven by a change in the price of raw materials.
>
> PJ stated that he was now entirely satisfied with the mixing machine and the support for the machine that had been given by Clayton Engineering. He was however unwilling to place an order for the mixing machine until he had received proper assurances from [the Company] on product pricing for the Perma-Soil binder material.

> PJ also stated that he and JC [Mr O'Connor] had now lost all confidence in the Directors of [the Company], as David Holloway does not respond to e-mails or telephone calls. The non attendance at the meeting without explanation or apology showed a lack of respect for a customer who has been prepared to trial the mixing machine and Perma-Soil binder, and who has purchased in excess of 120 tonnes of binder in the last three months. JC reiterated these views, commenting that he had travelled from Clacton, Essex, for the meeting. ...
>
> It was agreed that no further business could be carried out without a Director of [the Company] being present."

18. The defendants say that Mr Jones' apparent displeasure represented a genuine loss of confidence in the management of the Company, but the Company says it was merely a pretext for what happened next.

19. On 1 October 2010 a company called SM Recycled Ltd ("SMRec") was incorporated[1]. Its shareholders and directors were Mr Jones and Mr O'Connor. The purpose for which SMRec was incorporated was the manufacture and supply of soil stabiliser, specifically soil stabiliser that could be used on the Interconnector Project instead of Perma-soil. Mr Jones' evidence was that the idea of setting up a company to manufacture and supply soil stabiliser occurred to him only in consequence of the breakdown in the relationship with the Company that became apparent on 25 June 2010. He said, further, that when he decided to set up the new company he knew nothing of Mr Williams' approach to Mr Holloway in May 2010. Mr Williams' evidence was that he learned of the intention to produce soil stabiliser and use a new company for that purpose only in September 2010.

20. On 14 October 2010, having worked five weeks' notice, Mr Thomas left the Company's employment and went to work for SMRec. The evidence of both Mr Williams and Mr Jones was that Mr Williams played no part in persuading Mr Thomas to leave the Company's employment and go to work for SMRec. Mr Thomas had a twofold importance for SMRec: not only did he know the soil-stabiliser business, but he brought with him the technical know-how to enable the new company to manufacture a product similar to Perma-soil. As early as October 2010, a soil stabiliser manufactured by SMRec and supplied by it to Welch was being used for trials for Appendix 9 approval. Welch still had some stocks of Perma-soil, which it continued using for a time on the Interconnector Project, but after those stocks had run out it used SMRec's product. That product had been in use for several months when on 30 June 2011 Mr Tulley gave written confirmation by email "that Flintshire County Council will allow the use of the soil stabilizer SMRecycled for the backfilling of the ongoing eirgird (sic) project."

21. The Company's case is that Mr Williams was guilty of the tort of misfeasance in public office and that it has suffered loss and damage in consequence. I shall examine the case in detail later, but the gist of it is as follows. After his approach to Mr Holloway in May 2010 had been rebuffed, Mr Williams actively assisted Mr Jones and Mr O'Connor to set up SMRec in competition with the Company, using the

[1] On 20 August 2012 SMRecycled Ltd changed its name to Stablearth Ltd.

knowledge and experience gained in his employment to do so, and actively encouraged and procured his friend, Russell Thomas, to go to work for SMRec. He was also instrumental in the grant of approval of the use of SMRec's soil stabilising product. In doing these things, he was motivated by hostility to the Company, because of the rejection of his approach to Mr Holloway, and by the desire for personal gain, in that he hoped or expected to benefit financially from SMRec's business. The inevitable and intended consequence of his actions was the diversion of business from the Company to SMRec. Although the Company had no legal right to be free of competition from other producers of soil stabilisers or to continue to receive orders from Welch, if it had not been for Mr Williams' misfeasance it would have continued to supply Perma-soil to Welch for the remainder of the Interconnector Project and would, in addition, have been able to use the Project to satisfy the requirements of Appendix 9 approval, thereby enhancing the marketability of Perma-soil.

22. The Company asserts that the Council is vicariously liable for the misfeasance of Mr Williams. The Council accepts that, if Mr Williams has tortious liability to the Company, it is vicariously liable for his conduct. However, the Council and Mr Williams deny the allegation of misfeasance in public office. They say that Mr Williams had nothing to do with the setting up of SMRec or with Mr Thomas's decision to go to work for SMRec: the directors of Welch set up SMRec because they were dissatisfied with the directors of the Company and considered that it was to their own financial advantage to manufacture and supply the soil stabiliser for the use of Welch on the Interconnector Project; and Mr Thomas went to work for SMRec because his relationship with Mr Holloway was mutually and bitterly hostile. It is said that, while Mr Williams was seconded to the Interconnector Project, Mr Hughes and Mr Tulley were responsible for the approval of the use of new products such as SMRec's soil stabiliser.

Misfeasance in public office: the law

23. The unlawful purported exercise of a power by a public officer or body will not generally give rise to a private right of action, even if an inevitable consequence of the unlawful conduct will be harm to a third party; any remedy will be in public law—for example, a quashing order. However, the tort of misfeasance in public office covers the case where a public officer misuses his powers in bad faith for purposes other than those for which the powers were conferred. In *Menon v Herefordshire Council* [2015] EWHC 2165 (QB) at [8], Lewis J helpfully summarised the requirements of the tort, though he made it clear that he was not offering a definition:

> First, there must be an exercise of power by a public officer. Secondly, that exercise of power must be unlawful. Thirdly, the public officer must either have intended to injure a person or persons (referred to in the case law as targeted malice) or, alternatively, the public officer must have done the act knowing that he has no power to do so and knowing that the act will probably injure the claimant. That alternative mental state may be established if the public officer is subjectively reckless as to whether the act is unlawful or not (sometimes described as

> wilfully disregarding the risk that the act might be unlawful). Fourthly, the actions complained of must have caused loss. [2]

24. The courts have always taken a broad approach to the conduct on the part of a public officer that may amount to an abuse of public power; any act or omission by a public officer in purported performance of the functions of his office will suffice: cf. *Northern Territory of Australia v Mengel* (1995) 69 ALJR 527 at 545, 185 CLR 307 at 355, *per* Brennan J. In *Three Rivers District Council v Governor and Company of the Bank of England (No. 3)* [2003] 2 AC 1, Lord Steyn explained at 191-2 that, though the tort is a single tort, the underlying wrong may be manifested in two distinct ways:

> First there is the case of targeted malice by a public officer, i.e. conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.

25. Lord Steyn's words make clear that the first form of the tort requires malice in the sense of an actual intention to harm the claimant; mere foresight or recklessness does not suffice: cf. also *Three Rivers District Council v Governor and Company of the Bank of England (No. 3), per* Clarke J at [1996] 3 All ER 558, 578.

26. The requisite mental element for the second form of the tort has two aspects. First, the public officer must know that his conduct is unlawful. Second, he must know that his unlawful conduct will probably result in harm to the claimant. For these purposes, the requirement of knowledge is satisfied by subjective recklessness, in the sense of a wilful indifference to the legality or the consequences of the conduct: cf. Lord Steyn in the *Three Rivers* case at 192; and, at first instance, Clarke J at [1996] 3 All ER 558, 632-3.

Misfeasance in public office: the Company's case

27. It is common ground that Mr Williams was a public officer for the purposes of the tort.

28. The Company's case regarding Mr Williams' conduct is set out in paragraph 22 of the particulars of claim, where it is said that, "consciously and acting in bad faith", he did two things[3]:

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[2] The need to prove causation of actual damage was confirmed in *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395. The actual damage must, of course, lie "within the ambit of the material intent or recklessness": *Akenzua v Secretary of State for the Home Department* [2002] EWCA Civ 1470, [2003] 1 WLR 741, *per* Sedley LJ at [20].

[3] A possible third thing—solicitation of Mr Thomas away from the Company to work for SMRec—is expressly pleaded, but only as a particular of bad faith. Anyway, that conduct involves no exercise of a public function.

1) interfered in the contractual relations between Welch and the Company;

2) caused or was party to the authorisation by the Council of the use of SMRec's product.

29. The allegation that Mr Williams interfered in the contractual relations between Welch and the Company is problematic for at least two reasons. First, as Mr Spackman accepted in his closing submissions, it does not involve any allegation of the exercise of a public function. Second, Welch was not subject to any contractual obligation to continue buying soil stabiliser from the Company. Although everyone had doubtless assumed that Welch would continue to buy from the Company all of its requirements for soil stabiliser in respect of the Interconnector Project, there was no contract to that effect; discrete contracts arose as orders were placed and accepted from time to time. In fact, the allegation is more in the nature of a complaint of the major head of loss said to have been suffered by the Company, namely the loss of further business from Welch.

30. The allegation that Mr Williams "caused or was party to" the authorisation of SMRec's product is not set out with any precision in the particulars of claim. Indeed, paragraph 20 states: "The precise circumstances of the authorisation are currently not known to the claimant, but the claimant's case is that, by reason of the involvement of the first defendant in SM Recycled, SM Recycled were duly authorised by the second defendant to supply soil stabiliser for use in the Interconnector Project." In argument at trial, the allegation was put in two ways: first, Mr Williams gave tacit approval to the substitution of SMRec's product for Perma-soil, in that he took no steps to prevent its use or to insist that it receive some formal approval before it were used but (to put the same point in a positive form) by his inaction allowed Welch to use SMRec's product; second, he was complicit in the express approval of its use that was given by Mr Tulley in June 2011. I shall, for convenience, refer to the first way of putting the matter as "the Non-Enforcement Basis" and to the second way of putting the matter as "the Express Approval Basis". I make the following observations. First, the Company did not advance the case, either in the pleadings or (at least expressly) in argument, on the basis that either the tacit or the express approval of SMRec's product was inherently unlawful. Rather it contended that conduct that otherwise might have been lawful was rendered unlawful by bad faith. Second, the Non-Enforcement Basis was not pleaded. Nor was there any assertion that there was a positive duty to prevent use of SMRec's product unless express approval were given. Third, the Express Approval Basis was not advanced in terms of the inherent unlawfulness of the express approval given in June 2011. Until a late stage of the trial it was common ground that compliance with the Code and the requirements of Appendix 9 was not mandatory, and the Company did not plead and prove (or seek to plead and prove) that Mr Williams or any of his colleagues at the Council believed that informal permission for the use of soil stabilisers was impermissible. The case advanced by the Company was rather, as I have said, that Mr Williams' conduct, though it might otherwise have been lawful, was rendered tortious by his bad faith.

31. The Company's case regarding Mr Williams' state of mind is set out in paragraphs 24 and 25 of the particulars of claim, which allege that he:

1) was motivated by hostility to the Company as a result of the refusal of his request to purchase the business;

2) was motivated by [a desire for] personal gain;

3) intended to cause damage to the Company and knew that his actions would cause damage to the Company or, alternatively, was reckless as to the risk of causing damage to the Company.

32. For the Company, Mr Spackman relied, at least ostensibly, on the first form of the tort, namely targeted malice. He submitted, not that Mr Williams purported to exercise a public power with knowledge that he was acting unlawfully, but that he acted with the intention of injuring the claimant. However, in the course of submissions Mr Spackman put the case regarding intention in two ways. First, he said that Mr Williams intended injury to the claimant, in the sense that that was what he aimed at and desired; he was motivated by his "hostility" to the Company. Second, in the alternative, he said that Mr Williams intended injury to the Company inasmuch as he knew that the diversion of business from the Company to SMRec, which he hoped would bring him financial advantage, would in fact cause damage to the Company. On this alternative case, the improper motivation was personal gain, but there was said to be knowledge of the harmful consequences to the claimant.

33. The first way of putting the matter falls squarely within the first form of the tort as described by Lord Steyn. In my judgment, the second way of putting the matter falls not within the first but the second form of the tort. It does not involve a specific intention to injure the Company; rather it involves conduct for improper motivation (personal gain), where the injury to the Company is foreseeable as likely or even, possibly, practically certain. If the cause of action in the second form of the tort is to be made out, it is necessary to establish that the bad faith, which itself is said to be constitutive of the unlawfulness of the conduct, involves or implies knowledge of that unlawfulness or reckless disregard of the question whether the conduct were lawful or not. Consider three kinds of case:

(1) The conduct is otherwise lawful, but it is done with the specific intention of harming X. Therefore the conduct is unlawful, as being for an improper purpose, and X, being the target of the unlawful conduct, can sue. This is the first form of the tort.

(2) The conduct is unlawful, because it is outside the scope of the public officer's powers. X suffers injury and the public officer knew that he would probably do so. However, the public officer believed that the conduct was lawful; he acted in good faith. Any remedy must lie in public law; there is no private right of action.

(3) The conduct is within the scope of the public officer's powers and would otherwise be lawful, but it is unlawful because it was motivated by an improper purpose. X suffers injury and the public officer knew that he would probably do so, though he did not act out of a specific intention to cause harm. The case does not fall within the first form of the tort. Whether it falls within the second form of the tort will depend on whether the public officer acted in bad faith. If he believed he was acting lawfully (for example, because he misunderstood the purposes for which the power was conferred), X will have no private right of action; any remedy must lie in public law. But if the public officer knew that he

> was abusing the power by exercising it for improper purposes (for example, that of feathering his own nest), X will have a right of action under the second form of the tort.

34. I think that the reason why Mr Spackman tried to shoehorn the second way of putting the requisite mental element (desire for personal financial gain) into a "targeted malice" analysis was a concern that he could not identify any unlawfulness in the conduct alleged on the part of Mr Williams. That would, however, be to overlook the fact that the exercise of a power for an improper purpose is itself unlawful. A public officer has no power to exercise a public power for an improper purpose, even though he could have done the same acts lawfully for a proper purpose. Therefore Mr Spackman's second way of putting the case is capable of being brought within the scope of the tort, but only within the second form of the tort; and for that purpose it is necessary to prove that Mr Williams was at least reckless as to the legality of his conduct.

35. Accordingly, the Company must prove: (1) that Mr Williams purported to exercise a public power; (2) that he did so with the specific intention of injuring the Company; (3) in the alternative to (2), that he did so for the purpose of personal financial gain, such that he knew, or was recklessly indifferent to the risk, that (a) he was acting unlawfully and (b) the Company would probably suffer harm as a result; (4) the Company suffered actual damage by reason of his purported exercise of the public power.

36. The required standard of proof is the balance of probabilities. The seriousness of the allegations made against Mr Williams does not affect that standard, but it may be relevant to determining whether the burden of proof has been discharged because, depending on the circumstances of the particular case, it may be that "the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability" (*per* Lord Nicholls of Birkenhead in *In re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] A.C. 563 at 586). See generally *Re B (Children) (Care Proceedings: Standard of Proof)* [2009] A.C. 11.

37. It is convenient, before addressing the specific issues directly, to consider the evidence relating to the nature of Mr Williams' involvement with SMRec and to the approval of the use of SMRec's soil-stabilising product.

Mr Williams and SMRec

Relevant oral evidence

38. Mr Williams and Mr Jones both insisted that Mr Williams had no direct or indirect interest in SMRec and was not involved in setting it up or arranging for Mr Thomas to go to work for it. Mr Williams said that, although he was in constant communication with Mr Thomas and shared an office with Welch on the Greenfield site, it was not until September 2010 that he learned that Messrs Jones and O'Connor were setting up a company to manufacture and supply soil stabiliser and that Mr Thomas was going to work for them.

39. The tenor of Mr Williams' evidence was that his involvement with SMRec went no further than giving the kind of advice that might properly be expected of a council officer in his position. The Council's document, *Street Works Section[:] Regulatory Control[:] Role of the Street Works Inspector*, includes the following passage:

> The current prime functions of the section at inspector level are as follows:
>
> ....
>
> 5. Provide advice to those working in the highway with regard to all aspects of carrying out works in the highway.
>
> 5.1 The role of the Street Works Inspector is one of specialist knowledge and as such is called upon to provide advice across a range of topics within the field of Street Works. This advice will be provided to Utility representatives, Contractors, both independent and those working for Utilities, applicants for private licences to excavate, other sections within the Directorate of Environment and other Directorate representatives.
>
> 5.2 Increasingly, experience shows that Utilities and others working in the highway are changing contractors for carrying out their works more frequently and have a high staff turnover. This results in a constantly changing workforce which lacks experience and street works knowledge. In this situation, the Street Works Inspector's role is being more frequently required to provide advice across the full range of Street Works procedures, specifications and Codes of Practice. The advice will primarily relate to reinstatement requirements, including construction and materials ...

Mr Williams' evidence, unchallenged on this point, was that after the Council first began authorising the use of Perma-soil he gave assistance to the Company in a number of ways, including helping Mr Thomas to give a Powerpoint presentation on the use of the product and inviting the Company to address a meeting of the regional Highway Authority and Utilities Committee. He maintained that he had done no more for SMRec than he had done for the Company and had no financial interest in either.

40. Mr Williams was not an impressive witness; he came across as evasive, cocky and confrontational. However, this unfavourable impression is not a sound basis for making assessments of his evidence. It is possible that his demeanour is, at least in part, explicable by understandable nervousness, as Mr Stagg submits. It is also possible that he simply has an unfortunate manner. The main problems with his evidence concern inconsistencies and points where what he has said is more or less implausible.

41. As a witness Mr Jones was unexceptional. Mr Spackman attacked his veracity by reference to two matters: first, the clear impression given by Mr Jones' witness

statement that he first met Mr Williams in the context of the Interconnector Project, whereas (as he accepted in cross-examination) he had worked with him on a previous project the year before; second, the omission from the witness statement of a considerable amount of relevant information. I do not draw any adverse inferences from those matters; both of them seem to me to be explicable in terms of the hazards of the preparation of witness statements. Mr Stagg properly observed that Mr Jones does not stand to gain or, apparently, lose by the outcome of these proceedings; he is not a party to them, no allegations of unlawfulness are made against him, and he no longer has an interest in SMRec[4]. These are significant points, though they do not necessarily mean that his evidence is true. The central question is the extent to which Mr Jones' evidence is credible when tested against other evidence and inherent probabilities.

The requests to buy the business

42. Mr Harris's written and oral evidence was that the enquiry was whether "your grandfather would be interested in selling the business "to us"; he did not know and did not enquire as to the "us". Mr Holloway's witness statement put the enquiry in similar terms; he said that Mr Williams had asked "are you willing to sell the Company to us?" His oral evidence was not so precise, however. I am not satisfied that Mr Williams' enquiries were clearly expressed in plural terms. If they had been, the irresistible question would have been, "Who is this 'us'?" Nonetheless, Mr Williams was clearly not acting solely, if he was acting at all, on his own account.

43. Mr Williams' evidence in his witness statement and oral evidence was that his approach to Mr Holloway was made on behalf of himself and Mr Thomas, though he did not disclose Mr Thomas's involvement. He denied that his approach had anything to do with Mr Jones and Mr O'Connor. Mr Jones gave evidence to similar effect. (Mr O'Connor did not give evidence.) Accordingly both Mr Williams and Mr Jones said that the setting up of SMRec had no connection at all with the approach to Mr Holloway in May 2010.

44. However, on 30 September 2011, as a result of a complaint made to the Council by Mr Holloway, Mr Williams was formally interviewed by an officer of the Council (DS). The interview included questions about the request to buy the Company's business; the relevant part of the transcript is as follows (for convenience, I omit DS' interjections such as "Yes" and "OK"):

> DS Did you at any point in the meeting [i.e. on 19 May 2010] approach Perma-soil asking if the company was for sale?
>
> KW I did, on behalf of Welch Civils (Phil Jones). It's a long story to this one. Right, prior to that Russell Thomas, who is their sales person—was their sales person, is also the son-in-law of David—told us about 6 – 8 months prior to that, said that Dave was looking at selling the company. So, he is, well, he is 70 now, so, you know, it's

[4] The precise submission in this last respect was that SMRec (now Stablearth Ltd) no longer exists. That does not appear to be correct. However, Mr Jones ceased to be a director of it in 2013.

long past retirement age. And we heard that he wanted to sell it again. So, yeah, I did ask him the question.

DS Yes, so was this with a view for you to go from Flintshire, or ...?

KW No, not at all. No, not at all. No, this was nothing to do with me. I was just asking on behalf of Welch Civils. You know, as you go asking the question. I don't know what the proper terminology is for it. Intermediary: will that do? (Yes) Thank you. It was because I knew him. And purchasing the company off him. So that would be the second approach. We asked the question, Dave thought about it, came back later and said 'No'.

DS OK. Did you previously offer on another occasion to purchase Perma-soil in a personal capacity prior to the meeting on 19 May 2010?

KW Yes.[5] I was asked by Russell because I know Dave. Me being me, I thought I'll ask him did he want to flog to me, because we heard on the grapevine that Dave did want to get rid of the company—he had had enough—and Russell asked me if I would be interested in going in with him.

DS Fine, OK. Was it with a view of going into partnership with Russell?

KW That was the idea from the original intention.

45. According to this account, Mr Williams' first approach to Mr Holloway—which was at an unspecified time—was made with a view to going into business with Mr Thomas. But the approach on 19 May 2010 was made not on behalf of Mr Thomas but as intermediary for Mr Jones. That account is contrary to Mr Williams' and Mr Jones' evidence at trial. It is not obvious why Mr Williams would have given the account in the formal interview, if it were not true. When asked about the account in cross-examination, Mr Williams said that he "[could] not remember" whether or not it were true. That was an unimpressive and unpersuasive answer and I do not believe it.

46. I find that, as he said in interview, Mr Williams' final approach to Mr Holloway was made on behalf of Messrs Jones and O'Connor. Accordingly I reject Mr Jones' evidence that he had no interest in the approach to Mr Holloway and learned of the approach only several months later. This undermines Mr Jones' credibility. This in turn might lend some support to the Company's contention that the fall-out from the meeting at Clayton Engineering on 25 June 2010 was manufactured as a pretext for setting up SMRec. On the other hand, as Mr Stagg observed, Welch had no need to manufacture a breakdown in its relations with the Company: it had no contractual obligation to continue buying from the Company; insofar as Welch was obliged

[5] The word "Yes" appears likely to have been spoken by Mr Williams, though the typed transcript shows it as spoken by DS.

towards its own employer to continue using soil stabiliser, Messrs Jones and O'Connor did not need any false excuse to justify setting up in competition.

47. It is a distinct question whether Mr Williams was personally interested in the approach to Mr Holloway or merely acting as intermediary on behalf of Mr Jones and Mr O'Connor. He had previously seen the Company's soil-stabiliser business as presenting a good commercial opportunity for him. His only explanation for why he lost interest in the possibility of purchase was that there was "no mileage" in it—that is, because Mr Holloway was not interested in selling. If that is correct, it is unexplained why he apparently made no effort to join with Messrs Jones and O'Connor in their proposed purchase; after all, he was working in the same office as they, and he agreed to be the front man for the approach to Mr Holloway. It is also less likely that he was wholly ignorant of moves to set up SMRec until September 2010.

Evidence regarding financial interest

48. Mr Williams has given disclosure of the documents relating to his financial affairs and those of his wife. They have revealed nothing in the nature of payments coming directly or indirectly from SMRec. There is no documentary evidence to connect him with the formation of that company or to show that it made payments to him. Such evidence as there is from the liquidators of Welch indicates that no payments were made to Mr Williams from that company; there are no recorded payments by cheque or transfer, and there is no evidence of cash withdrawals that might be referable to payments to him. The point is fairly made by Mr Spackman that it is hardly to be expected that a corrupt council officer would leave a paper trail. However, in circumstances where the Company has not demonstrated that Mr Williams and his wife lead a lifestyle that is not explicable by legitimate sources of income, the absence of documentary financial evidence to support the claim is significant.

The evidence of Jayne Thomas

49. The only direct evidence that Mr Williams gained financially from SMRec's business comes from Jayne Thomas, who is a daughter of Mr and Mrs Holloway and the wife of Russell Thomas. She claims to have knowledge of matters that were told to her by Mr Thomas or were gleaned by her when she overheard him talking by telephone to Mr Williams and Mr Jones and (possibly) Mr O'Connor. She recorded these matters in an exercise book and claims to have given this book to her mother two or three years ago. It is said that the exercise book was discovered in a drawer in an unused desk by Mrs Thomas' sister, Debbie James, in January 2016, a matter of weeks before the commencement of the trial. I gave permission for the Company to rely on the exercise book and the witness statement of Mrs Thomas dated 7 January 2016. The text in the exercise book is as follows; I add paragraph numbers for ease of reference:

> (1) Keith Williams would become a director of SMRecycled after his retirement from Flintshire County Council.

> (2) Keith Williams was paid cash sums of £500 or more every week by Phil Jones of Welch Civils at a café where Keith Williams would hold out his hand[6].
>
> (3) A9 [i.e. Appendix 9] trial—was passed by ? at Flintshire County Council when it had not gone through the 2-year testing period. All data was made up.
>
> (4) Family members working in Flintshire County Council & some at Welch Civils.
>
> (5) Merc [i.e. Mr Williams drives a Mercedes]—has a number of very nice holidays per year.
>
> (6) Big job in North Wales—ratio of product was not what it should have been so all or some of works would be failure if tested.

50. Mrs Thomas's evidence was that, when she made the note, she was not on speaking terms with her father, who had fallen out with Mr Thomas, though she was still on speaking terms with her mother. She had written the note and given it to her mother, because she thought that her parents should know the truth. She said that the note had been written on a single occasion. When it was put to her that what I show as paragraphs (4) and (5) appeared to be in different writing or to have been written with a different pen, she said that it was possible that they had been added later. I think that unlikely: I find that the entire text was probably written at one time and in the order of the existing text. She said that her relationship with her father was now excellent but that her husband was unhappy that she was giving evidence and had asked her to withdraw her statement.

51. It was put to Mrs Thomas that her evidence was fabricated and that she had acted in order to win back her father's affection and out of financial dependence on him. It was put to Debbie James that her evidence concerning the discovery of the exercise book was untrue. I reject those suggestions, and I accept that the exercise book was written in the manner described by Mrs Thomas. I make the following observations.

    1) Mrs Thomas was a particularly impressive witness—by some margin the most impressive witness at the trial—, who struck me as an honest woman in a difficult position. I bear in mind that appearances can be deceptive, but I should not readily think that she was a fabricator of evidence. Mrs James also appeared to be credible, but she was subjected to much less cross-examination and I could not place great weight on that appearance.

    2) I have no doubt but that Mr Holloway is a difficult and forceful man, who is prone to fall out with members of his family and who has the capacity to be intimidating. It is also clear that Mrs Thomas has been financially beholden to her father, who pays her daughter's school fees but has in the past withheld the fees with the result that the child had to change schools. These are possible

[6] Mrs Thomas gave evidence that the reference to holding out the hand arose from her husband's demonstration to her of the brazen way that Mr Williams would put out his open hand to receive cash.

reasons why she might have given false evidence at her father's request or insistence but they do not show that she has done so. On the other hand, Mrs Thomas's evidence draws her husband into the matter in a manner that one would think is likely to cause domestic disharmony. She is unlikely to have done this if her evidence is untrue, unless there were an agreement between her and Mr Thomas that she would give false evidence to their mutual advantage on the basis that he did not give evidence himself. That is possible but highly speculative.

3) The exercise book itself is, if anything, embarrassing to the Company rather than an advantage to it. Its late production almost invited allegations of late fabrication. But the notebook was hardly necessary, because it is not said to be contemporaneous with the events it records and Mrs Thomas could just as well have been adduced as a late witness who, for reasons of family discord, had not been approached earlier. It could, perhaps, be said in response that Mr Holloway might have believed that the exercise book would be more persuasive than a witness statement, or that its supposed discovery was a good pretext for admitting late evidence. That, though possible, is also highly speculative.

4) Mr Stagg points to the absurdity of the account in paragraph (2) of the note of Mr Williams holding out his hand to receive his periodic bribe in a public place. I agree that the account is absurd. As Mr Williams and Mr Jones shared an office, a cash payment would obviously be made in private, not in a café. And, if for some reason it were made in a café, it would be made and received discreetly, not with an open show of greed and corruption. In my view, however, this tends if anything to support the genuineness of the note, although it casts doubt on the truth of what is recorded. If Mr Holloway had bullied his daughter into giving supporting evidence—and that is what the suggestion comes to—he would have made her give a better account than the one she does give. Although Mr Holloway may be capable of bullying, he is far from being stupid and he has a keen eye for practical realities.

5) Other details of the note do not materially affect my view of it and may be briefly mentioned. The amount of the payments to Mr Williams mentioned in paragraph (2) of the note, equivalent to a rate of £25,000 a year, is surely incredible. But that affects the truth of the matter recorded rather than the genuineness of the note and of Mrs Thomas's evidence. The omission of the name in paragraph (3) may be contrived but is more likely to reflect lack of recollection. The contents of paragraph (4) are materially incorrect, in that no members of Mr Williams' family worked for the Council; it is hard, however, to see why this detail, for which there is no evidence, would have been included at Mr Holloway's behest.

52. Accordingly I find that the note in the exercise book was made by Mrs Thomas in the manner she describes and that it reflects her recollection and understanding when she made it.

53. However, the extent to which the facts recorded in the exercise book are true is a different matter. Whether or not Mr Williams was receiving payments from Mr Jones, the account in paragraph (2) of the note is incredible. Mrs Thomas may have

misunderstood something that she was told, or innocently conflated several things that she was told, or Mr Thomas, of whose character there is reason to be circumspect, may have given an account that was either wholly untrue or exaggerated for dramatic effect. Paragraph (5) of the note reads more like evidence that fuels suspicions than a record of the consequences of known corruption. It is clear that Mr Thomas was indeed telling his wife that Mr Williams was behaving corruptly. But, though he may have done so because that was the truth of the matter as known to him, he may also have been motivated by other factors, one of which may have been a combination of suspicion and of annoyance and resentment at finding himself as a mere employee in a business of which he had hoped to be a principal. Mr Thomas did not give evidence and was therefore not subjected to cross-examination. The contents of the note must therefore be considered with considerable circumspection and in the light of the other evidence.

54. It is significant that on two occasions, when Mr Thomas might perhaps have been expected to mention Mr Williams' involvement in or financial gain from the business of SMRec, he did not do so. The first is in a telephone conversation on 13 October 2010, when (as I understand the transcript) he seems to regard the new enterprise as involving himself and Mr Jones and Mr O'Connor; I deal with this further below. The second is in an email in July 2011 when he complained to Messrs Jones and O'Connor about his poor remuneration; if he had believed that, while he was being poorly paid, Mr Williams was receiving large amounts of cash, he would have a reason to mention the fact.

55. There is a further reason to be cautious about the note in the exercise book. According to Mrs Thomas's chronology, it was written some time after the Company had made a formal complaint to the Council about substantially the same things that are in issue in these proceedings. Although Mrs Thomas was not on speaking terms with her father, she had remained on speaking terms with her mother and, quite possibly, with others who were liable to talk about the matter. It is by no means impossible that, albeit innocently, the account in the exercise book will have been embellished by the introduction of details from a different source or by a simple process of interpretation of scattered pieces of information half-remembered.

56. Mr Stagg submitted that I should draw an adverse inference against the Company on account of its failure to call Mr Thomas as a witness; I had given permission for him to be called, though no statement from him or summary of his evidence had been served, and he was subject of a witness summons. I do not think it appropriate to draw any adverse inference. The relationship between Mr Holloway and Mr Thomas is clearly one of mutual loathing and the difficulty of the matter is compounded by Jayne Thomas's position. Of course, Mr Thomas could have been called and forced to answer questions. But all parties could have called him; he is not the Company's property. He has fallen out with Mr Williams too. One has to be realistic in assessing decisions not to call witnesses in such circumstances. The most relevant point is that the weight to be attached to hearsay evidence originating with Mr Thomas is much reduced by the fact that he has not given the evidence on oath or affirmation or been cross-examined on it.

Confidential communication with Welch

57. On the morning of 11 June 2010 Mr Williams and Mr Tulley, as officers of the Council, were copied in to an email from Mr Hughes to an employee of Dŵr Cymru. The subject of the email was shown as "SMR – Dwr Cymru – confidential", and the email concerned a request by Dŵr Cymru for permission to use a soil stabiliser produced by SMR, Clive Holloway's company. Mr Hughes informed Dŵr Cymru that only Perma-soil was currently used in Flintshire. At 9.46 p.m. that day Mr Williams forwarded this confidential email to Mr Jones and Mr O'Connor without comment; presumably there was oral discussion about the email. On 6 March 2011 Mr Williams forwarded that email chain to Mr Thomas "for information".

58. When he was asked about these emails in cross-examination, Mr Williams said that he could not explain why he had forwarded the confidential email to Mr Jones and Mr O'Connor and to Mr Thomas. He said that he could think of no reason why he had sent the email to Mr Jones and Mr O'Connor, unless it was that they had a machine for mixing Perma-soil. He denied that the reason was that he knew that they were thinking of setting up their own soil-stabiliser company and that this was a potentially useful lead. He was unable to explain why he had sent the email so late in the evening.

59. In my judgment, the forwarding of the email to Messrs Jones and O'Connor in June 2010 probably reflects the fact that, having been unsuccessful in their approach to Mr Holloway to buy his business, those two men were considering establishing their own business and had mentioned the fact to Mr Williams. I therefore reject Mr Williams' evidence on this point. The email does not establish whether Mr Williams was intending or hoping to have an interest in the new business.

SN Engineering Ltd

60. Another matter relied on by the Company is communications that passed between Mr Williams and a company called SN Engineering Ltd ("SNE"). SNE built, among other things, a machine for manufacturing soil stabiliser. On the morning of 1 October 2010 a telephone call was made from Mr Williams' mobile telephone to SNE; the duration of the call was 15 minutes and 45 seconds. Later that day SNE sent by email to Mr Williams' personal account a letter addressed on its first page: "Keith Williams" and underneath "SM Recycled". The letter began: "Hello Keith; Further to our earlier telephone conversation on above date [1 October 2010], please find the following details reference Ploughshare Batch Mixer." There followed a specification of the machine and a price of £32,000 ex works. Underneath the price the letter ended as follows:

> Keith: This is mixer we discussed and price quoted to the other party. For your information we quoted a price of £80,000 for silo, screws and mixer. This price included delivery, mechanical (no civils or electrical) installation and crane hire.
>
> Load cells: Have not included load cells but is easy to put mixer onto load cells. Suggest you contact specialist supplier for these, Rod at Applied Weighing would probably be the best. Would expect cost for supply, installation and calibration by their engineer to be approx. £2000.

> Hope all this OK and if you need any more information please call. Many thanks and best regards, Jerry.

61. In his witness statement dated 26 October 2015 Mr Williams said that he had a specific recollection of his conversation with SNE. Mr Thomas had been in discussion with SNE but was concerned that his emails were being monitored by the Company, for which he was still officially working, and so asked Mr Williams to receive the quotation for the machine by email on his (Mr Williams') account. Therefore he had spoken by telephone to SNE in order merely to give his contact details. When he received the quotation he simply handed it to Mr Thomas and had no involvement with it. In cross-examination Mr Williams said that he had been put on to the telephone at the end of a call by Mr Thomas.

62. There are several difficulties with that explanation. First, a telephone call made simply for the purpose of giving contact details would obviously not take quarter of an hour. The call must therefore have been a substantive discussion about the machine, either by Mr Williams or by someone else. Second, if Mr Thomas had the main conversation and simply handed the telephone over at the end for Mr Williams to give his contact details, it is hard to see why Mr Thomas would have made a lengthy call on Mr Williams' telephone about SMRec business; possible explanations were forthcoming at trial but were hardly convincing. Indeed, Mr Williams was aware of this difficulty; in cross-examination he first said that the conversation was not on his telephone, although when he was shown the records he acknowledged that it was. Third, the letter is not addressed to Mr Thomas but to Mr Williams and is most naturally read as referring to a substantive contact that SNE had had with Mr Williams. Fourth, paragraph 23(1) of the Defence gives a quite different explanation of the telephone call, namely that Mr Williams, having a proper concern that streets would be restored in a satisfactory manner, was seeking to ensure that the specification of the machinery was satisfactory.

63. Nevertheless, although Mr Williams' involvement with SNE on 1 October 2010 raises suspicions, it is hard to draw any firm conclusions from it by itself. No one from SNE was called to give evidence, but some further documents were adduced at trial. A note of a telephone conversation with Jerry Harper of SNE—presumably the "Jerry" who gave the quotation—records his recollection that his dealings regarding the machine were with Mr Thomas; he could not remember why the quotation was sent to Mr Williams and not to Mr Thomas. (I believe that the note was produced in the course of the Council's investigation into the complaint by the Company against Mr Williams.) A letter dated 5 September 2013 from SNE's managing director implies that Mr Williams was probably involved only as a contact address, though the letter is rather speculative. An email sent by Mr Thomas to Messrs Jones and O'Connor in July 2011 is also of some relevance, as he bolstered his complaints about his pay by pointing to the fact that, among other things, he had "sorted out the whole of the installation of the machinery required"; that, though, is not strictly inconsistent with the Company's case that Mr Williams held substantive discussions about the machine. Accordingly this piece of evidence has to be viewed along with all other evidence in the case.

Emails

64. A significant number of emails sent by Mr Thomas and received by Mr Williams, on their respective private accounts, were put in evidence. The Company contends that many of the emails show that Mr Williams had a close involvement in SMRec.

65. A general point made by Mr Stagg on behalf of the defendants is that, although there is evidence that the Company was gaining access not only to emails sent from Mr Thomas's account but also to his Inbox[7], the email traffic is one-way: Mr Williams was not replying to Mr Thomas. I do not think that that is a strong point. Mr Williams was, as he accepts, in constant communication with Mr Thomas and saw him very frequently in Flintshire. It is implausible that he was ignoring Mr Thomas's emails; he probably dealt with them other than by sending email responses.

66. Some emails relate to the machinery supplied by SNE. On 31 January 2011 Jerry of SNE sent by email to Mr Thomas and Welch drawings of the access and working platform for the machine, with a request that they confirm the adequacy of the drawings. Mr Thomas forwarded that email to Mr Williams, with a message saying, "As discussed[.] Many thanks, Russell". The obvious question is why Mr Williams should be involved in the approval of such drawings. In cross-examination he said that Mr Thomas had asked him, as a friend, for his views, because he had some knowledge of health and safety matters. He said that "this sort of thing" was just "bounced around" among them. A further email from SNE was forwarded on that same day, this time concerning a specific design point on the silo that formed part of the installation. In his witness statement Mr Williams said that he was sent this email because Mr Thomas "knew that [he] would be interested in it." However, in cross-examination he said that he had no interest whatsoever in the subject-matter of the email and could think of no reason why Mr Thomas should have sent it to him. Further emails from SNE regarding specific queries concerning the machinery were forwarded to Mr Williams on 5 May 2011. Then on 13 July 2011 Jerry of SNE sent an email to Mr Thomas:

> Please find attached drawings of ball joints we do. Please check with your fabricator chap which size/type he wants, expect type 05 but best to check. Please also ask him how he going to fix on to tube, expect he has got a bit of tube to fit them onto. Also please confirm length and diameter of socks you want and sort of material, flexible rubber, linatex etc.

Mr Thomas forwarded this email to Mr Williams on 14 July: "Please confirm which of these we need to order, many thanks". Mr Williams said in evidence that he had taken the necessary measurements and, by reference to a document attached to SNE's email, advised Mr Thomas which size ball joint was appropriate.

67. The emails did not relate only to machinery. On 6 October 2010 Mr Thomas forwarded to Mr Williams an email from a designer showing a proposal for SMRec's branding; he said: "As discussed please find company logo many thanks Russell". Mr Williams said that Mr Thomas always put the words "as discussed" into his emails; they meant nothing. It is certain that the words appear in a great many of the emails,

[7] The Company was accessing ("hacking") Mr Thomas's account, though it is unclear precisely how it did so. This is likely to have involved unlawful conduct by the Company, but it was not suggested that the evidence was on that account inadmissible.

though this does not lead to the conclusion that there had been no discussion. In cross-examination Mr Williams said of this particular email that he was not being asked for any input but was being shown the design, as a friend, out of interest and because Mr Thomas was excited about the new venture. That, it must be said, is not the way the email reads.

68. On 10 January 2011 a company called Autopak sent an email to Mr Thomas with quotations for bag-filling equipment. On the morning of 17 January 2011 Mr Thomas forwarded the email to Mr Williams: "Hi Keith. As discussed all details on bagging machines." In cross-examination Mr Williams said that he would have been sent this information simply because, as Mr Thomas knew, he had a general interest in machinery. That does not explain why Mr Thomas sent to Mr Williams the following email that same afternoon:

> Keith, Contacted autopak machinery reference bagging/bucket machine these are not stock items and need to be manufactured approx time of delivery 4/6 weeks I will go down on Wednesday/Thursday for demo and will keep you informed price as per email sent earlier terms of supply 50% deposit 40% on delivery and final 10% on commission of machine. Many thanks, Russell.

That email certainly gives the appearance that Mr Williams had some involvement in SMRec, and when cross-examined Mr Williams said that he could not explain why he was sent those details and said that he had "no idea" why Mr Thomas had kept him informed of such matters. I note that on 5 May 2011 Mr Thomas forwarded a further communication regarding bag-filling equipment, this time from Handling Techniques Ltd.

69. Also on 17 January 2011 Mr Thomas sent to Mr Williams an email attaching a draft introductory letter for use in SMRec's business. In cross-examination Mr Williams said that he had been asked for his views on the letter and had been happy to give them, as he had previously given informal, friendly advice to the Company when Mr Thomas was working for it.

70. On 25 February 2011 Mr Thomas received an email concerning the electricity supply for the installation of the machinery. He promptly forwarded it to Mr Williams: "As discussed please read message below." Mr Williams' evidence was that, as the electricity company needed a particular measurement for SMRec's new premises and he was the only person on the spot, he was sent the email so that he could take the necessary measurement.

71. On 3 May 2011 Conroys Development sent an email to Mr Thomas inviting SMRec to tender for the supply of soil stabiliser and making a number of enquiries in that regard. Mr Thomas forwarded the email to Mr Williams: "Hi Keith, Please read info required to supply Conroys give me your views. Many thanks, Russ." Mr Williams' evidence was that he could not explain why Mr Thomas had sent him the email; he had replied that the tender was a matter for SMRec and he could not get involved.

72. Also on 3 May 2011 Mr Thomas sent by email to Mr Williams an image of a delivery note in respect of a supply by SMRec: "As discussed please find attached delivery

note. Many thanks, Russ." Mr Williams observed that the delivery had been "free of charge" and—somewhat inconsistently—that the email was sent because Mr Thomas was excited about his first sale.

73. These emails do not themselves show that Mr Williams had any financial or other interest in SMRec. However, the nature of the information being given to him and the enquiries being made of him is barely consistent with the picture presented by Mr Williams. In particular, the communications in January 2011 regarding the bagging machine give the impression of more involvement in the business than Mr Williams admits to.

Recorded telephone calls

74. Mr Holloway insisted that Mr Thomas serve out a period of notice before leaving the Company's employment. He took the opportunity during that period to record secretly telephone calls that Mr Thomas was making on his mobile telephone. Transcripts[8] of those calls, containing only Mr Thomas's side of the conversations, were put in evidence in respect of the last fortnight of Mr Thomas's employment. Most of the transcripts are irrelevant to this case, but the Company contends that three of them, all in respect of conversations that apparently took place on 13 October 2010, show that Mr Williams was involved in the arrangements to set up SMRec.

75. The first conversation includes the following passages:

> What's the name of the cement company that's close to you, then? Phil keeps saying 'Castle'. Is it Castle? ... Right, where are they? In Flintshire? ... Buckley, OK. I'll speak to them. Everything else all right with you then, mate? ... Yes, yeah, I know—big agricultural ones, isn't it? ... Yes, as long as they can take 2 psi, yes, or 2 bar—not 2 psi, 2 bar, yes. That's all it is, half the price, is it? We are getting somewhere. It's fucking getting quite hard now, isn't it? ... Yes, I sent him a big document yesterday from Secretary of State on bulk purchases of cement, which he's reading that this morning. ...
>
> Well no, I don't talk anything in that office about what we're doing. All the calls from Phil I take out the yard ... yes, walking around the yard. They can't have anything out the yard, yes, because ... right, right.

76. The second conversation contains the following passages:

> Well, you need to get that number if you can, then, as I'm going to come up next week and see if I can get some balls rolling. ... Well, I think he's sorting that out today, now, yes, I think there's movement in that today ... Yeah, we can it by Christmas ... Yeah, but he's supposed to have sent all the terms and conditions to Phil's email now, yes, of what he wants and

[8] The transcripts as produced are unpunctuated and I have regarded it as legitimate, when reproducing extracts, to engage in some interpretation.

> hopefully we can get that order placed today. Yes ... middle of January, yeah, we haven't got that amount of time, see mate. ... Have you got the number for that or not? Or text it to me if you get a chance, yeah. So have you got it at hand? ... Text it over to me, coz then I can do some work with the printer and stuff next week, yes, and the internet man, suppliers, some documentation, some contracts, and get everything starting to pull together—you know what I mean?—and all the stuff I've taken from Perma-soil. I've got a busy week next week, yes, so that'll be OK. And like I said, I think Phil wants me to come up one day, and I've got a sample of SMR to a laboratory and they've gone down here because it will look like [?] It's got to be up your area into a laboratory, so I'll have to travel to Bristol then travel up North. You'll see me one day next week, anyway, mate. ... Yes, OK mate, yes, you are still in this loop. Do you know what I mean? ... I know, I'm speaking a bit to Phil. I'm just trying to get things moving along, do you know what I mean? OK, well, I sent him a nice document which he's reading this morning—about 36 pages from the Secretary of State—bulk-buying batches of cement. Yes, he'll be pretty armed up when he gets it. Yes, I'll speak to you later.

77. The third conversation is a diatribe about Mr Holloway:

> "I woke up this morning and, you know, my fucking father-in-law can't afford to pay me my commissions, yes, but he's just gone and bought himself a brand new fucking Ferrari. Yes, that's fucking good, isn't it! Yes, fucking, he's a ... He can't pay me my commission, because he said he didn't have enough money, yeah, but then he's just gone and bought himself a brand new Ferrari. My commission was only £400 he took off me, mate. ... Yeah, he is a bastard of a bloke. Yeah, we'll have him, we'll fucking have this fucking bloke. Yes, me, you and fucking John will fucking get revenge. I'm glad I can speak to people, yes. Cheers mate, I'll come back to you with figure."

78. The Company's case is that these conversations concern the setting up of SMRec and that they—or, at least, the first and second—were probably with Mr Williams; the third might be with Mr Jones. The first and second conversations cannot be with Mr Jones, because he ("Phil") is mentioned in them by name. They are unlikely to be with Mr O'Connor, because the interlocutor appears to be located in Flintshire. In cross-examination Mr Williams accepted that the first conversation looked likely to have been with him, though he was uncertain.

79. I do not think that these conversations advance matters greatly. The first was probably with Mr Williams, but it does not seem to me to demonstrate that he was active either in setting up SMRec or in procuring Mr Thomas to go to work for the new company. The conversation does relate to SMRec's business, but it is quite consistent with Mr Williams being taken into his friend's confidence and engaging in discussion in those circumstances. It is inherently unlikely that the second conversation is with the same person as the first conversation; they cover some of the

same ground, on the same day, and the second conversation does not identify the other speaker. The third conversation seems most likely to be with Mr Jones, the reference to "John" being to Mr O'Connor; if that is right, the lack of mention of Mr Williams serves if anything to support his claim not to have been involved, though it has to be borne in mind that Mr Thomas was himself involved only as an employee and not as a quasi-partner.

The website

80. The Company placed some reliance on a quote from Mr Williams on SMRec's website, praising the innovation and forward thinking shown in the use of soil stabilisers in the reinstatement works. I do not think that this materially assists the Company's case. The origin of the quote was a press release in terms that originated with EirGrid and were approved, with modifications, by Garry Hughes. The appearance of the quote on the website does not indicate that Mr Williams had an actual or hoped-for commercial involvement in SMRec.

The approval of SMRec's product

81. There is evidence that the Council gave two forms of approval for SMRec's soil stabiliser: it agreed to the use of the product in a formal trial under Appendix 9 of the Code; and it approved its use on the Interconnector Project in substitution for Perma-soil. Because of the irregular way in which the Council was applying the Code, these were different things. The Appendix 9 approval was, *de facto* if not *de iure*, an optional course—an option that the Company had never taken. But permission to substitute the new product for Perma-soil was required by the terms of the Council's approval of the use, on the Interconnector Project, of "Perma-soil or similar approved stabiliser" (paragraph 10 above). Unfortunately, the evidence regarding the two approvals is rather patchy. Before I consider that evidence, I shall make some comments about the way the Company has put its case.

82. In his opening submissions, Mr Spackman made it clear that the Company did not contend that SMRec's product was unsuitable for approval: the complaint was about the manner of approval, not the nature of the product. This led to the following submission:

> If the product [of SMRec] was identical to that produced by C, there can have been no reason for D2 to authorise the product supplied by SM Recycled in preference to that supplied by C which had been in use in the county for several years. The only reason why SM Recycled's product was authorised was that D1 told [Mr Tulley] to authorise the product, riding roughshod over the A9 approval process and purely for his own personal reasons.

The logic of this argument is seriously flawed. The main problem with it is that, if the products were identical, there can have been no reason *not* to authorise SMRec's product: the original approval (paragraph 10) envisaged the use of suitable alternatives to Perma-soil, and it was no proper function of the Council to protect the place in the market of any one supplier. Further, it ill lies in the Company's mouth to complain of approval of an alternative product "riding roughshod over the A9

approval process" when it had never so much as sought approval under Appendix 9 in Flintshire. More generally, the Company's stance that it does not suggest that SMRec's product was not suitable for use leaves it high and dry. SMRec required approval, both in law (under Appendix 9) and in fact (by permission from the Council, which was all that the Company had for Perma-soil). If indeed SMRec's product was as worthy of approval as Perma-soil, the fact (if it be such) that the actual approval given was tainted by improper motives on Mr Williams' part would take the Company's case nowhere: approval could not have been withheld from the new product if it were given to Perma-soil. I shall return to this last point below.

83. Mr Spackman sought to get around this difficulty by a change of tack. He said, first, that there was no evidence that the new product was substantially the same as the Perma-soil and, second, that SMRec had not undertaken or procured the same tests that had been done on Perma-soil before its approval by the Council. Neither point is a good one. The Company had no right to be the sole supplier of soil stabiliser for use in Flintshire. If the Council had power to approve the use of Perma-soil, it had power to approve the use of any other suitable product. Welch wanted to use a different product. If the Company contends that lawful permission for the use of that different product could not have been given (but—necessarily—that such permission was or could have been given for Perma-soil), it bears the burden of proving as much. A complaint that permission was unlawfully given does not advance a damages claim unless it be shown that permission could and would not have been lawfully given. As for the tests said to have been performed on Perma-soil, these are the subject of a report dated 2 April 2002 from Scientific Group Services Ltd. The report post-dates the first approval given by the Council and does not relate to use in the Interconnector Project. The specific purpose of the tests and any respect in which they were required by the Council are not established on the evidence. There is in fact good reason to suppose that SMRec's product was substantially identical to Perma-soil, and that the Council had cause to know as much, because Mr Thomas knew precisely how Perma-soil was made and passed the formula to SMRec, and because Mr Williams and Mr Thomas both had knowledge of the specification of the machine that was to be used to mix the recipe and produce the soil stabiliser.

84. I turn to consider the approvals given by the Council for the use of SMRec's new product. For the purposes of this case, the more important approval was for the use of the new product on the Interconnector Project in place of Perma-soil. It would have been, and I am satisfied it was, obvious to all concerned with Welch and SMRec that the ability to substitute the new product was of particular importance. They could in theory have dealt with this either by just ignoring the need for any approval and using the new product until such time if any as a point were taken, or by asking for approval. As the ability to use the new product was of importance, and as Mr Williams was a close friend of Mr Thomas and shared an office with Mr Jones and Mr O'Connor, it is inherently probable that the question of approval was discussed with him.

85. The only document indicating approval for the use of SMRec's product on the Interconnector Project is an email dated 30 June 2011 and sent by Mr Tulley, as the Council's Senior Street Works Engineer, to Nigel Kemp of ABB, one of the major contractors on the Interconnector Project (the email was copied to Mr Williams): "I can confirm that Flintshire County Council will allow the use of the soil stabilizer

SMRecycled for the backfilling of the ongoing eirgrid project." This is some eight months or so after Welch would have been requiring permission to use SMRec's product, and it is considerably later than the date on which the Appendix 9 trials started (see below), and it is notable that the email was sent to, and apparently in response to an enquiry by, another party and not Welch.

86. Evidence relating to the approval of the new product was given by Mr Jones, Mr Williams and Mr Tulley. Mr Hughes, who was the Council's officer with overall responsibility for these matters, did not give evidence; I was told that he was seriously unwell.

87. Mr Jones' witness statement dealt with the matter briefly: "SM Recycled obtained A9 approval from the second defendant for its soil stabilising product on 12 November 2012, after having completed the A9 trial process. Initial approval for use of the product was given in June 2011."

88. In cross-examination Mr Jones said that from the outset Welch had been alive to the need to get approval for the use of SMRec's product. Welch employed a project manager called John McStravock, and Mr Jones assumed that Mr McStravock had sorted out approval with Mr Hughes, who had been the person with whom he had initially discussed the approval of Perma-soil.

89. In his witness statement, Mr Williams gave the following evidence regarding the approval of SMRec's product:

> Around the time of the incorporation of SM Recycled Limited, I recall Phil Jones, John O'Connor and Russell Thomas asking me how they could obtain Flintshire County Council's approval of their product. At this time I was not in my post as Street Works Engineer and [was] still on secondment to Eirgrid. Accordingly I re-directed them to Garry Hughes and Sam Tulley from the Street Works department of Flintshire County Council for them to obtain approval of their product. I gave them their contact telephone numbers. I know that approval was granted for the trials to be undertaken. All correspondence went through County Hall, including the locations of the trial sites. I know that they subsequently obtained approval from Garry Hughes and Kevin Sutton of Flintshire County Council, as per the approval records shown to me by Flintshire County Council's legal department during their investigation period.
>
> SM Recycled Limited decided to obtain A9 approval of their product in accordance with the [Code]. This is something which the claimant has never to my knowledge applied for. A9 approval would have involved a trial of the product at various locations. As I was not in post at the time, I remained seconded to the Eirgrid project. I had no knowledge of the A9 trial sites for the soil stabiliser manufactured by the SM Recycled Limited product and played no part in the trial process.

> On 30 June 2011 Flintshire County Council authorised the use of the SM Recycling Limited product for the back-filling exercise on the Eirgrid Interconnector Project. SM Recycled Limited subsequently obtained A9 approval for their product on 12 November 2012 following a two-year trial period. I played no part in this approval.

90. In his oral evidence, Mr Williams said that it was in about October or November 2010 that he discussed with Mr Thomas the appropriate manner in which to obtain approval for the use of SMRec's product. It was also at around that time that Mr Thomas met Mr Hughes in connection with the Appendix 9 approval. Mr Williams said that the email of 30 June 2010 was sent because ABB had a new engineer on the Project, who was asking for confirmation of approval to use the new product. As he (Mr Williams) knew that Mr Hughes had given approval when SMRec started production, he advised Mr Tulley to send an email confirming the necessary approval.

91. The evidence both of Mr Tulley and of Mr Williams is that, while he was seconded to the Interconnector Project, agreement to a change of products within the approved specification was a matter for Mr Hughes or Mr Tulley, not for Mr Williams. The only evidence tending to contradict that position is the final sentence in the extract, below, from the Council's internal report into the Company's complaints against Mr Williams; however, it is unclear that weight can be put on that sentence as regards Mr Williams' authority during the period of his secondment.

92. Mr Tulley's evidence was that he had not been aware of the approval procedure under Appendix 9 of the Code until 2012—he was not involved in the trials relating to SMRec's product—and that, so far as he was aware, it was open to the Council to approve the use of soil stabilisers without going through the Appendix 9 procedure. He could not specifically recall the circumstances in which he came to write the email of 30 June 2011, but it must have been pursuant to an enquiry from one of the main contractors. "I would have spoken with Keith Williams and based on what he told me would have approved the use of SM Recycled's product. ... If I had not been satisfied with what Keith Williams had told me, then I would not have approved the product. ... I know that the soil stabiliser manufactured by SM Recycled is identical to that manufactured by the claimant. I would have been told this by Keith Williams at the time I approved the product ... so I had no hesitation in approving the product for use." From his oral evidence it appeared, in fact, that Mr Tulley thought that all soil stabilisers were the same, so that the identity of the manufacturer or supplier was immaterial.

93. Because Mr Williams gave evidence after Mr Tulley, his account of the circumstances in which the email of 30 June 2011 was written could not be explored with Mr Tulley.

94. That email of 30 June 2011 is probably the approval that was referred to in the Council's internal report dated March 2012 into the Company's complaints against Mr Williams. That report contained the following text:

> 6.4 The use of any product for use on Flintshire roads has to be approved for use by Flintshire Council, it was alleged that Keith Williams authorised the use of the soil stabiliser produced by SMRecycled which could have presented a

> potential issue given Keith Williams' close working relationship with Welch Civils and the link between Welch Civils and SMRecycled. The approval process was reviewed and it was found that a Highways Inspector (Sam Tulley) authorised the use of the soil stabiliser produced by SMRecycled.
>
> 6.5 Sam stated that, on this occasion he approved the use of the SMRecycled product following a direct request from a Nigel Kemp of ABB (a company that is part of the interconnector project manufacturing the cable and overseeing the construction) he would have also discussed the use of the product with Keith Williams prior to approval. He also said that this product had been used for many years from different manufacturers and had been proven to be a good product. Approval for using products on Flintshire's roads requires approval to be given in compliance with the Highways Authority Product Approval Scheme (HAPAS) and could be carried out by any of the inspectors in the Streetworks Section including Keith Williams.

95. I turn briefly to the evidence regarding the Appendix 9 approval. On 12 November 2012 Mr Hughes, as the Council's Regulatory Services Manager, wrote to Mr Thomas a letter headed "Appendix 9 Trial—Soil Stabilisation Product", in the following terms:

> The Authority is in receipt of the summary document relating to the trial of the soil stabilising product used on the East-West Interconnector Scheme and is happy to accept the findings and conclusions of the trial and therefore authorise the use of the material in the road network of the Authority under Clause S1.6 of the Specification for the Reinstatement of Openings in the Highway, 2nd Edition 2006.

96. The documentation produced by SMRec in support of its request for approval under Appendix 9 showed a period of testing that commenced in October 2010 (Mr McStravock being named as the project manager). Mr Spackman submitted that the documentation did not demonstrate compliance with the requirements of Appendix 9, because the commencement of the trial was not preceded by a written agreement signed by the parties and because there was no evidence of a final inspection. Those points do not assist the Company's case. The Company does not allege that the formal approval of SMRec's product under the Code amounted to misfeasance in public office. The evidence sufficiently demonstrates, to my satisfaction, that a trial in purported compliance with Appendix 9 commenced in October 2010. It is nothing to the point if the requirements of Appendix 9 were not correctly complied with.

97. My conclusions in respect of the Appendix 9 trial are of some relevance when considering the question of approval of SMRec's product for use on the Interconnector Project generally. Drawing together the various pieces of evidence and having regard to the gaps in the evidence and to the inherent probabilities of the situation, I make the following findings.

1) Those involved in Welch and SMRec—that is, Mr Thomas, Mr Jones and Mr O'Connor—would have been alive to the need for permission to use the new product in place of Perma-soil, as would Mr Williams.

2) There were discussions on this point between those other men and Mr Williams. His evidence is to that effect, and it is overwhelmingly probable that they would have sought his guidance as to how to proceed and he would have given it. However, I think that the discussions probably took place before arrangements for the new company were finalised, because it would clearly be important for Messrs Jones, O'Connor and Thomas to discuss the matter sooner rather than later.

3) Mr Williams' advice was that Messrs Jones, O'Connor and Thomas should get in touch with Mr Hughes or Mr Tulley. It is inherently plausible that he should have given such advice. Further, the fact that Appendix 9 trials commenced in October 2010 means that some contact was indeed made with the Council by then. As Appendix 9 had been viewed as something of an optional extra, it is the more unlikely that the Council was told of SMRec's product for the purpose of the Appendix 9 trials but not of its use on the Interconnector Project.

4) Either Mr Thomas or Mr McStravock did indeed contact Mr Hughes or Mr Tulley regarding the use of the new product in about October 2010.

5) There was no reason of principle why they should not give consent; see the terms of the original approval in February 2010 (paragraph 10 above). But obviously they would want to know whether the new product was suitable. The most likely explanation of the evidence is that Mr Hughes or Mr Tulley got in touch with Mr Williams, as being the man on the ground and intimately involved in the Project, and asked for his views about the product. He said that it was substantially the same as Perma-soil, and on that basis Mr Hughes or Mr Tulley said—probably orally—that there was no problem with using it. This was all dealt with entirely informally; the original approval required no formality. Some months later ABB's engineer, noticing that there was no documentation permitting the use of SMRec's product, made an enquiry and received in response Mr Tulley's email of 30 June 2011.

6) The reconstruction in sub-paragraph (5) is to some extent speculative, but I consider it a reasonable inference from such evidence as there is. There is no documentation to show approval for use of the new product on the Interconnector Project prior to June 2011, but in the light of Mr Williams' evidence and, to a lesser extent, Mr Jones' evidence, and of the commencement of the Appendix 9 trial in October 2010, and having regard to inherent probabilities, I think it likely that some undocumented approval was given. It is probable that the approval was given by Mr Hughes or Mr Tulley. But it is highly improbable that it was given without any reference to Mr Williams: he was the person best placed to give relevant information to the Council officers; Mr Tulley confirmed that he would have spoken to Mr Williams before making any decision and, though unable to recollect any specific conversation, did appear to have some recollection that Mr Williams had told him that the product was identical to Perma-soil; and Mr Williams

was confident enough of what had occurred previously to tell Mr Tulley in June 2011 that Mr Hughes had already given approval, which is consistent with him having an involvement albeit not being the decision-maker. As I say, it was possible to deal with approval of SMRec's product quite informally.

7) The less probable alternative explanation is that there was no initial involvement of Mr Hughes or Mr Tulley, and that Mr Williams simply took it upon himself to tell Welch that it could use SMRec's product. According to the evidence both of Mr Williams and of Mr Tulley, that would be improper, as the decision ought to have come from Mr Hughes or Mr Tulley. It is possible that Mr Williams took it upon himself to bypass proper procedures. On the whole that is doubtful, both for the reasons given, and because he would have known that his advice would be determinative or at least of critical importance for any approval given by others, and because to ignore proper procedures would lay him open, quite unnecessarily, to the risk of getting into trouble. (An informal approval of this kind given directly by Mr Williams would not, I think, be consistent with the Company's case, both because it is materially indistinguishable from the unpleaded Non-Enforcement Basis—see paragraph 30 above—and because the Company has advanced the case on the basis that the conduct complained of was unlawful only by reason of Mr Williams' bad faith.)

Some further conclusions regarding Mr Williams and SMRec

98. Several matters, when taken together, create a very strong suspicion that Mr Williams had some financial interest in, or benefit from, SMRec. The following points are particularly significant. First, Mr Williams accepts that he had thought of exploiting the soil-stabiliser market for his own advantage, namely through acquiring the Perma-soil business. Second, he made at least one approach to Mr Holloway to acquire the business on behalf of Messrs Jones and O'Connor. It is plausible to suppose that he was personally interested in this approach. Third, it is probable that the setting up of SMRec was the result of the refusal of the approach to Mr Holloway. Put simply: Messrs Jones and O'Connor decided that, if they could not buy the supplier, they would take the place of the supplier. Fourth, I reject the evidence of Mr Williams and Mr Jones that the former knew of the intention to set up SMRec only in September. In view of his involvement in the approach to Mr Holloway in May and his close personal friendship with Mr Thomas, it is probable that he had knowledge of the plans much earlier. Mr Jones' contrary evidence is undermined by his false denial that the approach to Mr Holloway had anything to do with him. Fifth, the forwarding of the Dŵr Cymru email to Welch in June 2010 is suggestive of some degree of collusion. Sixth, the explanations given for Mr Williams' apparent involvement with SNE in October 2010 are unconvincing and inconsistent, although the extent of the inferences that can reasonably be drawn from this aspect of the case by itself is limited. Seventh, the email communications with Mr Thomas are not convincingly explained and make it appear very much as though Mr Williams were acting as a form of consultant to the business.

99. However, despite these strong suspicions, and after considerable reflection, I am unable to find that the evidence supports a positive finding, on the balance of probabilities, that Mr Williams had a financial involvement in SMRec. My reasons may be summarised as follows.

1) The approaches to Mr Holloway were with a view to buying an established business, in which Mr Williams would probably have had personal involvement after retirement. It does not follow that he would have committed himself to involvement in the set-up of a new business, though he might have done so. He did not in fact retire.

2) Although Mr Thomas was important to the new business, he was no more than an employee. He was not given any share in the new business. That does not, of course, count against Messrs Jones and O'Connor having paid Mr Williams for his help. But it does count against any supposition that he had any greater involvement in the business.

3) There is no evidence at all to link Mr Williams directly with the setting up of SMRec. The contention that he was so involved rests on inference and circumstantial evidence.

4) There is no evidence, save for the unreliable hearsay evidence of Mr Thomas as contained in the exercise book, to show that Mr Williams did in fact receive any payment. Although it may be said that absence of evidence is not evidence of absence, the fact that the disclosed financial records lend no support to the Company's case seems to me to count positively in favour of Mr Williams. Further, no serious effort has been made to show that his lifestyle calls for explanation beyond his salary and that of his wife.

5) The recorded telephone calls do not support any stronger inference than that Mr Williams knew of the new business. If anything, they tend to count against his personal involvement in SMRec. So do the terms of Mr Thomas's later complaint to Mr Jones about the terms of his employment; there is no suggestion that Mr Williams was profiting from the business.

6) Although Mr Williams' evidence is in my judgment clearly false in material respects, corruption is not the only possible explanation. It may very well be the case that, out of concern at the serious allegations being made against him, Mr Williams has fallen into the trap of lying for the purpose of showing greater distance between himself and those behind SMRec than actually existed. It is reasonably clear on any basis that Mr Williams' relationships with those with whom he had contact in the private sector, whether the Company or Welch or SMRec, were not as arm's-length as should have been expected.

7) The supposition that Mr Williams was receiving some form of financial recompense from SMRec or those behind it is not as compelling as the Company would have it. I have no doubt but that Mr Williams provided considerable assistance to Mr Thomas while he still worked for the Company. Mr Williams was also involved in the striking decision to give exclusive approval for Perma-soil but none for SMR's identical product, for reasons

which are not said by anybody to have had anything to do with the comparative suitability of the two products. The Company was happy enough to accept this assistance and the benefit of the approval; indeed, as I have mentioned, it has advanced its present case as though the approval gave it some form of monopoly entitled to protection. Yet the Company is not, of course, suggesting that it had to confer any favours on Mr Williams for the benefits that he conferred on it. As the Company may be taken to be free of hypocrisy in this matter, one possible conclusion is that surprising behaviour may be seen as naïve or corrupt depending on the interests and perspectives of the viewer.

Conclusions on the issues

100. In the light of the foregoing discussion of the law and the evidence, I turn to state my conclusions on the issues identified in paragraph 34 above.

Issue 1—exercise of a public power

101. The Company must prove that Mr Williams purported to exercise a public power. For reasons that I have already explained, the power in question must relate to the approval of the use of SMRec's soil stabiliser. He did not himself give approval for the use of the new product. But, in response to an enquiry by Mr Hughes or Mr Tulley, he advised them that the product was substantially similar to Perma-soil and could properly be used in its place. That advice or information was well within the scope of his functions as a public officer and was an exercise of a public power for the purposes of the tort of misfeasance in public office.

Issue 2—intent to harm

102. If (as I find) Mr Williams did purport to exercise a public power, the Company must prove—if it wishes to establish the "targeted malice" form of the tort of misfeasance in public office—that he did so with the specific intention of injuring the Company.

103. I find as a fact that Mr Williams was not motivated by any intention to injure the Company. The allegation that he was so motivated is wholly implausible. Only two points of evidence could possibly be thought to lend any support to it. The first is that, as the last of the telephone calls mentioned above demonstrates, Mr Thomas was driven not only by a desire to improve his own circumstances but by a wish to take revenge on his father-in-law. This evidence does not show that Mr Williams was so motivated. It is one thing for Mr Williams to have been friendly with Mr Thomas and even, perhaps, to have sympathised with him in his complaints about his treatment at the hand of Mr Holloway. It is quite another for him to have been motivated by the same desire to cause harm. The second piece of evidence is the evidence in Mr Holloway's witness statement that, when he rejected Mr Williams' approach to buy the Company's business, Mr Williams "sounded quite disappointed and annoyed". That, however, was a somewhat unconvincing interpretative gloss, and in his oral evidence Mr Holloway made clear that he was unable to infer more than disappointment. It is unjustifiable to see in his reaction any evidence of a desire to pay Mr Holloway back with harm.

104. Therefore the first form of the tort—targeted malice—is not established.

Issue 3—personal gain and knowledge of unlawfulness

105. For the second form of the tort, the Company must prove (1) that Mr Williams' conduct was unlawful in that it was for the purpose of personal gain, (2) that he knew[9] that it was unlawful in that respect, and (3) that he knew that the unlawful conduct was likely to cause injury to the Company.

106. In my judgment, none of these requirements are satisfied on the evidence.

107. The first requirement cannot be satisfied, in the light of my conclusions in paragraph 99 above. Mr Spackman submitted that it was not necessary to prove actual financial gain; the desire for prospective gain sufficed. That is correct. But in practical terms, in the circumstances of this case, a failure to demonstrate actual benefit leaves the case on motivation in terms of hoped-for benefit high and dry. The Company has not proved that Mr Williams acted for the purpose of personal gain.

108. In my judgment, it would not even suffice to establish that Mr Williams had, or hoped to have, a personal financial benefit from the business of SMRec. The Company pointed to the stipulation in the Council's *Officers' Code of Conduct*, of which Mr Williams accepts he had knowledge, that officers "must not allow their private interests to conflict with their public duty." However, it does not follow from the existence of a conflict of interest that an officer is exercising a power for an unlawful purpose. The burden upon the Company is to prove illegality and bad faith, not a mere conflict of interest. The difficulty is stark, because the Company has made no genuine efforts to establish, and has certainly not succeeded in establishing, that SMRec's product was any different from its own; see the discussion of this point above. Therefore it is not in a position to show that approval for use of the new product in place of Perma-soil, or advice that it was suitable for use in place of Perma-soil, could not have been given for entirely proper purposes. This gives rise to at least four problems for the Company.

    1) There is a difficulty in showing that Mr Williams acted for an improper purpose at all. The fact that improper considerations might present themselves as a motive for action does not itself show that one is motivated by those considerations. There is no good reason to suppose that Mr Williams could not properly have given the advice that (as I find) he gave. Why should one therefore suppose that he gave the advice for any but proper reasons?

    2) There is a difficulty in showing that an improper purpose, if present, made the conduct unlawful. The correct analysis of the effect of the presence of mixed purposes upon the legality of public action is not settled law: see *De Smith's Judicial Review* (7th edition, 2013) at paras 5-109 to 5-119; Auburn et al. *Judicial Review[:] Principles and Procedure* (1st edition, 2013) at paras 16.10 and 16.11. For this discussion, it suffices to note that the existence of an improper purpose alongside a proper purpose does not automatically result in the illegality of the conduct and that the weight of authority tends to support a

[9] As I have mentioned, for the purposes of this requirement and the next knowledge includes subjective recklessness. For convenience, in what follows I shall speak only of knowledge.

test by reference to the identification of the true or, better, dominant purpose for which the power was exercised. On the basis of the evidence I do not consider that there was any reason why the advice given by Mr Williams could not properly have been given; Mr Spackman himself made clear in opening that the case was not advanced on such a basis. Why therefore should one suppose that Mr Williams' true or dominant purpose in giving the advice to Mr Hughes was not to give correct advice and information?

3) There is a difficulty in showing that Mr Williams knew that his action was unlawful by reason of an improper purpose or was reckless as to its legality. If the Company had proved that the new product was unsuitable for approval and that Mr Williams knew as much, it would be a proper inference that he knew he was acting improperly. But if, hand on heart, he could tell Mr Hughes or Mr Tulley that the new product was materially the same as Perma-soil, that inference cannot in my judgment be made.

4) There is a difficulty in showing that Mr Williams knew that the Company would suffer injury by reason of unlawful conduct. The Company has proceeded on the basis that the loss of Welch's business would be and was harmful to the Company. Doubtless that is correct. But there was no legal entitlement to the continuation of the business relationship with Welch. The question is not whether the loss of the business relationship would be injurious but whether the unlawful conduct caused or would cause harm. Unless the advice supposedly given for improper purposes would not properly have been given for proper purposes, the existence of ulterior motives on Mr Williams' part was not causative of loss. The evidence discloses no proper reason why approval of SMRec's product should not have been given, and it therefore does not establish that Mr Williams knew that the (supposed) impropriety of his motives would be causative of loss.

109. The analysis in the last preceding paragraph would apply equally to the alternative factual possibility that Mr Williams himself gave informal approval for the use of SMRec's product.

Issue 4—causation of actual damage

110. The alleged unlawfulness of Mr Williams' conduct did not, so far as the evidence shows, cause any loss to the Company. The reasons for this conclusion have already been set out. It may be assumed for the moment that the use of SMRec's soil stabiliser in place of Perma-soil caused some loss to the Company. But as there is no demonstrated reason why Welch should not have been free to use SMRec's product, any such loss was not caused by misfeasance on Mr Williams' part.

Loss and damage

111. In view of my earlier conclusions, the issue of quantum of damages does not fall for determination. I shall therefore deal with the point relatively shortly.

112. Paragraph 27 of the particulars of claim identifies four heads of loss said to have been suffered by the Company by reason of Mr Williams' wrongful conduct: (1) the loss of its contract with Welch; (2) the loss of (a) its status as the sole approved supplier of soil stabiliser within Flintshire and (b) the opportunity to obtain Appendix 9 approval via the Interconnector Project; (3) the loss of contracts with other customers; (4) the loss of reputation in the industry. Paragraph 28 indicated an intention to prove the losses by means of expert accountancy evidence, but in the event none was adduced.

(1) The loss of the contract with Welch

113. The particulars of claim state (paragraph 8) that the agreement between the Company and Welch was that the Company would continue to provide Perma-soil to Welch "for the duration of the Interconnector Project". That is naturally read as meaning that there was an obligation on the Company to supply Welch's requirements of Perma-soil for the entire duration of the Interconnector Project and an obligation on Welch to purchase all its requirements from the Company. That reading is confirmed by paragraph 9, which states that on 8 October 2010 "the contract was terminated by Welch Civils", and by the allegation in paragraph 23 that Mr Williams secured "the breach of the contract with Welch Civils". Nevertheless, the case advanced at trial, consistently with the evidence, was that there was no ongoing contract that obliged the Company to sell and Welch to buy Perma-soil; rather there was an ongoing business relationship, whereby discrete contracts were made from time to time by the placing of regular orders and the supply for Perma-soil pursuant to those orders.

114. Although Mr Stagg suggested the contrary, I do not think that this different way of putting the case raises any genuine pleading point. If I had taken a different view, I would have had no difficulty in permitting an amendment for the purpose of making the particulars of claim accord with the weaker basis on which the case is now put. The difficulty for the Company is that the diversion of Welch's business to SMRec cannot be seen in terms of positive legal rights but is rather a matter of the loss of anticipated trade in a free market where (as the evidence goes) there was no good reason why Welch should be refused the ability to use SMRec's product in place of Perma-soil if it wanted to do so. This is the causation point already dealt with.

115. If, however, the loss of the business with Welch were a loss caused by a tortious wrong and sounded in damages, the question of quantification would arise. The pleaded case is that the Company lost profits of £9380 a month for the remaining 14-month term of the contract: £131,320. A schedule produced by Mr Holloway shows the analysis behind these figures: the Company sold 472 tonnes of Perma-soil to Welch; the price was £280 a tonne; the cost price of Perma-soil was £140 a tonne—exactly 50% of the sale price; the average amount sold in a month was 67 tonnes; therefore the loss of profit over 14 months was (14 x 67 x 140 =) £131,320. In submissions Mr Spackman put the case on a slightly different basis: according to a case study produced by Stablearth in about 2014 the total amount of soil stabiliser used by Stablearth (SMRec) was 960 tonnes, which at a profit of £140 a tonne would indicate a total profit of £134,400. The two questions that arise are, first, the amount of soil stabiliser that the Company would have sold to Welch and, second, the profit margin.

116. I do not think it reasonable to take the mention of 960 tonnes in the case study as referring only to SMRec's product. The relevance of the data concerned the benefits

of the technology, not the niceties of the particular supplier. If the Company supplied 472 tonnes, the amount unaccounted for is 488 tonnes. That seems to me to be the best available evidence as to the amount of soil stabiliser that the Company would have provided during the remainder of the Interconnector Project. The average supply until October 2010 does not appear to me to be a reliable basis on which to proceed. On the other hand, I was not persuaded by Mr Jones' suggestion that the figures in the case study were wrong because they failed to take account of areas on which soil stabiliser could not be used; the information in the document is quite clear as to the quantities used. Mr Jones could do no more than guess at the total amounts of product used and the proportion of product that was provided by SMRec. I do not think that I can rely on his evidence. Similarly, Mr Williams' evidence that the quantities of soil stabiliser required for the Project reduced after October 2010 may be right—a figure of 488 tonnes for the remainder of the Project suggests that it is right—but I do not believe that he had real knowledge of the quantities involved. To the extent that his evidence about quantities relied on his understanding of the Appendix 9 trials of SMRec's product, it did not seem to me to be directly in point.

117. The claimed profit margin of 50% on the sale price of Perma-soil is in my judgment clearly wrong. Mr Holloway said that he had done the calculation with the help of Mark Davies of the Company. There was no document to show how the profit margin had been calculated. The Company did not produce its accounts for 2010 and 2011. The profit and loss accounts for 2012 and 2013 show that gross profit was 32% of sales in 2012 and 36% of sales in 2013. After administrative expenses, operating profit was 20% of sales in 2012 and 20% of sales in 2013.

118. I do not have the benefit of reliable accountancy evidence. If I were awarding damages, I would have to do the best I could, having regard to three matters: first, on the assumed basis, there was clearly a loss; second, the Company bears the burden of proving the amount of the loss; third, any assessment must not be purely speculative but must have some evidential basis. In the circumstances, and where accounts for 2010 and 2011 were not produced, I would allow a profit margin of 25%; this reflects the probability that administrative costs would include a significant proportion of fixed costs. This would result in a loss of profit calculated as follows: 488 tonnes at £280 a tonne—£136,640; profit equivalent to 25% of sale cost; therefore total lost profit of £34,160.

(2) The loss of sole-approved-supplier status and Appendix 9 potential

119. This head of damage does not seem to be anything more than a statement of a factor that is said to underlie the other pleaded heads of damage. It cannot operate as a free-standing head of damage. The claim for damages for loss of the Company's status as sole approved supplier is untenable, because that status was not a property right and the Company had no right to its protection. The claim for damages for loss of the opportunity to obtain Appendix 9 approval under the Code is untenable, because the Company never initiated an agreed trial under Appendix 9.

(3) The loss of other contracts

120. Paragraph 28 of the particulars of claim identifies three other customers whose business was lost: Alternative Recycled Materials Ltd ("ARM"); Conroy Developments Ltd ("CD"); and Forefront Utilities Ltd ("FUL").

121. The Company traded with ARM from December 2010 until April 2011, and with CD from June 2010 until March 2011. In neither case was there an obligation on the customer to buy Perma-soil on a regular basis; orders were placed and received on an individual basis. In paragraph 19 of his statement Mr Holloway says that these companies stopped trading with the Company because SMRec's product had Appendix 9 approval and Perma-soil did not. That cannot be right, in any relevant sense. SMRec's product did not obtain Appendix 9 approval until November 2012. Before then, it was subject of an agreed trial under Appendix 9. The Company never applied for or obtained agreement to such a trial of Perma-soil. It was entirely a matter for the customers to decide with whom they dealt; if their reasons included the existence of Appendix 9 trials, they were entitled to act accordingly. In fact, however, the Company's case does not even get that far in the case of ARM, because Mr Holloway's evidence of the reason why ARM stopped doing business with the Company was hearsay and was unconvincing and Mr Breandan Flynn, the former proprietor of ARM, gave evidence to the effect that he had experienced a disagreement with the Company and preferred to do business with Mr Thomas, whom he knew, rather than with the Company.

122. The Company's business relationship with FUL extended only through April and May 2013. Mr Holloway's evidence was that FUL put an end to the relationship because the Company did not have Appendix 9 approval; this was told to one of the Company's employees. In fact, FUL placed only two trial orders with the Company. The evidence is that FUL did not thereafter deal with SMRec. If the lack of Appendix 9 approval was the reason why the relationship did not thrive, that was a matter for the customer. Moreover, FUL is based in Essex, not in Flintshire, and approval of alternative specifications under the Code is a matter for the particular highway authority, not a national matter.

123. I regard the claim in respect of the loss of other customers as entirely bogus.

(4) The loss of reputation

124. The Company made no attempt to quantify this head of loss. It appears in fact to be just a different way of putting the second and third heads of loss and is untenable for the same reasons as they are. Insofar as the additional contention were made, that the loss of Welch's business itself caused reputational damage, this would not advance matters: first, it is implausible that the loss of one customer will cause reputational harm; second, such harm would be too remote to sound in damages; third, there was no evidence of general reputational damage. As to the last point, the Company relied on Mr Holloway's evidence that its turnover had reduced after 2011. I do not regard that as evidence of reputational damage. Deteriorating financial performance has all manner of causes. The cause in this case is unidentified. If the cause is competition in the marketplace, it provides no legitimate ground of complaint, despite Mr Holloway's apparent belief and Mr Spackman's submissions to the contrary.

Conclusion

125. For the reasons set out above, the claim is dismissed.