

Neutral Citation Number: [2012] EWHC 2593 (TCC)

Case No: HT-11-386

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**TECHNOLOGY AND CONSTRUCTION COURT**

Royal Courts of Justice  
Strand, London. WC2A 2LL

Date: 5<sup>th</sup> November 2012

**Before :**

**MR RECORDER M SOOLE QC**

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**Between:**

**RIVERCOVE TRUSTEE LIMITED** **Claimant**

**- and -**

**JAN van WINKELLEN t/a EURO RUBBER LINES** **Defendant**

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**Mr Gary Blaker** (instructed by **Martineau LLP**) for the Claimant  
**Mr Ben Quiney** (instructed by **Clyde & Co LLP**) for the Defendant

Hearing dates: 18<sup>th</sup>-21<sup>st</sup>, 25<sup>th</sup>-29<sup>th</sup> June & 13<sup>th</sup> July

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**JUDGMENT**

## **Mr Recorder Soole QC :**

1. This action concerns former industrial premises known as the Wardle Storeys Brantham Works near Manningtree in Essex ('the Site'). In 2007-9 (principally 2008) the Site underwent an extensive clean-up operation in order to remove, in particular, substantial oil contamination. The Claimants ('Rivercove') as owners of the Site claim that this oil contamination was caused by the Defendant ('ERL')'s workmen in the course of removing and/or dismantling heavy oil-lubricated machinery which it had purchased from Rivercove in July 2007. Rivercove says that the total cost of the clean-up was £331,677.58 and claims this sum as damages for breach of contract.
2. ERL contends that the oil contamination stems from the historic condition of the Site, not from any act or omission of its workmen. Thus the central question to be resolved in this case is whether the undoubted oil contamination was historic or whether it was caused by ERL's workmen. If it was caused by ERL, there is no dispute that this would constitute a breach of the relevant contract. Equally it is agreed that ERL had no responsibility for clearing up historic contamination.
3. In addition there is a major dispute on quantum, ERL in particular contending that the claim has been fabricated.

### **The Site**

4. The Site lies on a peninsular of land by the Stour estuary. It is divided into a northern and southern section by the mainline railway. Rivercove purchased the northern section from Wardle Storey<sup>1</sup> in July 2006 and subsequently purchased the southern section in December 2007. The northern section, in particular, had been used for heavy industrial processes since Victorian times. In recent years a Wardle Storeys company<sup>2</sup> ('SIP') had, as tenant, used the northern section for the manufacture of plastic sheeting. The tenancy and business continued after Rivercove's purchase of the northern section. However at the end of January 2007 SIP went into administration. The business ceased operation then or shortly thereafter and the administrators eventually surrendered the lease and vacated the Site in March 2007.
5. SIP's manufacturing process involved the use of a number of 'Calender lines', namely composite heavy machinery which was used to produce rolls of plastic sheeting. The 'lines' were made up of a number of parts. At the heart was the Calender 'machine' which weighed between 150 and 180 tonnes. In each case the machine sat over a pit which was about 8 feet deep. Beneath the machine and seated in the pit was a tank which contained lubricating oil for the machine ('the lubrication tank', sometimes referred to as the 'oil reservoir') with a capacity of 350-400 litres.<sup>3</sup> The machine was attached to 'upstream' parts of the 'lines' - including mills, mixers, extruders and associated gearboxes - and 'downstream' parts.
6. Four of these Calender lines were situated in a building which has a confusing array of descriptive numbers in the various documents. On the plan (D/34) the building is numbered

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<sup>1</sup> Wardle Storeys (Property) Limited

<sup>2</sup> Storeys Industrial Products Limited ('SIP')

<sup>3</sup> According to the Specifications for Calender Lines 2 and 5 : C/61,65

234, elsewhere it is called 'Building 2'. I will follow the parties' course at trial by referring to it as 'the Calender Building'. The four 'lines' in the Calender Building are identified on the plan by numbers 1, 2, 4 and 5.

7. Pursuant to its July 2007 contract with Rivercove, ERL purchased and removed Calender lines 2 and 5 and its ancillary equipment. These had been manufactured and installed in 1956 and 1976 respectively and were in use until the business closed. Line 4 had been purchased and removed by ERL under a previous transaction in 2005. Line 1 was removed by Rivercove in November 2008. In a different building (numbered 307 on the plan) was another Calender line, numbered 6. This was removed by other contractors (Trans XL) in the period June-August 2007.
8. Under the same July 2007 contract ERL also purchased and removed a laminator and two printers which were located in a building (numbered 309 on the plan) which has been referred to as 'the Printer Building', also 'Building 6'.
9. In each of the relevant buildings there was a network of ducts in the floor, to carry water pipes, cabling etc. Although the detailed position is very far from clear, it seems that at least some of these ducts led to the pits. In the Calender Building the ducts were covered with heavy steel plate.
10. In each of the pits was an electric pump ('the pit pump'). The effect of the water table at this estuary site was that groundwater would seep into the pits and so needed to be pumped out. Although the precise cause and extent are very much in dispute, there is no real dispute that some oil from the manufacturing process entered the pits and would contaminate the groundwater. The power supply to these pit pumps was turned off at about the end of March/early April 2007.
11. When the automatic pumps were triggered by the influx of groundwater into the pits, the oily water was first pumped to nearby large oil/water separation tanks. From there the water was discharged through the surface water drainage system towards an oil/water interceptor located close to the boundary with the southern section.
12. This interceptor consisted of a collection of brick construction separating chambers and included a skimmer, or rotating 'oil mop', for the removal of residual oil.
13. The water would then be discharged along an open drainage ditch which ran along the north side of the railway line, through a culvert under the railway line and into the southern section. The water (and any residual oil) then ran down the southern drainage ditch into a further interceptor. The water was then pumped into a holding 'lagoon', from where 'effluent pumps' (also referred to as 'estuary pumps') pumped the water into the estuary at high tide. Unlike the pit pumps, these pumps remained in operation throughout these events.
14. Rivercove allege, and ERL dispute, that an underground pipe ran from the relevant pits (i.e. for lines 2 and 5) into the external drainage system.
15. Adjacent to the Site was the Stour Estuary Reserve, a protected SSSI (Site of Special Scientific Interest) operated by the RSPB. The prevention of pollution from this Site was thus

a matter of particular concern.

### **The parties and other players**

16. Rivercove is an Isle of Man trust company which was purchased off the shelf for the purpose of the Site purchase and development. Its beneficiary is a trust of the Kelly Family ('the Patrick James Kelly Settlement Trust') of which Mr James (Jim) Kelly and other family members are the beneficiaries. Mr Peter Crompton, a trust manager of Abacus Trust Company Ltd, advised and assisted the Kelly family interests in connection with the purchase and later (December 2008) became a Director of Rivercove. He gave evidence in that latter capacity.
17. ERL was the trading name of Mr Jan van Winkelen's business of buying and selling machinery for the rubber and plastics industry which had been established at its Lancashire base since 1992. He was assisted in that business by his son Hans. His employees included Messrs Parker, Weaver and Simpson; and Mr Doody worked for him on a self-employed basis. Since these events ERL has become a corporate entity.
18. It emerged during the trial that members of the Kelly family also controlled two other important corporate participants in these events. First, St Francis Group Limited ('St Francis') which was in the business of managing property development and managed the Site for Rivercove, in succession to Stephens McBride Piercy Taylor Limited ('Stephens McBride'). Mr Jim Kelly and Mr John Kelly were Directors. Mr Rob Braid, another Director, gave evidence in support of Rivercove's claim. Secondly, DSM Demolition Limited ('DSM') which was in the business of land remediation and demolition. DSM was engaged by St Francis in respect of demolition/redevelopment and the clean-up issues at the Site. Mr Jim Kelly and Mr John Kelly made their witness statements in their respective capacities of Director and Contracts Manager of DSM. In cross-examination Mr Jim Kelly agreed that St Francis and DSM were essentially run by the same people, i.e. himself or his brother John.
19. In pre-trial correspondence (3.11.11) concerning a potential application for security for costs ERL's solicitors sought information on these trust/corporate/personal links but received no response.
20. I find it surprising and unsatisfactory that the family links between the ownership and control of Rivercove, St Francis and DSM did not emerge until cross-examination. The witness statements (in particular of Mr Jim Kelly and Mr John Kelly) gave no such indication. As will be seen, these close links are of particular potential importance on the issues of quantum. In my view fully open and candid witnesses should and would have made these family links clear.
21. Elimpic Limited ('Elimpic') was DSM's contractor for the pumping out and subsequent clean-up process in 2007-9. Most of its work was in fact sub-contracted to Haz Environmental Limited ('Haz').

### **The contract**

22. On 19th July 2007 Rivercove and ERL entered a written agreement for the sale and purchase of 'the Equipment', namely the Calender lines 2 and 5 including all ancillary equipment, a

laminator line and two printers, for the sum of £90,000 plus VAT. Payment was to be made no later than 25th July 2007, with title passing on payment.

23. As to removal of the Equipment, clause 4 in particular provided:

*'a) following payment of the money [ERL] may commence dismantling and removal of the Equipment.*

*b) [ERL] shall... use reasonable endeavours to remove at its cost the Equipment and all its equipment, tools, staff, agents and contractors from the Premises by 15 January 2008. Failing this... by 31 January 2008... Failing this... by 28 February 2008. Ownership of any equipment left on site after the 28 February 2008 will revert to Rivercove. No refund of the purchase price will be payable should [ERL] fail to remove the Equipment by the final deadline date of 28 February 2008 and ownership of the Equipment transfers to Rivercove.*

*c) [ERL] shall be responsible for the removal and disposal of waste material in connection with or arising from the said removal...*

*...e) [ERL] shall ensure that its staff agents and/or contractors shall comply with all relevant laws relating to health and safety when carrying out the said removal and shall be responsible for the safe operation of and for obtaining the necessary permits and licenses for the use of all equipment and tools (including, without limitation, cranes and lifting joists) whether they be the property of Rivercove or any other entity. Copies of method statements and risk assessments for removal of the equipment shall be submitted to [McBride] prior to commencing removal of the equipment.*

...

*f)...The Premises shall be left in a safe and tidy condition following removal of the Equipment, to the satisfaction of [McBride]..*

...

*Rivercove does not give any warranty, representation or undertaking as to any equipment, machinery, plant or power supply at the Premises used by [ERL] during the removal of the Equipment."*

24. There is no dispute that the effect of these provisions was that ERL was liable to clean up any oil which might be discharged or spilled in the course of the removal of the Equipment. Thus if, as Rivercove alleges, the task resulted in the discharge or spillage of oil from the machines onto the floor and/or into the ducts and/or pits, ERL was responsible for cleaning it up. Equally, it is agreed that ERL did not have any obligation to clean up historic contamination.

25. The sale was negotiated on behalf of Rivercove by Mr Malcolm Cox. Mr Cox had multiple roles in this story. He was employed by Wardle Storeys from 1996 to 2007 and as managing

director of SIP from 2000. After the administrators vacated the northern section of the Site in March 2007 he agreed to become the agent for Rivercove (through Stephens McBride) in respect of the sale of the machines, for which he received a commission. This led to a dispute with Rivercove and litigation ('the Cox litigation')

which was originally joined with the present action until settlement was achieved. In addition he continued to be responsible for the management of the southern section until Rivercove purchased that part in December 2007. This interim role also led to dispute with Rivercove, concerning oil contamination allegedly emanating from the northern section.

### **Standard of proof**

26. The burden of proof is of course on Rivercove. As to the standard of proof Counsel for ERL submits that, insofar as Rivercove alleges that ERL's workmen deliberately drained oil onto the floor/ducts/pits, there is a heightened standard of proof, given the gravity of the allegations; and that the seriousness of the allegations requires commensurately persuasive evidence. He cites the well-known cases of Hornal v. Neuberger Products Ltd [1957] 1 QB 247 and In re H [1996] AC 563, which was further considered and explained in In re B [2009] 1 AC 11.
27. In my view the true position is best summarised by Lord Hoffmann in In re B : "*I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.*" : para. 13. I shall therefore apply that standard.

### **Witnesses**

28. Over 8 ½ days I heard evidence from 17 factual witnesses (9 on behalf of Rivercove, 8 on behalf of ERL) and two expert Environmental Consultants (Mr Martin Bjerregaard for Rivercove; Mr Marcus Wright for ERL).

### **The state of the Site and its causes**

29. In order to decide the central factual issue it is necessary to make findings as to the state of the Site - and the cause(s) of that state - before and during ERL's works of removing/dismantling the equipment. In particular this requires consideration of the position (i) prior to the first arrival of ERL's workmen (31<sup>st</sup> July 2007) and (ii) between the beginning of August and the end of November 2007. As it developed in the course of the trial Rivercove's case is that the essential contamination resulted from ERL's conduct in the period to the end of November 2007. However in reviewing that period it is also necessary to consider events at Site between December 2007 and ERL's departure from Site at the end of February 2008. This latter period has particular retrospective relevance because of issues concerning what was seen and said at an important meeting on Site between the parties on 9<sup>th</sup> January 2008; and as to the nature of the work carried out by ERL's workmen in January and February.

### **Before 31<sup>st</sup> July 2007**

30. Rivercove says that until about June 2007 the Site was no more than an old heavy industrial factory with some oil staining and small spills, commensurate with its age and industrial processes; that a moderate oil problem had been identified in June and July 2007 which resulted in the Environment Agency ('EA') intervening in August 2007; and that this was effectively dealt with in the course of that month.
31. In contrast ERL says that there was a serious historic problem of oil contamination at the Site; and that those problems have been wrongly minimised in the witness evidence on behalf of Rivercove.
32. Rivercove relies in particular on the following witness and documentary evidence.
33. In 2004 Stephens McBride obtained on behalf of Wardle Storeys an environmental report from Harrison Environmental Consultancy. The authors noted '*some hydrocarbon sheen and oil staining the trenches but this was limited in extent*'; but this concerned the ditches in the southern section.
34. In his witness statement Mr McBride, who is a chartered surveyor, described the 'numerous' site visits which he had made to the Site, both before and after Rivercove's purchase. He said that this often involved entering the buildings, including the Calender Building. During those visits "*I did not witness contamination of the type that forms the subject of these proceedings.*"
35. Mr Jim Kelly said that he visited the Site on occasions in 2004-6. In particular he made a visit on 30<sup>th</sup> March 2006 for the purpose of advising on development potential and any potential contamination issues. He walked round the northern and southern sections and went into a number of the buildings. He saw no significant oil spillages or leakages. He looked into the pits and saw no flooding and only some 'minimal' oil staining. He said that the vast majority of the ducts were covered with the plating; but in those where it was missing he saw no more than some oil staining.
36. Mr Kelly also referred to a valuation report from Bache Treharne which was obtained in August 2006 when Rivercove was considering purchase of the site. This recorded that '*Site personnel report that there has (sic) been limited incidents relating to spillages or other events that could cause ground contamination however again our inspection revealed that housekeeping standards appeared less than adequate*' and that oil deposits were visible on the water in the drainage ditches. However there was no suggestion that there had been significant quantities of oil in the drainage ditches, the buildings or elsewhere. Conversely the report expressed scepticism about suggestions that the likelihood of ground contamination was low; and said that in the light of the chemical and petroleum operations '*...it would not be unreasonable to conclude that there is a degree of contamination across the whole site.*'
37. In his evidence the author of the report (Mr James Roberts) said that he would have flagged up '*...anything untoward pointing to heavy oil contamination in these buildings*' and that there was no such issue in his report. He described the building as 'oil stained' from a hard working life but not 'soaked in oil'. However he also agreed that he had not lifted the steel

plate covers of the ducting nor looked into the pits in the Calender Building.

38. Mr Ralph Bailey, the Managing Director of Elvanite Recycling Limited, gave evidence that he had visited the Site in 2002 in order to produce an asbestos report (no longer available) and had visited on other occasions until 2006. He described the site as *'very untidy but there were no significant oil contamination issues'*. He would have noticed if there had been oil all over the floors, as it would have affected his quotations. He recalled some oil and sludge in the pits beneath the Calenders, *'perhaps a few inches but no more than you would usually expect.'*
39. Mr John Kelly visited the site, including the Calender Building, in early March 2007. This visit followed a report that the administrators' workmen may have been damaging the buildings and associated concerns about asbestos. He *'did not see any significant oil contamination'*. In cross-examination he agreed that he did not go into the pits but said that he would have looked around the buildings; and *'I certainly didn't see any oil to what I saw later in the year'*. He said he visited the site about once a week or fortnight between March and June 2007 and would have gone into all the buildings; and that before his visit in November 2007 there was no oil in the pits. Until November he never saw the pits flooded or big ponds of oil; *'any oils that were in the pits were in drums'*. In his witness statement he said that the Calender Building in November 2007 *'...was in a much more heavily contaminated condition than the last time I had seen it at the beginning of March 2007.'* When it was put to him that it was not a fair comparison between his visits in March (when he did not go into the pits or look beneath the duct plates) and November 2007, he ultimately agreed.
40. Mr Anthony Sullivan, a site clearance sub-contractor, was from March 2007 until February 2008 working at the Site removing non-ferrous metals. At the end of July 2007, following the departure of its employee Mr Hawes, DSM gave him the additional task of co-ordinating access to the Site on its behalf. In his witness statement he said that in March 2007 the floor of the Calender Building was free from oil. He could not see beneath the duct cover plates but he recalled looking into the pits and seeing that they were free of oil. In cross-examination he said that in March 2007 he had been working in building 307 (where Calender 6 was located), not the Calender Building; and that he had not gone into the Calender Building until November 2007, with John Kelly. In reexamination he said that he had gone into the Calender building with John Kelly in March 2007 and that *'...it was in fairly good condition. There was a few barrels of stuff lying around. There wasn't a mess in there or nothing'*
41. An asbestos survey was commissioned by Rivercove and took place between 26th April and 5th December 2007. The survey included the Calender Building and the Printer Building. Although its Executive Summary recorded that *'No access could be gained into sub floor ducts/basements as these were flooded with water at the time of survey'*, there was no reference to serious oil contamination or water filling in the Calender pits. Rivercove says that if there had been such contamination it would have been difficult for the surveyors to carry out their work and they would have notified Rivercove's managing agents accordingly.
42. Mr Robert Cooke has been general manager of DSM's Environmental Division since 2004. He said that the asbestos survey in respect of the Calender Building and the Printer Building

would have taken place between 26<sup>th</sup> April and 3<sup>rd</sup> May 2007. In his witness statement he said that on first visiting the site (including the Calender Building) with Mr James Kelly on 30 March 2006 he found it *'messy and untidy'* but *'relatively clean'*. As to 1st August 2007 when he visited the site with the representative of the EA (Mr Mann) he told me that *'The site was dirty, but not abnormally so'* and there was a lot of waste in drums. He said that some buildings had dirty floors, but nothing beyond what would be expected in a normal industrial machine shop. When pressed with the observations made in the EA's subsequent (3<sup>rd</sup> August) letter - which included *'...we found varying quantities of oil present in pits, tanks, barrels and numerous combinations of these...'* - he replied that he was not saying that it was inaccurate but that it was a question of degree and interpretation.

43. In his previous witness statement (19.3.09) made in the 'Cox litigation' Mr Cooke had stated that : *"4. Towards the end of the summer of 2007 the situation regarding the quantity of oil had significantly changed. Large amounts of oil were noted in pits and ducts in a number of buildings. In the... 'calender building', oil was also present on the actual floor slab where machinery was being removed from. 5. The oil in the pits and ducts had by the middle of August 2007 migrated through the site drainage system and had overflowed out of the oil water interceptor... From here the oil had passed into the stream on the site that discharged into the estuary..."* In cross-examination he said that the reference should have been to the beginning, not the middle, of August.
44. ERL's evidence as to the historic state of the Site came in particular from Mr Malcolm Cox, together with Mr Brian O'Reilly, Mr Chris Hawes and Mr Chris Duke. For the purpose of his litigation with Rivercove Mr Cox prepared, with the assistance of Messrs Hawes and O'Reilly and two others<sup>4</sup>, a document entitled 'Brantham Site Background to March 2007' ('the Brantham Report'). Rivercove says that this is a self-serving document prepared for litigation, is the product of 5 individuals and should be viewed with great caution.
45. Until the closure in late January 2007 Messrs O'Reilly, Duke and Hawes had many years service with Wardle Storeys. They were respectively Operations Manager, Departmental Manufacturing Manager and Electrical Foreman. Following SIP's departure from the Site Mr Hawes was employed at the Site by DSM as Site Representative from 1<sup>st</sup> March to 24<sup>th</sup> July 2007, when his employment was terminated either by dismissal or resignation. It was put to Mr Hawes (and he emphatically disputed) that he had inflated electricity invoices. Rivercove says that Mr Hawes' evidence is tainted by resentment at the termination of his employment.
46. In addition to this Report Mr Cox also took a number of photographs of the Site - and of the Calender Building in particular - in 2007 and 2008. The 2008 photos were taken by him entering the Site as a trespasser. These 'Defendant's photos' are then compared with the 'Claimant's photos' taken in August 2006 (by Bache Treharne) and by unidentified persons from April 2007 to September 2008. ERL says that the photographs demonstrate similar incursions of oil and water in the periods before and after ERL's presence on Site; Rivercove disagrees.
47. In evidence Mr John Kelly suggested that Mr Cox's photographs had not been taken on the dates given by him, and that the digital camera dates and times had been tampered with so as

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<sup>4</sup>Gerry Watson and Gary Head

to present a false picture. This suggestion was not pursued in cross-examination or closing submissions. However it emerged that some of the photographs were zoom extracts of larger photographs and it was submitted that these had been 'doctored' or at least 'cropped' to give a misleading impression of the oil contamination at the Site.

48. The gist of the Brantham Report is that the site had serious historic oil contamination problems, arising in particular from significant and persistent oil leakages at all the main pieces of manufacturing equipment and in particular the Calender lines. In particular oil from the lubrication system in the Calender lines would leak into the pits and ducts. In consequence substantial purchases of oil had to be made each year. Although the problem of oil loss was reduced over the years, by 2006 the annual cost of oil purchases is said to have been £15,000, equivalent to 6-8,000 litres. Taken with the ingress of groundwater into the pits, these leakages necessitated the extensive facility for the removal and separation of oil and water from the pits.
49. A number of e-mails from Mr Cox provide evidence of problems with both groundwater and oil in April - August 2007.
50. As to water ingress, and in the context of the negotiations for the sale of the Calenders, his e-mail to Mr McBride on 29<sup>th</sup> April recorded '*...the calenders are now starting to deteriorate — the all important boles are going rusty and the pits containing the machines lubrication, hydraulic packs and some electrics are starting to fill with groundwater...*' These references to pits filling with water were repeated in Mr Cox's e-mails to Mr McBride on 7<sup>th</sup> and 19<sup>th</sup> June, to Mr John Kelly on 14<sup>th</sup> June and to Mr McBride on 4<sup>th</sup> July. In the latter Mr Cox stated that the consequential deterioration of the equipment had caused ERL to withdraw its previous offer to buy three Calender lines and other equipment for £131,000; but that he had salvaged part of the transaction through ERL's agreement to buy 2 calender lines and the other equipment for £90,000.
51. As to oil, and in his capacity of managing the land in the southern section which was not then owned by Rivercove, Mr Cox's e-mail of 25<sup>th</sup> May stated that his inspection of the drainage ditches had shown a build-up of oil - '*in areas it was quite heavy*'. He concluded that this came from the Rivercove (i.e. northern) section. These concerns were repeated in an e-mail of 30<sup>th</sup> May. On 14<sup>th</sup> June he met Mr John Kelly at site to discuss this issue. His e-mail to Mr Kelly on the following day stated '*The source of the oil contamination is believed to be the old oil separating pits near to the calendar hall. You advised that you will arrange for these to be drained and steam cleaned to permanently remove this source of contamination, together with cleaning up the localized oil contamination that has built up on the BW<sup>5</sup> [i.e. Southern] site*'. In an e-mail to Mr McBride on 29<sup>th</sup> July Mr Cox complained that, six weeks on, nothing had been done to address the source of the problem; that the level of oil contamination on the southern site had worsened; and that a representative of the EA had visited the site and commented on the oil contamination.
52. Mr McBride replied on 30<sup>th</sup> July. Whilst denying that any oil contamination was emanating from the northern site, he advised that Mr John Kelly had asked 'our previous employee' Mr Hawes to take whatever action was necessary. In his evidence Mr Kelly said that he had

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<sup>5</sup> Bernard Wardle & Company Ltd

instructed Mr Hawes to undertake the required clean-up works but that he had failed to do so. In his witness statement in the Cox litigation Mr Hawes said that he had been instructed by Mr Kelly on 14<sup>th</sup> June to have the interceptor tanks pumped out and steam cleaned and for the oil contamination to be removed from the drainage ditch; and I understood him to stand by that evidence. I found it difficult to follow Mr Hawes' explanation of why he did not do so, but understood that it was because of the need to have a licence to remove waste oil from a site; and that he had for that purpose contacted a company called OSS : see his e-mail to Mr Kelly dated 18<sup>th</sup> June. In my view Mr Hawes was evidently resentful about the termination of his employment and this affected the quality of his evidence.

53. As to the state of the buildings, Mr Hawes agreed in cross-examination that it was a 'relatively tidy factory site' when he was employed by Wardle Storeys, but said that this was not so when he was working for DSM. He said that in the Calender Building there was 'oil staining' around the machines and no puddles on the oil floor. He agreed that the state of the pits was similar to that shown in the April 2007 (Claimant's) photo (I/B412). He agreed that the pits were not 'full of oil' at that time.
54. Mr O'Reilly confirmed agreement with the Brantham Report. In cross-examination he agreed that the site was 'relatively tidy' and that the floor in the Calender Building in April to June 2007 '*was the same as I recall it ever being*'. He said that he had seen oil and water in the pits. He agreed that the April 2007 photographs (I/B412-3) represented 'pretty much' the type of oil he saw in his time there; and said that the October 2007 (Claimant's) photo (I/C163) represented the oily water (and duckboards) he had seen before in the pits. He did not recall seeing oil flowing freely on the floor. He said that he had never seen more than a few inches of water in the pits, '*...because there were pumps that were pumping water and oil out while the calenders were in production.*'
55. Mr Duke also agreed that the state of the Calender Building floor was 'relatively tidy' and that it was not 'swimming with oil'. He said that there was always a film of oil on the drainage ditch but that it was not 'thick' oil. He said that in some of the departments where he worked there were small presses with pits underneath; and these used to fill with oil and water all of the time.
56. Mr Cox, referring to his 29<sup>th</sup> April e-mail reference to ground water in the Calender pits, said he thought that it had been triggered by a walk round the Site with Mr Jan van Winkelen. Mr van Winkelen had walked down the pit to no. 5 Calender and got his foot submerged in some water. As to his 4<sup>th</sup> July e-mail and its references to pit water and damage to the equipment, this followed another visit with Mr van Winkelen when the water level was such that you could not get into the pit. Rivercove says this must be an exaggeration and inconsistent with his later evidence that some small oil drums might have been kept in the pits.
57. Mr Cox agreed that in July 2007 the floor of the Calender Building was fairly tidy and that there would not have been any puddles of oil save one or two relatively small ones alongside one or two bits of machinery. He described the oil in the ducts before Rivercove's purchase. Near the mills for Calender 4 it was very thick and sludgy; nearer the electrical room it was fluid '*but it never flowed or ran*'. He did not look into the ducts during the period in 2007 when removal work was going on.

58. Mr Jan van Winkelen said that when he visited the Site in 2005 it was a normal factory in production and *'no better or no worse than most others'*. On first visiting in 2007 in connection with the proposed purchase of equipment, he did not recall who took him round but there was nothing that jumped out to make him think that there was anything drastically wrong with the site; but he was there to look at machinery, not as an environmental expert. He wore ordinary steel toe-capped shoes. He thought that ERL's ordering of oil spill granules on 2<sup>nd</sup> and 9<sup>th</sup> May was triggered by Mr Cox's supply of a draft contract on 1<sup>st</sup> May and reflected the fact that he must have noticed oil on his visit. Rivercove says that there was no mention of an oil problem at this time, nor in his witness statement, and that this purchase was not related to this particular Site. Mr van Winkelen said that on his next visit in July 2007 the pits had filled with water, which he had not seen before, but he did not go down into the pits.
59. Mr Hans van Winkelen said he had visited the Site with his father in May 2007 (and on no other occasion). There was some oil staining on the Calender Building floor but no oil spill or other concerns. He had been concentrating on the machinery and had not peered into the pits.

#### **Conclusion on the period to 31.7.07**

60. I accept and prefer the evidence called on behalf of ERL. In particular I am satisfied that the Brantham Report presents an essentially accurate and reliable account of the historic problems at Site. There were, I am satisfied, significant historic contamination problems arising from substantial and persisting oil leakage in the course of the manufacturing process and in particular from the operation of the Calender lines. This resulted in significant oil contamination of the pits and the ducts. The problem was compounded by the undoubted intermittent incursion of groundwater into the pits; and necessitated the system for the pumping away and separation of oily water.
61. In reaching my conclusion I have borne in mind that Mr Cox had an adverse interest in the matter, through his litigation with Rivercove and the dispute over oil contamination of the southern section; and that his Brantham report is a composite of the information pooled by him and four others. However I do not consider that this has affected the quality of his evidence.
62. Mr Cox and his colleagues Messrs O'Reilly and Duke had a long and intimate knowledge and understanding of the site and its industrial processes. I have found their account, both in the Brantham Report and in their other evidence, to be both inherently persuasive and consistent with other significant evidence. Mr Hawes' evidence on the historic condition was consistent with that of his former colleagues but in the light of his evident resentment at the termination of his employment by DSM I have given it only limited weight.
63. Thus the Brantham Report is detailed and coherent in its explanation of the problem and how it was tackled. Its evidence accords with the very system which was in place to pump out and separate the groundwater from the oil; and with the 'Claimant photos' in April 2007 [I/B412-3] which in my view clearly depict the historic leakage of oil into the pits and the steps (e.g. the absorbent pads seen in B/412) taken to deal with the oil problem. Looking forward to the later period, I consider that much the same scene appears in Mr Cox's photograph of the No. 1 Calender pit in July 2008 [I/Def/16].

64. The Report's account is also consistent with Mr Cox's various e-mail comments in April- July 2007 which provide evidence of water in the pits and oil contamination of the drainage ditch. Evidently oil was emanating from somewhere in the Rivercove site; and notwithstanding that production had ceased. In their Joint Statement the experts agree that '*...during operation the upstream production elements ...are all leaking oil*' (para.30) and that '*...after production ceased some oil loss can continue*' (para.31). I accept that - given the absence of pressure within the machinery - this leakage would be less than when it was operational (Mr Bjerregaard first report (para. 3 6)).
65. I also accept Mr Cox's account of water in the pits when visiting the Site with Mr van Winkelen in late April and July 2007. Those accounts are supported by the fact that the pit pumps had been turned off by this time.
66. The account of historic and continuing problems with groundwater and oil is also consistent with evidence which post-dates this period. This includes the evidence from the EA visit on 1<sup>st</sup> August (to be reviewed below); and Mr Cox's photographs of April, July and August 2008 which show significant quantities of oily water in areas where ERL did not work, notably Calender 6 in building 307 [I/Def/64-71] and Calenders 1 and 4 [I/Def75-20;41-43]. I accept the authenticity of Mr Cox's photographs and his evidence of the dates (with the corrections he made) when they were taken and am quite satisfied that there was nothing improper or misleading in his creation of close-up zoom pictures from larger photographs.
67. In my judgment, the evidence called on behalf of Rivercove in no way undermines ERL's evidence on the historic condition of the Site, in particular as to the state of the pits and the ducts. None of the witnesses had the knowledge and experience of the Site of Mr Cox and his former colleagues, nor were they subjecting the Site and its machinery to the sort of close examination that would have been necessary to detect and understand the cause and extent of the historic oil leakage problem. This applies equally to the makers of the various expert reports, including Mr Roberts who agreed that he had not looked into the pits or ducts.
68. Whereas Mr Jim Kelly saw minimal oil staining in the pits and a few areas of exposed ducts, Mr Bailey recalled '*perhaps a few inches but no more than you would usually expect*' of oil and sludge in the pits. The absence of flooding of the pits on their respective visits in 2006 was consistent with the operation of the pit pumps: Mr John Kelly had not looked into the pits or below the duct plates on his visit in March 2007. Having particular regard to the terms of his first witness statement I am not satisfied that he went into the Calender Building between that visit and November 2007, or if so had looked into the pits. Furthermore he evidently knew, for example from Mr Cox's e-mail of 14<sup>th</sup> June, of the problem of pits filling with water. Mr Sullivan's evidence as to which building he had entered in March 2007 was confused. Mr Cooke's evidence, in particular his witness statement in the 'Cox litigation', is that there was oil in the pits and ducts at the beginning of August.
69. As to the state of the floors (and of the Calender Building in particular) during this period, I am satisfied from the witness evidence and photographs that the historic and continuing leakages were responsible for considerable oil staining, particularly in the vicinity of the

machines. In my view the leakages would have caused occasional small puddles and pools in the same vicinity but not otherwise across the floor of the buildings. This is also supported by the evidence of oil on the floors (as well as in the pits) when the EA inspected on 1<sup>st</sup> August.

**1<sup>st</sup> August - end-November 2007**

70. On 31<sup>st</sup> July 2007 ERL (through Mr Parker and Mr Weaver) came to site. I am satisfied that they did not do any relevant work on that date.

**Environment Agency**

71. From 1<sup>st</sup> August the EA documents provide independent evidence of events at the Site.
72. The EA's 'Full Incident Report' prepared by Mr Philip Mann, Senior Environment Officer, records an initial report of '*oil in the stream running through the Wardle Storey site in Brantham*'. The Report identifies the 'cause type' as '*containment and control failure*' and the 'cause description' as '*failure to clean out interceptors*'.
73. A meeting took place on Site the same day (1.8.07) between Mr Mann and a colleague and Messrs Cooke and Sullivan.<sup>6</sup> It is common ground that the reference to 2nd August in this report must be a mistake. The EA report records that '*We walked the drainage ditch from the access road under the railway where there was a thin film of oil visible on the flowing water to the point where it emerges from under the railway where a lot of black oil was visible.*' Having walked to the oil skimming facility on the southern site and found that the collection tank had been removed and the skimmer turned off, they walked back to the northern side '*...and examined several buildings where there was a lot of oil (some of this was unused) in drums, on the floor, in pits etc plus the main\_interceptor next to the ditch was full of waste oil*'. Arrangements were made for the interceptor to be cleaned out and emptied.
74. On 3rd August Mr Mann wrote to Mr Cooke. Having referred to the black oil seen in the drainage ditch where it emerges from the culvert and onto the southern side, the letter continued: '*I suspected that the source of the oil was an interceptor on the north side of the railway... and on inspection, found this appeared to be full of waste oil. Could you please write and explain how and why this oil was allowed to drain into the watercourse?*' Then:

*'With Mr Sullivan my colleague and I further inspected a number of buildings on site where we found varying quantities of oil, present in pits, tanks, barrels and numerous combinations of these plus in other containers as well as being spilled over some internal floors. In addition, the innumerable containers of inks/dyes/chemicals of varying states of condition were also found. Some of the spillages may have been*

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<sup>6</sup> Mr Mann's letter of 3<sup>rd</sup> August says that Mr Hawes was present, but this appears to be a mistake. Mr Hawes' employment terminated on 27<sup>th</sup> July and his presence is not supported by the statements of Messrs Cooke and Sullivan.

*deliberate but they do require urgent attention.'*

75. On 7th August the Incident Report records *'Inspected interceptor on site and it had been cleaned out but more oil had entered. This is as a thin film <10 and no oil was entering the ditch. Received e-mail from XXXX advising that 4500 litres oil/water had been removed. They hoped to clean up other oil in ditch later in week.'*
76. On the same date (7<sup>th</sup> August) Mr Cooke e-mailed Mr Mann and said that 'our waste company Elimpic' had pumped out the interceptor taking off site a reported 4500 litres of oil/water. He added that *'Strangely by today the interceptor has filled back up with water and although oil is on the surface it is only a thin sheen according to Anthony [Sullivan]...'*
77. On 21st August the EA Report records *'Inspected site, more oil in interceptor but XXXX deploying absorbent rolls to control...'* Mr Cooke said that it was at this point that the decision was made to install a new and more modern type of oil mop in the interceptor.
78. On 29th August the Report states *'... They have installed an OPEC oil skimmer, e-series, at the interceptor. Await reply letter before closure of incident.'*
79. On 31st August Mr Cooke wrote to the EA. Having referred to the installation of the 'oil mop' he continued: *'With respect to the oil as well as installing the mop we have embarked on removing from site oils in pits and cable ducts.'* The letter went on to state that the termination of Mr Hawes' employment had led to the interceptor not being fully maintained.
80. On 3rd September<sup>7</sup> Mr Mann acknowledged Mr Cooke's letter of 31<sup>st</sup> August, stating in particular : *'Following our site meeting and discussions, I confirm that I am satisfied with the oil mop installation and your proposed actions with regards to managing the site and its oil and other waste materials.'*
81. Mr Sullivan gave evidence that in August 2007 he had helped to clean out the ducts in the Calender Building and that the oil had not come back into the ducts at that stage, but at a later stage he saw it come back in.
82. In his witness statement (19.3.09) in the Cox litigation Mr Sullivan had said that: *'In about August 2007 I was instructed by John Kelly to monitor the oil interceptor as apparently there had been a steady flow of oil into it. We would take approx 10 gallons of oil a week from the interceptor with a mop system installed by Rob Cooke of DSM Environmental.'* In cross-examination Mr Sullivan agreed that he had remained on site until the end of February 2008; and that throughout this 7-month period the mop system had continued to collect about 10 gallons of oil every week from the interceptor.
83. In the same witness statement Mr Sullivan had stated that *'We could not find the cause of the problem having checked all the buildings and drains apart from the buildings occupied by [ERL]'*. In cross-examination he agreed that this was an assumption he had made as a result of his observation of the state of the Calender building in November 2007 i.e. that

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<sup>7</sup> Letter wrongly dated 3<sup>rd</sup> August

*'We could see the oil from the machines that had obviously been dumped into the pits and the service ducts* However he also agreed that if there was a problem with groundwater and historic oil that could also be an explanation for what he saw in November.

84. Mr Cooke referred in his 'Cox litigation' statement to Mr Sullivan's ongoing work of oil removal from the numerous pits and ducts. He said that in late 2007 he had witnessed a duct being pumped free of approximately 75 mm of oil at an inspection point; and that about one hour later it was noted that the oil had returned *'presumably from the other areas of the duct.'* Mr Sullivan said that that observation was more than likely correct.
85. Mr Cooke also said that the initial problem had been solved by cleaning out the interceptor and installing the mop *'so we could recover the oil out of the interceptor as it kept coming through.'* However he had not expected the oil to keep coming through to the interceptor *'in quality'* (*sic*) nor the amount of *free oil, free product that was in the buildings.'* Later he said that there came a point when he considered that the majority of the oil came from the Calender Building; and that he saw the August 2007 problem as being different to what he saw in May 2008.
86. Rivercove contends that this episode with the EA was a limited matter which was resolved by the installation of the new oil mop. ERL says that it was further evidence of the historic continuing oil contamination problem; and that Mr Sullivan's evidence particularly demonstrates that the flow of oil had not been checked and must have been from some other source for which ERL was not responsible.

#### ERL on Site

87. I return to ERL's arrival on Site on 31<sup>st</sup> July by their employees Mr Karl Parker and Mr Dave Weaver. These men were employed as drivers but Mr Parker told me that he had engineering experience from his service with the Royal Engineers 'heavy plant operator mechanic class one'. For the first six years in service he was working as a plant operator and then supervisor; and for the last two years he taught engineering at the Royal School of Military Engineering. He left the service in 2006, having previously completed resettlement courses in forklift, lorry mounted crane and health and safety. Mr Parker had been employed by ERL since March 2007 and Mr Weaver began a few weeks earlier. Before the Manningtree work Mr Parker had removed parts of Calender lines about five to ten times but he had not dismantled any part of a line. Mr Weaver was not called to give evidence. Mr Parker said that Mr Weaver had served in the infantry and then had been HGV driving. The documents include certificates in fork lift operation for both men. Mr Parker said that, having the greater engineering experience, he would generally take the lead.
88. Mr Parker said in his witness statement that while carrying out the removals he noticed that the pits beneath the calenders were filled with what looked like oil and water. In cross-examination he agreed that there were no oil puddles on the floor but that one of the pits *'at the back of calender five'* had water in it, up to about 2 to 3 feet from the top.
89. Francis Doody and John Simpson were also involved in the works of dismantling and removing the Equipment from site. However Mr Doody's evidence was that their work in 2007 was limited to a few days in August when they began the work of removing the

laminator and printers in the Printer Building and about twelve days in October when they returned to complete that work.

90. As to the Calender lines the evidence of Mr Parker, supported by Mr Doody, is that in 2007 he and Mr Weaver did not carry out any work on the dismantling or removal of the Calender 'machines' themselves. Their work involved the removal of the 'upstream' parts of the Calender lines, including the mills, extruders, mixers and associated gearboxes.
91. Mr Parker gave me a detailed account of how he and Mr Weaver physically removed - in his word, 'uplifted'- the upstream parts. This task involved the use of forklift trucks and cranes to lift up and remove these parts, but some prior removal of connecting water pipes and cables was necessary. The oil was mainly to be found in the gearboxes for the mills and mixers.
92. The mills were self-contained and mounted on one baseplate, so its gearbox did not need to be uncoupled and the whole unit was picked up under the base and taken back (with oil in the gearbox) on the wagon(s) to ERL's Lancashire base. The mills also had drip trays to catch lubrication that came out of the bearings. These were connected to 25 litre drums which they emptied into a bulk container ('IBC') and took back on the wagon.
93. In the case of the mixers, the three components (mixer, motor and gearbox) were each uncoupled, uplifted and taken back on the wagon. This whole process did not require any draining of oil, either at Site or in Lancashire, nor did they do so. Sometimes they would travel down in two wagons rather than one. He said that he and Mr Weaver always worked together on the Site.
94. Mr Parker said that the uplifting of the upstream parts (save the extruders) would reveal a thick black oil residue underneath. This was cleared up by shovelling it into empty 200 litre oil drums and taking these back on the wagon. Oil spill granules were used to absorb any residue or the oil from other spills; before shovelling into the drums. He denied the suggestion that he or Mr Weaver had had any accident or spillage of oil or that by October/November the Calender floor had puddles of oil or was coated in a *'floating runny oil'*
95. Mr Jan van Winkelen said that he had visited in August when Messrs Parker and Weaver were there and had seen puddles of oil. He said that *'the machinery was in a cluster in the centre of the building.'*
96. Although the contract required the provision of method statements and risk assessments for the removal/dismantling works, no such documents have been produced for this stage of the works. The only extant statement/assessment is dated 2<sup>nd</sup> February 2008 and relates to the dismantling of the Calender machines. Although Mr Hans van Winkelen thought that there may have been some earlier documents which have either gone astray or been replaced by subsequent adaptations of a template, in the absence of documents I am not satisfied that there were statements/assessments for the task of removal of the upstream parts.
97. ERL's witnesses did not dispute that this work was essentially unsupervised and that Mr Parker and Mr Weaver were left to get on with it. Likewise there was no other paperwork for this task. They were shown pictures of the lines and the parts to be removed, sent off down to the site in one or two wagons and the job was done when they returned with the parts. I am

clear that it was indeed a very informal system.

98. The question arises as to the amount of time taken by Messrs Parker and Weaver to carry out this task. The tachograph records of their journeys from Lancashire to Essex show that they were on site for a total of 103 days between 31<sup>st</sup> July 2007 and 31<sup>st</sup> January 2008 Rivercove says that there is no credible explanation for what they were doing on site during this 6-month period; and that they are now seeking to underplay what they were doing.

October/November 2007

99. Rivercove's witnesses say that when they came to site in October/November 2007 there was a very stark difference from what they had seen before.
100. Mr Braid gave evidence of a visit on 3<sup>rd</sup> October. He went into the Calender Building and saw *'large amounts of oil covering the factory floor* He described it as *'very runny'* and having accumulated in numerous puddles. The oil was mainly located around the Calender machines but had spread out across the floor. He did not examine the pits and the ducts were covered. His e-mail of 4<sup>th</sup> October to Messrs Cox and McBride stated that *'...in some areas where machinery had been removed there was a substantial amount of Oils and residues'* and asked that *'the respective companies collecting the machines'* be reminded of their *'responsibility to drain and dispose of any residual oils from the machines that they are removing.'* He also saw a *'good film'* of oil on the floor of the Printer Building.
101. Mr John Kelly said that when he visited the Calender Building with Mr Sullivan in early November 2007 he noticed damage to the doors and the duct plates. The floor was covered in oil. The pits were full of oil to a depth of several feet and he could see oil in the ducts. In cross-examination he said that you could go down the pits steps *'about a metre plus'* before reaching the *'oil and water'*. He described the volume as *'massive amounts'* and that he *'wouldn't put my hands in it'*. He could not understand how ERL's men could work in those conditions and said that there was *'no way I would go and work in that building the way they left it'*. He said he would have expected oil around the machines but not across the whole floor of the building. Contrasting the position in March 2007 he said : *'I could walk through them buildings before and not be too concerned. When I went there in November you had to be cautious not to slip over, and that is how badly contaminated it was as I went through the entrance... It was fresh heavy oil as it hadn't got dust over the top... this was shiny oil lying on the floor and running to the ducts'*.
102. Mr Kelly said that he challenged Mr Weaver at site. In his witness statement he said that he told him that the oil needed clearing up straight away; that Mr Weaver did not deny spilling the oil but said that he did not see the problem as the building was going to be demolished; and that they would mop up the floor using the granules but that he would have to speak to Mr van Winkelen about cleaning the pits. Mr Kelly said that he had no doubt after the conversation that ERL had caused the spillage as no other explanation for the appearance of so much oil had been offered.
103. In cross-examination Mr Kelly went rather further in his account of the conversation. When it was put to him that he had never suggested to Mr Weaver that it was his fault he replied : *'He did tell me it was his fault. It wasn't like that when I been around the building before, he was*

*the only guy working there.'*

104. Although still employed by ERL Mr Weaver was not called as a witness. Rivercove submits that an adverse inference should be drawn from ERL's failure to do so.
105. Mr Parker said that he was not present at Mr Kelly's conversation with Mr Weaver. He accepted that the floor of the building was black with stained marks from the fork-lift track but the floor was not oily: *'it wasn't a slippery oil'*.
106. Mr Sullivan's evidence of this early November visit was that he noticed the damage to the doors and *'a significant oil spillage in the building'*. He said that the floor of the Calender Building was covered in oil. The cable ducting was full of oil and the pits *'had been filled almost to the top with oil'*. *'There was a huge increase in the amount of oil in the building since the last time I had seen it in August.'* As to Mr Weaver his witness statement simply states *'On that occasion, Mr Kelly spoke to ERL's workers (including a Mr Dave Weaver) about the oil'*.
107. In the meantime on 5th November 2007 the EA made a further inspection of the Site, relating back to the August events. Its incident note for that date records :

*'Made a further inspection today. Oil skimmer has been effective. XXXXX advised that BIFF A waste contractors will be attending on Wednesday to remove quantities of oil found in a number of sumps/channels. This process is likely to continue for some time until the demolition of the site is completed next year. NFA by DA except to monitor occasionally.'*

108. On the following day (6<sup>th</sup> November) the EA sent DSM a notice to the effect that it had committed an offence on 1st August 2007 by oil pollution of the watercourse, contrary to section 85 of the Water Resources Act 1991. The notice continued that they did not intend to prosecute on this occasion but warned that this would be taken into account in the event of any future breaches.
109. On the same date (6<sup>th</sup> November) contractors Biffa attended the Site to remove 13,500 litres of oil/water.
110. On 22nd November 2007 DSM issued a quotation to St Francis for demolition and other works at the site for the sum of £365,102.01. The quoted work included *'Removal of oils and debris from pits and ducts and backfilling with clean crushed material'*
111. On 29th November Messrs Braid, Cooke and Sullivan met on site.
112. Mr Cooke said in his witness statement that the Calender building floor was *'a slip hazard with several puddles of oil'* that a large number of the ducts were filled with oil; and that the quantities of oil (particularly in the ducts) seemed significantly more than on his previous visits. In further evidence he described the floor as having *'accumulations of free oil puddles at odd spots'* and *'to such an extent that I was dubious about going in the building and slipping over.'* As to the ducts there was *'a large amount of free oil that wasn't there during the previous visits'* and he assumed it had come from the floor and run into the

ducts.

113. Mr Braid said that the floor was in a similar state to his previous visit in October. In cross-examination he said that he saw *'pools of oil to the side of the machines, not underneath the machines* He later said this was in the area of Calender 2 and it *'wasn't a small pool'*.
114. Mr Sullivan said that he lifted up some of the cable duct covers to enable Mr Cooke and Mr Braid to inspect. Several of the ducts were filled with large quantities of oil. In cross-examination he said that this included the ducts for Calender 1.
115. Mr Cox was not present at this meeting. However he thought he may have visited the Calender Building in November. He described the *'centre area of the building, between where the machines had been located'* as *'extensively marked' in terms of black impressions in the pattern of the tyres you get on fork lift trucks; so sort of a herringbone type pattern was there. It wasn't as far as I remember, in any way slippery, it was just like it had been printed on the surface'*.
116. On 7th December Mr Cooke wrote to Mr McBride in respect of the 29th November visit. The letter in particular stated:

*'... whilst on site I inspected the oil water interceptor and found oil was still arriving at it from the site drainage. The whole site was therefore checked again to identify the source of this oil. Whilst a few buildings have pits and ducts with very minor traces of oil/oily water in them [the Calender Building] was found to have ducts, which despite having already been cleaned by ourselves, again contain significant amounts of free oil in them. This oil appears to be a type of hydraulic/gear box oil similar to that noted in the interceptor. It is in this building that [ERL] were present removing redundant machinery on my visit. The only sensible conclusion is that the machinery removal is the cause of the oil spillage/contamination and no measures were identified as being in place to prevent this.'*

117. The letter quoted an estimate of £35,000 for the necessary works to be undertaken, excluding an estimated £10,000 for works to identify the source of the oil if this proved necessary. I note that the focus of the letter was on the ducts and pits rather than the floors.
118. By letter dated 10<sup>th</sup> December 2007 Mr Jan van Winkelen advised Mr McBride that they were anticipating *'to commence the removal of the calender line recently purchased ...on Thursday 3<sup>rd</sup> January 2008'* and that they would be on site for about 6 weeks, hoping to finish on 15th February. The letter concluded *'Method statements and risk assessment will be provided together with copies of our insurance and health & safety certificates.'*
119. By e-mail dated 13 December 2007 Mr McBride notified Mr Hans van Winkelen of the information he received from Mr Cooke in his letter of 7<sup>th</sup> December. He required that:

*'... steps must be taken immediately to prevent any further oil from entering the ducts as from there it drains into the site's drainage system and eventually the open water. Furthermore, oil*

*that has got into the ducts from the dismantling of the machinery must be removed as quickly as possible and removed off site under a hazardous waste consignment note. We have been advised that the works to remove this oil should the problem remain and get worse, could be very significant indeed, ie up to £30,000 - £35,000.'*

120. Mr Jan van Winkelen replied by e-mails on 18th December:

*'I have spoken to the engineers and drivers who have been removing the machinery and they are all puzzled about the allegation as they are unaware of any oil leakages. The only oil that could leak is when an oil pipe has been disconnected and a very small amount of oil would drip out and this would be soaked up with granules as it occurs. There has not been any leakage of oil that could warrant your allegations. Please be assured that due care will be exercised when the remaining machinery is dismantled.'*

121. ERL were then off site from 21<sup>st</sup> December until 8<sup>th</sup> January 2008. Mr Sullivan said that in December 2007 he had received instructions from Mr John Kelly to stop any equipment being taken off site until the spillages had been addressed.

122. Mr Doody said that he arrived back on Site on 8<sup>th</sup> January with Mr Simpson to begin the work of dismantling the two Calender machines. However they did not start the work that day. He noticed that the pits were almost full with water, with some oil floating on top. He also saw oil on the floor which was dripping from an old air duct in the ceiling. Around the area of the calender machines he saw oil spilt on the floor, which he attributed to the historic operation of the machines. He also saw damage to the doors and that some of the duct cover plates were bent.

#### 9<sup>th</sup> January 2008 meeting

123. On 9<sup>th</sup> January a meeting took place on site involving Mr Jan van Winkelen, Mr Doody, Mr John Kelly, and Mr Braid. Mr Sullivan was also there for some of the time. There is a major dispute as to what was said and agreed at this meeting.

124. Rivercove's account is summarised in Mr Braid's e-mail to ERL on the following day (10<sup>th</sup> January). This stated:

*'Jan,*

*further to our meeting yesterday I confirm the following:*

*The issues raised at the meeting were -*

*Oil spillage*

*Damage to floor plates*

*Damage to roller shutter doors*

*Following previous letters and discussions and negotiations on the day it was agreed that the following actions would be taken.*

*[ERL] will provide an environmental clean to the Calender roll building. This will include the removal of all material from the floors and within ducts. Any existing cables and pipes etc should be removed from the ducts prior to cleaning to ensure that all of the oil/contaminated material is removed.*

*All material arising from the environmental clean should be removed from the site by [ERL] and disposed of in line with current legislation.*

*Rivercove trustees will not charge [ERL] for the damage caused to the floor plates or the roller shutter doors and instead of demanding that [ERL] replace the damaged plates Rivercove will employ DSM to fill the ducts with concrete after they have been cleaned out by [ERL] so that the trip hazard is avoided.*

*We trust this is in line with our agreements reached yesterday and look forward to the works being carried out.*

*We would appreciate your confirmation and acceptance of the above by return so that we can close this matter.'*

125. Mr John Kelly's account of the meeting is that he and Mr Braid pointed out the damage to the roller shutter doors and duct plates and the oil spillages on the floor and in the pits and ducts of the Calender Building. He says that a small but inadequate effort had been made to clean up the oil using the granules. However there were still puddles on the floor and oil had been dispersed across it by the workmen and their forklifts. Some of the ducts could be seen past the bent plates. Some contained very little evidence of oil, whereas others were *'were swimming in what seemed to me to be fresh oil'* He also pointed out spilled oil in the Printer Building. He said that Mr van Winkelen objected to remedying the damage as the building was being demolished. As to the oil he *'... seemed shocked and said 'I've got to hold my hands up, I hadn't seen this before and I did not know it was this bad' or words to that effect.'* It was agreed that ERL did not have to remedy the damage to the building if it cleared up the oil and agreement was reached to the effect set out in the e-mail of the following day. Mr Braid gave evidence to similar effect.
126. Mr Sullivan said he was not involved in the discussion. However he did hear Mr van Winkelen discussing cleaning up the oil. In answer to the suggestion that the condition of the building was not very different from what he had seen in November he said that *'There was still a lot of oil on the floor though...'*. Asked whether it was the sort of oil you would expect to see when large bits of leaking equipment had been moved from site, he replied : *'Basically you are right because they've took a lump apart, and it looked like to me it had been dragged across the floor and there was a spillage across the floor.'*
127. Mr van Winkelen gave a quite different account of what was said at the meeting. In his witness statement he said:

*'I explained that the dirt and oil in the gullies had nothing to do with my*

*employees or I and I denied having any responsibility for cleaning them, especially as my men have not even begun to remove the calenders. At this point Mr Kelly was being aggressive and hectoring, insisting that I clean the gullies. Despite denying responsibility for the cleaning of the gullies, I made an offer to Mr Kelly that if there was time after the removal of machines I would have my employees clean the gullies with a jet wash and tidy the area where they had been working. I did this as a gesture of goodwill for Rivercove, in order to ensure that I could complete the removal of the equipment I purchased. The area I said I would clean was approximately 3,000 square feet. At no time during this conversation did Mr Doody or I offer or agree to carry out an environmental clean, or admit that any of the oil in the area was there as a result of work which had been done by my employees. My employees had not even commenced work to the calender lines’.*

128. In cross-examination he agreed that he had seen spillage and puddles of oil on the floor and fresh oil in the pits floating on top of water. As to the ducts he saw oil which was ‘liquid’ and ‘static’ and had been there for years. The oil was not ‘fresh’ or ‘runny’. He was shown a few ‘slightly bent’ duct plates and the damage to the doors. He said he was being threatened with being locked off site, without all the machinery he had purchased and had a gun to his head : *‘Under those circumstances, you have to do what you can and so I made a vague promise that if I had time I would clean the trenches out, and that’s what I did. This was done in order for me to be able to return on site and get the machinery off site that I had purchased.’*
129. Mr Doody said that he explained to Mr Kelly that the pit problem was because the pumps had been turned off; and that Mr Kelly just shrugged his shoulders in response. Mr Doody said that he pointed out the air duct and explained the reason why it was dripping; and that oil would have built up over a number of years due to the operation/lubrication of machines which was why there was some oil on the floor around the machine. He said that the oil dripping from the ducts was very black and different from the oil in the calender machines. He described Mr Kelly as very aggressive and difficult to reason with. He said that they all walked round looking at the oil. At no time did Mr van Winkelen agree that he would carry out an environmental clean or any other type of clean. Mr Doody then left the others (including Mr van Winkelen) to carry on walking round. There was no discussion about the damage to the doors and duct plates while he was present.
130. ERL did not respond to the e-mail of 10th January until a letter of 7th February from Mr Hans van Winkelen to Mr John Kelly. The explanation for the delay is said to be that Mr Jan van Winkelen was away on holiday in the Grand Canyon for 3 weeks shortly after the 10th January e-mail and that it was either impossible or difficult to contact him during this period. The letter stated:

*‘I refer to the above site where [ERL] are currently taking out machines purchased from [McBride], and confirm that we will ensure that any oil spillages caused by [ERL] in the removal of said machines will be cleaned up. This letter in no way admits acceptance of oil spillages prior to work commencing on 07/01/2008 as previously advised by email to [Mr McBride].’*

131. By e-mail to Mr Jan van Winkelen dated 21st February 2008 Mr Braid referred back to his e-mail of 10th January and continued:

*'... although you and your son have verbally agreed that the content is correct we have received no confirmation in writing. I handed a further copy to your son last week when he was at our offices, he said he would return it signed as agreed in the next couple of days. This has not happened. We need your confirmation in writing by return. We also note that you have not commenced any of the works to clean out the ducts and pits as agreed. If we have not heard from you by Friday, 22nd February 2008 we will secure the site at 5.00 pm on this day and no access will be granted either to dismantle or remove any machinery from the site until these issues are resolved. If it is your intention to carry out the cleaning works after the machinery has been removed from site we will require a bond in the form of funds placed in an escrow account the sum of £30,000... which will be released upon satisfactory completion of the works.'*

132. In his evidence, Mr Hans van Winkelen denied that he had in any way agreed with the contents of the 10<sup>th</sup> January e-mail. He said that he attended a meeting with Rob Braid and James McBride in a Portakabin office. The meeting lasted about 20 minutes. He was presented with the e-mail of 10<sup>th</sup> January and a pen and told 'sign this'. He said *'I can't sign it because I can't agree to it, Jan has to sign it'*. Mr Braid was not examined on this point and did not elaborate on his reference to a 'verbal agreement' to the content of his 10<sup>th</sup> January e-mail.

133. On 22nd February Mr Jan van Winkelen replied to Mr Braid :

*'... even though I do not accept liability for any oil spillages I did agree that [ERL] would attempt to clean the cable trenches in the calander building as agreed verbally during our meeting late last year. [He said that this must be a mistaken reference to the meeting of 9th January], It is difficult to start this work whilst the calenders are still being removed as we are still driving the area on a daily basis. I shall, however organise to start the cleaning process where we can next week, I shall do my utmost complete the work as soon as possible.'*

134. On 26th February Mr Braid replied that the agreement was to have all plant removed from site by the end of February; that no access would be allowed after this date; and that *'... the calendar building must be cleaned to our satisfaction by this date. If it is not we will require a bond as stated below to ensure these works are carried out.'*

135. ERL did not respond but vacated the site by the end of the month. They did not carry out the full clean-up which Rivercove says that they had agreed to, nor a clean-up of the ducts.

136. As to the work carried out before ERL's departure, Mr Doody said that in January/February 2008 he and Mr Simpson, with some help from Mr Parker on one Calender, dismantled the Calender 'machines'. On Mr Doody's account this included the physical removal of the tanks in the pits. He described a process whereby the tanks were lifted with hooks attached to a 'framework' on the top. The tanks were open at the top. The oil and water were drained at Site into the IBC. As part of the work they also removed the calenders' hydraulic power pack unit

and drained its oil into the IBC. This was because it was a small unstable unit and there would have been the risk of spillages if this were not done. He denied that oil was drained or spilled into the pits or ducts or that there were major spills onto the floor. Any minor spillages were cleared up with the granules as they went along.

137. A letter of claim (copy unavailable) dated 26th March 2008 was sent to ERL by solicitors (not their present solicitors) on behalf of Rivercove. Mr Jan van Winkelen replied on 28 March with a denial of any liability, in particular stating:

*'At no time did an oil spillage occur and the allegations from [Rivercove] are groundless. The former Wardle Storey factory is very old and there is a build up of oily substances which have happened over a number of decades. These have occurred in the cable trenches and calendar pits especially. The trenches and pits were subject to flooding due to high water table in the area... As a gesture of goodwill I was planning to have a go at cleaning the trenches, once the machinery had been removed, however emails subsequently arriving from Mr Rob Braid became ever more menacing.... I have no obligation to complete an environmental clean on a site which is being demolished as no contamination was caused by [ERL].'*

### **Conclusions post-31<sup>st</sup> July 2007**

138. I will first set out my conclusions on the state of the Calender Building pits, ducts and floor at the time of the visits in October/November 2007 and 9<sup>th</sup> January 2008.

#### The pits

139. Mr Braid did not look into the pits or ducts on 3<sup>rd</sup> October. As to the visits in early November, 29<sup>th</sup> November and 9<sup>th</sup> January I conclude that the pits were filled with oily groundwater to a depth which was probably about 3 or 4 feet. This was in consequence of the continuing problem of the ingress of groundwater - exacerbated by the non-operation of the pit pumps - into pits which had suffered historic and some continuing leakage of oil. I reject any suggestion that the fluid essentially consisted of oil. I am satisfied that the oil in the groundwater was not present as a result of any acts or omissions on the part of ERL's workmen.

#### The ducts

140. On each of these occasions the ducts were contaminated with oil, consistent with the historic and to some extent continuing problem of the leakage of oil. I do not accept the evidence that the ducts were 'swimming' in oil and consider that to be a significant exaggeration. In a context where there was some continuing leakage of oil from the machinery at Site, a continuing steady flow of oil into the interceptor and a continuing need to clean out the ducts, I did not find the questioning and debate as to whether or not the oil in the ducts was e.g. 'fresh' 'runny' or 'static' to be particularly helpful to the issue at hand. In any event those terms are imprecise and open to subjective interpretation. Whatever the type or consistency of

the oil I am quite satisfied that it was not present as a result of any acts or omissions of ERL's workmen.

The floor

141. As to the floor, I find that on all these occasions - but with inevitable variations - the floor was marked by black oil stains, marks and impressions of the type generally described by Mr Parker and Mr Cox. In addition I conclude that there were occasional puddles or pools of oil of the type noted by Mr Doody on 8<sup>th</sup> and 9<sup>th</sup> January and Mr van Winkelen on 9<sup>th</sup> January. I think it likely that there would have been a few similar pools or puddles, particularly in the vicinity of the machinery, when Messrs Braid, Kelly, Cooke and Sullivan made their respective visits in October/November 2007. To this extent I think that the recollection of Mr Parker and Mr Cox is probably incorrect, although I do not doubt the honesty of their evidence. In my judgment these pools and puddles resulted from the minor leakages and spillages which would inevitably occur in the course of the work for the removal of the upstream parts; and by early January 2008 also because of leakage from the air duct.
142. Conversely I do not accept the evidence of more extensive or severe oil contamination of the floor from the witnesses called on behalf of Rivercove, least of all Mr Kelly's evidence to the effect that in early November oil was flowing across the floor and into the ducts. I consider these accounts to be a significant exaggeration. If the state of the floor was as bad as is now suggested I would expect this to have been recorded in the contemporary documents. However Mr Braid's e-mail of 3<sup>rd</sup> October went no further than to state that *'...in some areas where machinery had been removed there was a substantial amount of Oils and residues* and Mr Cooke's letter of 7<sup>th</sup> December, which followed the visit of 29<sup>th</sup> November, contained no allegation about the state of the floor but focussed on the state of ducts and the pits.
143. As to the conduct of ERL's workmen, I accept that the only works carried out by them in the Calender Building in 2007 were those involving the removal of the 'upstream' parts by Messrs Parker and Weaver on the dates indicated by the tachograph records. I am quite satisfied that neither Mr Parker nor Mr Weaver at any time drained or spilled oil into the pits or ducts; and that to the extent that there was oil residue or spills on the floor, this was of a relatively minor nature consistent with the nature of the task. Such contamination was either being cleared up as they went along or would have been cleared up by the end of the job.
144. I do not accept Mr Kelly's evidence to the effect that Mr Weaver accepted responsibility for the state of the pits or the ducts. I accept Mr Doody's evidence of 8<sup>th</sup> and 9<sup>th</sup> January, in particular that oil was dripping from an old air duct in the ceiling; and that he had the discussion with Mr Kelly in the terms that he described. I accept Mr van Winkelen's account of the meeting on 9<sup>th</sup> January and reject the contrary versions of Mr Kelly and Mr Braid.
145. These findings have been underpinned by my confidence in the competence and integrity of Mr Parker and Mr Doody.
146. As to Mr Parker, I am satisfied that he had good practical engineering experience not least from his time in the Royal Engineers. I accept that he and Mr Weaver came to site on the dates

identified by the tachograph records and there, always working together, they carried out the works of removing/uplifting the 'upstream' parts of the calender machines in the way that he described. Mr Parker's account of that task demonstrated in my judgment a clear understanding of what he had to do and competence in that task. I accept that he followed the methodology that he described and that it was appropriate. I am satisfied that the removal of the upstream parts did not involve the need to drain away oil, save to the limited extent that he described.

147. As to their methods of work, I do not find it surprising that the arrangements for sending the men down with the wagon(s) from the Lancashire trading estate to bring back the various parts were arranged on an informal basis without paperwork. Whilst I understand Mr Bjerregaard's criticisms of the absence of such matters as risk assessments, method statements, waste transfer documentation and supervision, I am quite satisfied that Mr Parker and Mr Weaver were in fact fully 'up to the job' and carried out their tasks appropriately and without mishap.
148. As to Mr Doody, although having checked his diary he had to correct his evidence on various dates, I accept his evidence that he and Mr Simpson worked at Site for the few days in August and October 2007 - removing the laminator and printers from the Printer Building - and that they did not begin the more complicated task of dismantling the Calender machines until after the meeting on 9<sup>th</sup> January 2008. I am satisfied that the dismantling work carried out by Mr Doody and Mr Simpson (and to a limited extent Mr Parker) did not involve them draining oil into the pits or onto the floor. I accept that the tanks in the pits were lifted out and their contents drained in the way described by Mr Doody. After Mr Doody had been cross-examined reference was made to a photograph of a tank which did not obviously show framework of the type suggested by Mr Doody. However I am satisfied that the task was essentially carried out in the way he described; and again without mishap. In any event Rivercove's case is that the material contamination had taken place by the end of November 2007.
149. Furthermore ERL's case and the evidence of Mr Parker and Mr Doody are consistent with the evidence of the historic oil contamination problems at the Site. I consider that the true and obvious explanation for the contamination of the pits and ducts lies in the historic problems at the Site, namely oil leakage from the machinery and the incursion of groundwater, together with the fact that the pit pumps had been turned off in March 2007.
150. I also consider that the events of and surrounding the EA investigation support ERL's case. The Incident Report and the letter of 3<sup>rd</sup> August 2007 provide independent support that there was oil in the pits. Mr Cooke's evidence of large amounts of oil in the pits and the ducts by the beginning of August is to the same effect. Contrary to Rivercove's case the deeper problem was not solved by the installation of an oil mop in the interceptor. The evidence of Mr Sullivan demonstrates the continuing flow of oil into the interceptor over the 7-month period from August 2007 to end-February 2008. In my judgment this was not a short-term problem which had been resolved by the fitting of the oil mop. On the contrary his evidence of the continuing removal of 10 gallons of oil per week suggests that there was a continuing and relatively constant flow from some source in the northern section. It is inherently unlikely that either deliberate or accidental draining or spillages of oil would have had this effect. In my

view there was a marked tendency in Rivercove's witnesses to underestimate the significance of the EA intervention and to leap to the unwarranted assumption that the continuing oil problem must be linked to ERL's presence on Site.

151. In addition the photographic evidence shows the presence of oily water in pits (notably Calender 6, in a different building) for which ERL had no responsibility; and a generally similar picture of the state of the Site in 2007 and 2008. It is also noteworthy that Mr Cooke's draft letter to Rivercove dated 20<sup>th</sup> May 2008 illustrated the problems of oil contamination with photographs of the interceptor and drainage ditch which had been taken in August 2007.
152. As to the conversation between Mr Kelly and Mr Weaver I have had to take particular account of the fact that Mr Weaver has not been called to give evidence on behalf of ERL. I was told by Mr Jan van Winkelen that Mr Weaver is still employed by ERL and would have been *'willing and happy'* to attend Court. I accept that evidence. However the fact remains that he has not been called to give evidence. Rivercove submits that I should draw an adverse inference from this failure to call Mr Weaver, namely that he would not be able to dispute the account of the conversation given by Mr John Kelly or to withstand cross-examination on that point.
153. Although I did not feel general confidence in Mr John Kelly's evidence, in the absence of a contrary account I accept that he had a conversation with Mr Weaver at Site in early November; that this included reference to oil on the floor the pits and the ducts; and that Mr Weaver made a comment to the effect that he did not see the problem as the building was going to be demolished. I accept that there was some oily mess on the floor and that Mr Weaver said that this would be cleared up with the granules; and that he said that he would speak to Mr van Winkelen about the state of the pits. However I do not accept Mr Kelly's evidence, put forward in cross-examination, that Mr Weaver expressly accepted responsibility for draining or spilling oil into the pits or ducts. Indeed Mr Kelly did not say that he expressly suggested to Mr Weaver that he was responsible.
154. As I have found, I accept Mr Parker's evidence that he and Mr Weaver worked alongside each other throughout this period; and that there was no draining or spilling of oil into the pits or ducts. I have no doubt that if Mr Weaver had been responsible for spilling/draining oil into the ducts Mr Parker would have known about it and would have said so in his evidence. In all these circumstances I do not draw any adverse inference from the absence of Mr Weaver.
155. In reaching my conclusions I have also had to consider the starkly conflicting evidence of the subsequent meeting of 9<sup>th</sup> January 2008. I have had to take particular account of the fact that Mr Braid set out his account of the matter in an e-mail on the following day and that ERL did not respond in any form until 7<sup>th</sup> February (Mr Hans van Winkelen); and that there was no explicit response to the suggestion that there had been an agreement to carry out an environmental clean up of the Calender Building until 22<sup>nd</sup> February when Mr Jan van Winkelen replied to Mr Braid's further e-mail of the previous day.
156. I accept and prefer the account of the meeting given to me by Mr Jan van Winkelen. Although he demonstrated uncertainty about some dates and details of relevant events, I was satisfied that his somewhat gruff and blunt evidence was always honest, and was

reliable on all important matters in dispute. I accept that Mr Kelly and Mr Braid conducted the meeting with aggression, an approach which only hardened with the subsequent threat to exclude ERL from Site and/or to require a bond. In my view Mr van Winkelen felt under severe pressure because of his concern to complete the removal of the equipment which he had purchased; and for that reason he made the goodwill gesture in the terms that he described in evidence. I accept that he had no reason to believe that his employees were responsible for the oil in the pits or the ducts and did not so believe. At most there was a responsibility to clear up the residual oil on the floor which had resulted from the removal tasks carried out by Mr Parker and Mr Weaver. Nor do I accept that he made such agreement as a *quid pro quo* for the damage to the roller door or duct plates. I accept that he then went to the USA (Grand Canyon) for a three week holiday. I reject the suggestion that the silence until 7<sup>th</sup> February or the limited terms of that document reflected the inability to think of a response to Mr Braid's e-mail. I accept the evidence of him and his son that, contrary to Mr Braid's e-mail of 21<sup>st</sup> February, they had never agreed the content of his original e-mail of 10<sup>th</sup> January. In my view any delays and inclarities in ERL's communications were a reflection of the relatively informal style of this family business.

157. In reaching this conclusion I have therefore rejected the contrary evidence of Mr Braid and Mr Kelly about this meeting. In my judgment they had no basis to believe or assert that ERL was responsible for the oil in the pits and the ducts or for trying to procure an agreement that ERL should carry out an environmental clean-up of the Calender Building. Contrary to Mr Braid's e-mails of 10<sup>th</sup> January and 21<sup>st</sup> February there was no such agreement.
158. In reaching these conclusions I have of course taken account of the expert evidence. However, although in each case it was presented with impartiality and professionalism, I have not found it of ultimate assistance to the central question which I have had to decide. The reports and the Joint Statement provide helpful background technical information but as each expert effectively acknowledged - the opinions of each are ultimately dependent on the witness evidence as to what happened on Site. In Mr Bjerregaard's main report he supported his conclusion that the deliberate or accidental draining of large quantities of oil was 'highly likely' by reference to '*...the large quantities of oil within the Calender machines, ERL's lack of pre-planning, not having assigned competent operatives for the deplanting operation, not being able to provide documentation for how the oils were actually handled and ERL not having in place suitable measures to deal with large oil spillages should they occur.*' (para.78). He developed these points in his summary (paras.89-95) together with his contentions that the oily water would not have overflowed the pits and onto the floor because of the effect of (i) the effluent pumps in controlling the level of the groundwater and (ii) the discharge of the water through the underground pipe and by the action of gravity (para.95).
159. When in cross-examination it was put to him that, if the evidence of the ERL witnesses who removed the machines is accepted, his opinion would be 'fairly academic', he agreed.
160. As to his point concerning the estuary/effluent pumps - with which Mr Wright disagreed - I was not satisfied that Mr Bjerregaard had the necessary expertise on this point. His expertise is in complex decommissioning and demolition projects, including contaminated sites; but not hydrology. By Court Order dated 4.5.12 permission was given for Mr Bjerregaard to consult a specialist hydrologist (or other discipline) for the purposes of interpreting borehole data; and

providing for either party to apply for permission to call an independent hydrologist. A report dated 22.5.12 was obtained from Mr Steven Peters, a Registered Environmental Auditor of SP Associates Geoenvironmental & Technical Services but no further application was made. Whilst the report provides support for the proposition that the groundwater should not overflow from the pits, this evidence has not been tested and I do not find it established.

161. In any event the proposition in my view takes the matter no further. On the evidence I do not accept that the floor was 'flooded' with oil or oily water, whether from the pits or from any other source.
162. As to the suggested underground pipe, on the available evidence I am not satisfied that there was any such pipe. In my view the evidence demonstrates that there were sources of oil contamination in areas other than where ERL worked and that there was a general problem of oil contamination from many parts of the machinery on Site.
163. Rivercove also submitted that ERL's case was dependent on a theory developed by Mr Wright that, having entered the Calender pit, the groundwater flowed into the connecting ducts and 'mobilised' the historic oil deposits both there and in the pits. Rivercove submitted that the theory was untenable and there was a good deal of rival cross-examination on the point.
164. In my judgment ERL's case was not dependent on the correctness of the theory and I have not placed any reliance on it. As I have found, the presence of oil in the ducts and pits is explained by the historic problems of oil leakages from the manufacturing process and which continued in some degree after the machines ceased to operate.
165. My conclusion is that these various theories take the matter no further and provide nothing which is inconsistent with the evidence which I have accepted from the witnesses called on behalf of ERL.
166. For all these reasons I have concluded that the claim for breach of contract must fail. ERL was not responsible for the oil contamination of this Site and the clean-up which has followed. That contamination and clean-up were caused by the historic condition of the site.

### **Quantum**

167. Although I find no liability on the part of ERL, I will deal with the issues of quantum because they have been the subject of detailed evidence and argument; including ERL's contention that the claim has been fabricated.
168. Rivercove's claim falls into two broad heads. First, the cost of the 'Specialist Clean Up-Operation', quantified in the Particulars of Claim at £140,938.72. The major item in this total is 'Elimpic full scale de-contamination of site from 31/07/08 to 13/11/08 : Elimpic Invoice 8.12.08 £124,085.' The balance is in respect of site visits by Biffa and Elimpic to pump out oil/water between 16<sup>th</sup> November 2007 and 29<sup>th</sup> April 2009.
169. The second broad head is 'Attendance and Reduced Productivity' which is said to have been incurred by DSM (and then ultimately passed on via St Francis to Rivercove) in the total sum of £138,345.20 plus 'DSM Overheads' of £52,393.66.

170. As to the works by Elimpic/Haz, the first relevant document is an undated quotation to DSM from Elimpic. This quotes a 'job price' for £117,735 (plus VAT) for work which includes *'Removal and disposal of all chemicals as shown on site visit, excluding laboratory on South side. Cleaning of all the areas, and drains as shown on site visit. (Cleaning and disposal of pit waste and washings subject to the pits being nominally empty of water. Emptying and cleaning of heavy fuel oil tanks and surrounding area.'* On the face of it this is a quotation for the clean up and removal of waste from the whole Site, save the laboratory on the south side i.e. is not confined to the buildings in which ERL had worked. As I understood his evidence, Mr John Kelly ultimately accepted that this must have been the original quotation. His statement had wrongly identified the quotation by reference to a written order.<sup>8</sup>
171. The works began on 31st July 2008, before any written order had been placed. They were carried out by sub-contractors Haz.
172. The Elimpic quotation was discussed in an e-mail dated 6th August from Mr Huw Evans (DSM's Section Manager on site) to Mr Alan Jones (its Quantity Surveyor back at the office). It is clear that the references in that e-mail are taken from the undated quotation.
173. On 7th August Mr Jones e-mailed Mr Braid a copy of the quotation stating that it had been given to him by Mr John Kelly. The e-mail stated *'John wants me to place an order with Elimpic to cover all the required decontamination to the North and South sites? Hugh Evans tells me Elimpic commenced the decontamination works on Thursday 31/07/08 and are expected to complete by Friday 22/8/08.'*
174. Later that day (7th August) Mr Jones e-mailed Mr Kelly with reference to this quotation. He reported : *'Whilst Ken [Price, of Elimpic] has allowed for cleaning out the oils/contaminants in the drainage system below ground he said that nobody knows where all the drains go and how much oil there maybe in the pipes. He is proceeding on the basis that Elimpic will extract as much oil as possible as they visit each pit/manhole in turn but he is not willing to say that all the oil in the underground drainage system will be removed after he completes the initial clean-up. He said they would do the best they could but he was not willing to give us a guarantee that no oil from more distant pipes would leap back into the pits/manholes later on.'* Mr Jones asked Mr Kelly if it was *'okay to place an order on this basis'*. Mr Kelly agreed that he must have given the go-ahead for Mr Jones to raise the order.
175. Mr Jones' e-mail also made reference to a letter which was to be drafted and sent to Rivercove, with copy to Mr McBride. A draft of that letter had been prepared, at Mr Kelly's request, two months earlier and dated 11<sup>th</sup> June 2008. That draft, at that stage addressed only to Mr McBride and to be signed by Mr Kelly as 'Senior Contracts Manager', stated:

*'Further to your instruction to carry out the removal of spilt oils within the Calendar Building we would record the following points:*

*1. The oil contains additional chemicals and paints.*

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<sup>8</sup> There is a version without a job price at D/118. It seems that this was removed by Mr Jones before forwarding to Mr Evans : D/145

2. *These substances have entered the outlets to the stream and lagoon...'*

176. The potential significance of the reference to the oil containing chemicals and paints was that the oil from the Calender machines would have been lubricating oil which did not contain chemicals and paints. Mr Kelly did not disagree with that proposition.
177. A longer draft of that letter, dated 'August 2008', now addressed to Rivercove and copied to Mr McBride, repeated the statement that the oil contained additional chemical and paints. That draft was forwarded by Mr Jones to Mr Cooke on 21st August with a request to '*amend as you see fit*'. Mr Cooke responded on 22nd August that he suspected the intention of the letter was two-fold. First, to obtain recompense from ERL for the oil contamination it appeared to have caused. Secondly, to include in this the cost of removing the drums of process waste situated on the south side of the site. He continued : '*Whilst this is clearly beneficial the potential is present for this to weaken our claim. Should [ERL] fight the claim it is hard for them to dispute oil has been entering the system from their area of work. To now add in paints and other fluids would be hard to explain as their machinery operations clearly would not have involved such fluids. They could then argue if such large quantities of other liquids are in the system in (sic) must have come from somewhere else along with the oils. In addition I suspect they have some sort of relationship with Malcolm Cox and my concern is that he is aware of the existing drums of process waste and may make this information available to [ERL].*'
178. On 19th September Mr Kelly e-mailed Mr Jones asking him '*...could you prepare all the invoices for waste removal at Brantham, including hire of pumps etc and downtime to DSM due to the oil*'. That request was forwarded by Mr Jones to Mr Evans on 23<sup>rd</sup> September with a request '*I would appreciate it if you could give some assistance in identifying the resources used for the cleanup operation including our labour/plant.*'
179. Mr Evans' response of 23<sup>rd</sup> September recorded the equipment which DSM had held on site. He continued : '*I have devoted over half my time to environmental clean up over the past 8 weeks and sometime before that also*' and '*Because of the availability of other buildings, we have not really had any downtime as a result of the environmental clean up*'. ERL says that this latter statement demonstrates that there is no true basis for the downtime claim.
180. In the meantime on 22<sup>nd</sup> September Mr Jones e-mailed Mr Evans to ask if Elimpic was '*...completely finished and if so what is the situation regarding swings and roundabouts on the extra/savings?*'
181. On Monday 29<sup>th</sup> September Mr Evans sent Mr Kelly one of his regular site updates. This referred to the work carried out on Site the previous week, ending Saturday 27<sup>th</sup>, and stated : '*The clean up operation is complete...*' I am satisfied that this reflected the essential position, although it seems that some limited further work was carried out on 13<sup>th</sup> November.
182. A further draft of the letter to Rivercove is dated 21<sup>st</sup> October. This did not contain any reference to chemicals and paints in the oil. The letter that was ultimately sent from DSM to St Francis (16<sup>th</sup> March 2009) again contains no reference to the oil containing additional chemicals and paints.
183. In the meantime there had been continuing discussion between Messrs Jones, Evans and Kelly

as to Elimpic's claims for the cost of the cleanup works. This included the question of the calculation of 'credits' for the value of oil removed: see e.g. the Jones-Kelly e-mail 6<sup>th</sup> November 2008.

184. On 18th November, with the works now fully complete, Mr Jones e-mailed Mr Evans: *'I need to place an order with Elimpic for the decontamination works. Obviously we need to word the order correctly and I want to be sure that I have accurately identified all the areas/items where oil and oil/water removal was carried out by them. I would be grateful if you could let me have a list of relevant building/items by return.'*
185. On 19th November Mr Evans prepared and supplied to Mr Jones a report setting out, building by building, the scope of works completed by Elimpic. The report records that on the North site the decontamination works were to Buildings 1, 2 [i.e. the Calender Building], 6, 14, 28, 29, 30, the water interceptor and fire hydrant pit. In particular the pits in Buildings 29 and 30 had been pumped cleaned jetted and dried. On the South side chemicals and oils were removed from site; and vats had been drained.
186. On 20 November Mr Jones e-mailed Mr Braid : *'As discussed this morning I enclose the report from Huw Evans. Can you please identify the buildings that [ERL] worked in. I would appreciate it if you could get this back to me today as John wants to place an immediate order with Elimpic and obviously this needs to highlight the oil contamination caused by ERL'*.
187. Later that day Mr Jones e-mailed Mr Evans *'I have drafted out an order for Elimpic based upon your report as per the attached excel file. Please have a look at it and add/amend anything you think need to be changed, as we do for the letters. I am still waiting for Rob Braid to get back to me to confirm which buildings ERL worked in but I anticipate this info will be available sometime tomorrow. I'm aiming to get the order out to Ken Price early next week'*. Mr Jones' draft order dated 24<sup>th</sup> November 2008 related to the northern section alone and was limited to buildings 1, 2, 6, 29, 30, the water interceptor and fire hydrant pit.
188. Mr Evans responded on 21st November : *'You have omitted building 6 which had clean oil lying discarded in the ducts. If this is one of the ERL buildings it may be relevant to the pollution of the adjoining ditch. I think Building 29 and 30 will be less relevant.'* Mr Jones replied on 24th November by pointing out that Building 6 was referred to in the draft order and concluded *'If you think anything needs changing please amend in different coloured text'*.
189. Mr Evans replied the same day *'As long as Rob Braid confirms that ERL were in both 2 & 6 then I don't see a problem with lumping them together. If ERL did not go into 6 then it would be better to exclude it completely'*.
190. Having received reports from Mr Braid Mr Jones noted the absence of reference to ERL activity in buildings 29 and 30 : see his e-mail to Mr Evans on 27th November. He asked *'Should any reference to Buildings 29 and 30 be omitted in the Elimpic order? You indicated in your email of 21/11/08 that these buildings would be less relevant and they do not appear to be on Rob Braid's list (as Buildings 10 and 28?)'*. He continued: *'John also wants us to look at the DSM resources used in relation to the clean-up as the cost of this will need to be*

*added to what we pay Elimpic to arrive at a total figure that go into the letter to Rivercove. Please give consideration as to how much time can be attributed to this for our labour, plant and supervision over the period that Ken was on site (31/7/08 to 13/11/08) and any other period that may be relevant since it took over the management of the project.'*

191. Mr Evans' response on the same day included *'I would omit 29 & 30 from your order if you're going for the full amount. In John Duncan's report<sup>9</sup> however, he says that there is contamination in these buildings and so we must be prepared to answer the question 'how would they cleaned then?' If they are not on the Elimpic order. I will get back to you about the DSM time contributed in addition.'*
192. On 1<sup>st</sup> December an e-mail from Mr Jones to Mr Evans further considered the interplay between the works that had been carried out by ERL, the evidence of contamination and the appropriate wording of the order to Elimpic.
193. On 2<sup>nd</sup> December Mr Jones sent Mr Evans a draft order and stated: *'Please have a look at the enclosed draft order to Elimpic and especially the Scope of Works. If you think anything needs to be changed/tweaked please let me know asap.'* This version of the draft order, again dated 24.11.08, removed from the Scope of Works the references to buildings 29 and 30, inserted works to the Drainage System (*'...where oil pollutants have migrated into the drains from buildings 2 and 6'*) and excluded the fire hydrant pit.
194. In a further e-mail that day Mr Jones told Mr Evans of the comments which Mr Braid had made about the draft order. Mr Braid was said to be happy that wording but raised two possible issues including: *1. Rob had the idea that ERL had been in what we are now calling Building 30...but he was not 100% certain about this... When I showed Rob the marked-up plan in your report and the key with brown dots in Building 10 (30) he thought it was possibly better to leave it out of the Elimpic order as it indicated the oil residues were historic from earlier normal machine operations? If that is the case the residues were presumably there to be seen when the site was purchased and if so cleaning them up would be a foreseeable event which we would not be able to claim for. What you think? 2. Rob asked if we wanted to put in anything about a general clean-up of the floor surfaces in Buildings 1, 2 and 6. He was not sure about this in case it diluted our case for the cleanup. Again it would be the argument that if some/all of the oil residues on the floor with their time the site was purchased cleaning them up would be a foreseeable event which we would not be able to claim for. What you think about this?'* He added that Mr Braid had asked that the draft letter include a paragraph to the effect that the oil clean-up was still ongoing, that it cannot be stated that it will be conclusive and therefore further costs may be incurred in the future.
195. On 3<sup>rd</sup> December a final order (No. C6088/26074) was signed by Mr Jones (as Contract Surveyor) and Mr John Kelly (as Contracts Manager). This broadly followed the previous draft but for Building 1 changed the wording from *'Remove oil/water contaminants stored in 45 gallon (205 litre) containers. Pump out and wash clean the pit system for a machine that was previously removed'* to *'Remove oil/water contaminants stored in 45 gallon (205 litre) containers previously pumped out of pits in Building 2 [i.e. the Calender Building] by yourselves'*. A price for these was now inserted, in the sum of £124,085 plus VAT. The date

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<sup>9</sup> This expert report is attached to the Particulars of Claim but is not relied on by Rivercove.

of completion of the works was stated to be 13<sup>th</sup> November 2008.

196. These details were essentially replicated in an invoice from Elimpic dated 8<sup>th</sup> December 2007 in the total sum of £145,799.88. However it appears that Mr Jones was also involved in the preparation of that document. On the same date (at 11.47) Elimpic sent him a 'proof' invoice, with a cover sheet stating *Allen, Could you read through this invoice and approve it a.s.a.p*'. A revised and final version of the invoice was sent to Mr Jones at 3.40 p.m., marked for his urgent attention.
197. On 2<sup>nd</sup> July 2009 Elimpic e-mailed Mr Jones ('*Subject: quotation*') a revised version of its original undated quotation. This version now had the date '22<sup>nd</sup> July 2008' and a revised scope of works and job price which matched the purchase order of 8<sup>th</sup> December 2008.
198. DSM's eventual letter to St Francis (16.3.09) reflected that scope of works, claimed Elimpic's costs of £139,805 plus VAT<sup>10</sup> and warned of a potential claim for delay costs and overheads.
199. As to the claim for downtime, in his subsequent e-mail of 4th December Mr Jones stated '*Attached is an Excel Spreadsheet with the hours I have attributed to the oil cleanup. I have not sent this as a PDF as you/John may wish to dabble in it. There should be around £50K of billable hours on there.*'
200. ERL submits that these documents demonstrate a fabrication of the evidence on quantum, in particular by revising the letter from DSM to St Francis so as to omit reference to oil containing chemicals and paints; by tailoring DSM's retrospective purchase order and Elimpic's invoice and revised quotation so as to exclude the clean-up works which could not be attributable to ERL's alleged draining/spillage in the Calender Building; and by creating a claim for downtime which had no real basis.
201. The quantum claim was supported by the second witness statement of Mr John Kelly. Mr Jones and Mr Evans were not called as witnesses. Accordingly Mr Kelly was cross-examined in considerable detail about these e-mails. He explained that his position as 'Contracts Manager' involved a 'hands on' management of the contract jobs. By contrast he was not involved in the contractual arrangements and paperwork : '*I don't get involved in the contracts, that's back in the office*'. When asked the about assessment and detail of all the aspects of the claim for the cost of the clean-up and the additional costs, he agreed that this was dealt with by 'the QSS', not him.
202. As to the drafting of the purchase order Mr Kelly was unable to give any satisfactory explanation for what had happened. To the question '*So what Mr Evans and Mr Jones appear to be doing is tailoring the order to Elimpic in order to try and attach as much as liability as possible to ERL. That is what it looks, doesn't it?*' he replied '*That is what it looks like*'. When asked '*And the amount of money that was being claimed in this claim attributed by Elimpic, which is the full cost that Elimpic has claimed for the works, include works to buildings that can't possibly be blamed on ERL. That is what it looks like, doesn't it?*' , he answered '*That is what it looks like, yes*'. Q : '*That is because that is the true position?*' A : '*That is what it looks like, I'm not going to disagree with you.*'

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<sup>10</sup> This included the water/oil removal works of 2007-8

203. However Mr Kelly also gave evidence to the effect that there was an informal system of credits whereby Elimpic would set off the value of oil and other products taken by them from site against their charges; and that these were taken into account by the parties and thus explained any apparent anomalies. Although there is no contractual provision to this effect, the documents do contain references to credits: see e.g. the e-mail of 6<sup>th</sup> November 2007 referred to above.
204. On the basis of this evidence Counsel for Rivercove submits that, insofar as Elimpic carried out clean-up works which were not related to contamination caused by ERL, the cost was met by this system of credits. In consequence the Court can be satisfied that the quotation/invoice/purchase order truly reflected the cost of the cleanup which was attributable to ERL.
205. I do not accept that submission. I accept that as a matter of practice the arrangements between DSM and Elimpic included some informal set-off of 'credits' for the value of goods and products taken from Site against the gross cost of decontamination works; and that the reason for the silence about this in Mr Kelly's witness statements and the relative coyness of the evidence in Court was because (to use the euphemism adopted in Rivercove's closing submissions) this was 'a system which sails a little close to the wind'. However I am quite unpersuaded that these informal arrangements account for or explain the drafting and redrafting of DSM's retrospective purchase order nor the linked invoice and revised quotation from Elimpic.
206. In my view Mr Kelly had no option but to make the concession that he did. On the face of it, the natural inference is that these contractual documents were being tailored, retrospectively, in order to try and attach as much liability as possible to ERL.
207. In my judgment the documents cry out for an innocent explanation and that has not been provided by the evidence of 'credits' nor any other evidence. In these circumstances I am quite unsatisfied as to their reliability as evidence of the true charges for the work that was in fact carried out in respect of the identified buildings.
208. In the circumstances I would have rejected, in any event, the quantum claim to the extent that it is based on those documents.
209. In the absence of reliable evidence of fact the only alternative recourse is to the expert evidence produced by the parties. In my view the evidence of Rivercove's expert Mr Bjerregaard was dependent on the validity of the quotation/purchase order/invoice and provided no real independent assessment of the attributable cost. Conversely Mr Wright had made his own assessment and concluded that the decontamination works in the Calender Building should have cost about £35,700. As it happens that figure is broadly similar to the costs first estimated in Mr Cooke's letter of 7<sup>th</sup> December and Mr McBride's subsequent e-mail of 13<sup>th</sup> December. I accept Mr Wright's evidence.
210. As to the claim for 'Attendance and Reduced Productivity' this was founded on the proposition that the cleanup had caused DSM to incur additional cost by the diversion of human and mechanical resources from the demolition works; and that St Francis had subsequently been charged for this loss and expense. These costs fell into the broad categories

of (i) non-productive downtime for DSM labour and plant on Site (Schedule items B,C,D,G,H) and (ii) the cost of hired-in plant (items E,F,J,K,L).

211. As to downtime, Mr Kelly stated that he considered the cleanup works to have lengthened the overall project time. In his second witness statement he said that *'Although it is difficult to assess the precise value of that non-productive time, I assess that to have been 50% of the cost of DSM's labour and machines being on site up to the end of the clean-up project.'* In Court he made it clear that this estimate and the other details had been made by the QSs in DSM. *'The basis I think of the QSs worked out is I think we were there twice so long and therefore half of the costs should be split down right the way through on everything. I was not party to that. I saw the programme because obviously we had a certain date we had to get it finished by and that doubled due to the clean-up.'* When pressed with Mr Jones' e-mail of 23<sup>rd</sup> September he agreed that it appeared to show no downtime. However he insisted that, leaving aside the detail, he knew from his position *and practical experience as Contracts Manager that DSM had wasted resources and downtime at the Site as a result of the cleanup; and that 'The job took twice as long because of what happened with ERL.'*
212. As to the cost of hired-in plant he attributed 50% of their cost to the cleanup, save for five items (oil mops; oil pads; generator; saw; sump pump) which were 100% related to the clean-up. Copies of the relevant invoices have been supplied.
213. In his evidence Mr Bjerregard said that he interpreted Mr Jones' statement (*'Because of the availability of other buildings, we have not really had any downtime as a result of the environmental clean up'*) as meaning that the machinery has been in full use, either for demolition works or for the environmental clean. He had not carried out any detailed analysis of the quantum claim but he considered the 50% charge for Mr Evans and some machinery, and the various costs and rates, to be reasonable. Whilst initially finding the total cost of £331,677 to be *'on the high side'*, his review of the material had led him to the conclusion that this was reasonable.
214. In my judgment Mr Kelly provided no adequate explanation for the apparent discrepancy between Mr Jones' e-mail of 23<sup>rd</sup> September and the subsequent 'downtime' figures which have been put forward. True it is that Mr Evans' 23<sup>rd</sup> September e-mail also states that he has devoted over half of his time to the environmental clean up over the past weeks 'and sometime before'; but having regard to the wholly unsatisfactory evidence about the cost of the Elimpic clean-up and the questions which are raised about the e-mail exchanges on downtime, I am quite unable to accept that evidence without having heard from Mr Evans or Mr Jones. In the absence of those witnesses I do not accept the broad evidence of Mr Kelly that the job took twice as long.
215. Equally without those witnesses I do not accept Mr Bjerregaard's suggested explanation of the e-mail of 23<sup>rd</sup> September. That e-mail was in response to Mr Jones' specific request *'I would appreciate it if you could give some assistance in identifying the resources used for the cleanup operation including our labour/plant.'* In the absence of evidence from Mr Evans, including an explanation of that and the other e-mails concerning downtime, Mr Bjerregaard's evidence takes the matter no further.

216. As to the hiring of plant I am willing to accept that, as supported by the invoices, the five 100% items were expended for the clean-up. However for the same reasons as above I am not otherwise satisfied by the claim for 50% of the other items.

#### Indemnity

217. The quantum claim gives rise to a further issue, namely whether Rivercove has any liability for any of the costs claimed. All the claimed costs are alleged to have been directly incurred by St Francis, by virtue of a contract between it and DSM. Rivercove alleges that there was a contract between it and St Francis whereby it was bound to indemnify St Francis for those expenditures. Evidence on that matter was given by Mr Crompton and Mr Braid, but was very unclear and unsatisfactory.
218. In his second witness statement Mr Crompton said that there had been an intention to put in place a written agreement which recorded the terms of the relationship between Rivercove and St Francis. He attached a draft Project Consultancy Agreement which was based on a similar agreement which St Francis had in place with 'another Abacus client' on other sites. He had sent a copy of the agreement to Mr Braid but '*it was never formally completed due to time constraints*'. An e-mail of 19.5.08 from him to Mr Braid indeed states '*We need to formalise St Francis appointment. Do you still have the draft agreement we sent out?*'. The draft agreement included a provision (clause 9.1.3) indemnifying St Francis against '*...any and all loss, damage or liability suffered, and costs and expenses incurred by St Francis, in carrying out its duties in relation to the Properties...*', subject to exceptions for fraud, negligence or wilful default. The provisions for Fees provided (clause 8) that St Francis should be entitled to a 'Project Consultant's Fee' to be paid on the sale of the Properties, together with reimbursement of '*any out of pocket expenses properly incurred in the provision of the Services under this Agreement*'. The Fee was defined as '*[ ] of the Gross Profit realised on sale of the property, payable on the sale of the property.*'
219. Mr Crompton said that Rivercove and St Francis proceeded on the basis that the terms of engagement were equivalent to those in the draft project consultancy agreement; so that it was agreed that St Francis would incur management and development costs throughout the Site project and would invoice Rivercove those costs, together with a commission based on the sale proceeds, when the Site was disposed. Furthermore those costs could be required to be paid earlier in the event that Rivercove elected not to dispose of the Site for any length of time.
220. In cross-examination he said that the understanding, that they would work on the basis that the engagement was in the same terms as in the draft agreement, was reached with Mr Braid and/or Mr Brian Baker of St Francis. He said that the formalisation of the draft agreement '*must have been overlooked* He said that if he had had a conversation with anyone it would have been with Mr Baker but could not be more specific than saying it was in 2008 or 2009. As to the terms of the conversation he was pretty certain that he had a conversation with Mr Baker '*where he said that the costs had been incurred and we would meet them in due course*'. In re-examination he said the conversations with Mr Baker were '*probably around May 2008*'. He finally said that he knew that he had the relevant conversation but could not say when it took place.

221. In his witness statement Mr Braid stated that St Francis had been appointed by Rivercove from September 2007 to provide management and consultancy services for the Site. Mr Crompton had sent him the draft agreement for review and amendment but due to time constraints it had not been completed. He made no reference to any other agreement or understanding but said that St Francis had paid DSM and would be invoicing Rivercove *'in accordance with the usual terms as mentioned... above'*, i.e. as per the draft agreement.
222. In cross-examination he said that St Francis had not invoiced Rivercove for these costs *'...but we have notified them that we intend to —... outside of our agreement with them because this is an abnormal cost outside of what we would normally expect.'* He continued : *'They [Rivercove] haven't agreed to it yet. That is what we have notified them, that that is what we want. And it wouldn't be me who had the conversation. It would be the FD of our business.'*
223. I am not satisfied by this evidence that Rivercove has undertaken or accepted any liability to St Francis for any of the costs which are claimed in this action. Mr Crompton's evidence that there was an agreement or understanding reached between him and Mr Baker was vague in the extreme; and is inconsistent with Mr Braid's account that agreement on reimbursement has yet to be reached. In reaching this conclusion I have of course taken account of the facts that Rivercove is the freehold owner of the Site; that the clean up was to that Site; and that St Francis was providing Rivercove with management and consultancy services for the Site. However the position is complicated by the family link between the ownership and control of Rivercove, St Francis and DSM and the evidence is too frail for me to be satisfied that the cost of the clean up has truly fallen on Rivercove.
224. In all the circumstances the claim must be dismissed.