Neutral Citation Number: [2023] EWHC 1789 (Ch)

Case No: C30LS159

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN LEEDS
BUSINESS LIST (ChD)

IN THE MATTER OF THE GREEN MINERAL COMPANY LIMITED (No.06877101)
AND IN HE MATTER OF THE COMPANIES ACT 2006

DERIVATIVE CLAIM

1 Oxford Row,
Leeds, West Yorkshire,
LS2 3BG

Date: 17/07/2023

Before :

HH JUDGE DAVIS-WHITE KC
(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

- -

Between :

PAUL HAGUE **(Suing on behalf of himself and of the other shareholders in the First Defendant other than the Second Defendant)**	**Claimant**
- and -	
(1) THE GREEN MINERAL COMPANY LIMITED **(2) WARREN GREENWOOD** **(3) SOIL HILL QUARRIES LIMITED**	**Defendants**

- -
- -

MR IAN PENNOCK (Direct Access Counsel) appeared for the **Claimant**
THE FIRST DEFENDANT was not present or represented
MR KAVAN GUNARATNA (instructed by **Schofield Sweeney LLP**) for the **Second and Third Defendants**

Hearing dates: 21-23 November 2022,
Written closing submissions: 30 November (Claimant's); 13 December (2nd and 3rd Defendants') and 15 December (Claimant's) 2022.

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HH JUDGE DAVIS-WHITE KC (SITTING AS A JUDGE OF THE CHANCERY DIVISION)

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 17 July 2023

HH Judge Davis-Whie KC :

1. This is my judgment on an inquiry as to losses suffered by the First Defendant, the Green Mineral Company Limited ("GMC") in relation to a contract diverted from GMC, in breach of duty by one of its directors and shareholders, Warren Greenwood, the Second Defendant, to the Third Defendant, Soil Hill Quarries Limited. I apologise for the delay in production.

2. The inquiry that was ordered followed a judgment delivered by me as long ago as 28 March 2019 following an 8 day trial (the Trial") For the Trial, as on the inquiry, the claimant was represented by Mr Ian Pennock of Counsel, instructed by way of direct access. On the inquiry before me, the Second to Third Defendants (the "Relevant Defendants") were represented by Mr Kavan Gunaratna of Counsel. I am grateful to both counsel for their helpful submissions, both oral and written.

3. Following judgment on the trial being handed down on 28 March 2019 (the "2019 Judgment"), I made an order to give effect to my judgment on 18 June 2019. There was considerable delay in arranging a hearing to deal with consequential maters and then, an order having been made orally, in achieving a written sealed order in a form that reflected my order pronounced orally. My order was in fact only sealed on 30 August 2019. My 18 June 2019 Order, ordered (among other things) the inquiry which is the subject of this judgment.

The 2019 Judgment

4. The 2019 Judgment speaks for itself but to assist in making this judgment self-explanatory, I summarise various parts and findings from it. The key overall history is as follows. Mr Greenwood owned part of a quarry, which part was called the Far Shay, and the minerals and clays in and on it. Under a revocable licence he permitted GMC to take and sell clays. GMC was a joint venture company between the Claimant and Mr Greenwood. A contract with a third party company, to sell clays and, later and for a period to take spoil materials to be tipped at the quarry, came up. The contract to sell clays (the "GT Contract", being a contract with Galliford Try as purchaser) was wrongly diverted from GMC to Mr Greenwood's new company, the Third Defendant. The clays in fact supplied were obtained from the Far Shay. At about the same time as the GT contract was diverted, the revocable licence to GMC to take clays from the Far Shay was revoked. For a period, GMC did load the clays and got paid accordingly but Galliford Try required that service to cease, being unhappy with GMC's performance.

5. The following is taken from the 2019 Judgment:

> *"[1] This case concerns a quarry known as "Soil Hill Quarry" (the "Quarry") at Thornton, near Bradford. It is situated on the northern flank of Soil Hill, hence its name. To the north of the Quarry is the A644. The main product of the Quarry is clay, but in addition sandstone and coal have been mined there. In addition, the Quarry is able to make money from tipping, that is the receipt of inert material to fill voids and or/to be used in providing layers of surface to enable the land to be landscaped and returned to agricultural use.*

[2] Title to the land comprised within the Quarry is registered under a number of different titles. In broad terms, prior to 2014 the Quarry had for many years, probably since the 1920's, been owned by members of the family of the Second Defendant, Mr Warren Greenwood ("Mr Greenwood").

*[3] In about May 2014, Mr Greenwood and the relevant company through which he traded, was experiencing cash flow difficulties. He agreed to enter into a joint venture with the Claimant, Mr Paul Hague ("**Mr Hague**"), under which he would provide money to enable the business of the Quarry to continue and be developed. That agreement was largely negotiated with Mr Brian Hague, the father of Mr Hague. (For convenience I shall refer to Mr Paul Hague and Mr Brian Hague together as the "Hagues")….*

[4] There are essentially three main issues between the parties. First, the precise terms of the joint venture agreement that was entered into and whether or not under it Mr Greenwood was required to transfer interests of his in lands at the Quarry either into his and Mr Hague's joint names or to a joint venture vehicle. Secondly, whether the first defendant has vested in it mining and tipping rights in relation to lands at the Quarry. Thirdly, whether in breach of his fiduciary duty as a director of the first defendant Mr Greenwood has diverted corporate opportunities or contracts from the first defendant to himself or his company, the third defendant."

6. As regards the Quarry, it comprises three areas: the Shay, the Far Shay and the Stone Quarry. By the time of the GT contract, beneficial ownership of the Shay was, under various agreements, ultimately vested in part in the Greenwood Company (being the Company defined in paragraph 7 of the 2019 Judgment) and in part in Mr Greenwood. However, (as I explain below) the relevant title excluded mineral rights to the Shay

7. In my 2019 Judgment I determined that:

   (1) there was no obligation upon Mr Greenwood to transfer title or ownership of any parts of the Quarry (and particularly, the Far Shay) as asserted by the Claimant, whether as a matter of contract between Mr Greenwood and Mr Paul Hague or as a result of any estoppel;

   (2) as regards tipping and mineral rights, I determined that GMC had no proprietary rights to tip onto or to extract clays from the Far Shay As regards the Shay, on the limited evidence before me I considered that there was an arguable case that GMC had vested in it various rights to clay and minerals which had been excluded from a conveyance of the land in question. I directed an inquiry to ascertain what these rights were. On the inquiry, it emerged that rights had been reserved but that the rights in question were clearly not vested in GMC and I so decided. My order in this respect, effectively ending the Claimant's relevant claim in this respect, is dated 4 November 2021. As regards tipping I held that GMC had a revocable licence.

   (3) as regards the derivative claim on behalf of GMC alleging a diversion of a contract with a firm referred to before me as "Galliford Try" ("GT"), I decided

that a relevant breach of duty by Mr Warren Greenwood as director was made out and by my order of 18 June 2019 ordered (initially) an inquiry as to loss and an account of profits, with an election to be made between the two by the Claimant. Ultimately the Claimant elected to pursue a damages claim (or equitable compensation claim) based on loss caused to the First Defendant by the diversion rather than an account of profits from those involved in or benefitting from the diversion. It is that inquiry with which this judgment deals.

8. Because it is relevant to the inquiry, as I shall explain later in his judgment, I should repeat findings that I made as regards the position of GMC in relation to the Far Shay. In my 2019 judgment I said the following:

"*[133] As regards the claim in respect of exclusive rights to exploit the Shay and Far Shay, that is, as I have said, premised on the basis that the rights are vested in GMC. In submission, Mr Pennock made clear that his client's case was that such rights existed and were vested in GMC prior to May 2014. The joint venture agreement was simply that such rights would continue to exist and would be exploited by GMC. Given the pleading in the particulars of claim that the exclusive rights were granted by Mr Greenwood and/or Mr Hague and or their predecessors in title, and given the alleged terms of the joint venture I invited Mr Pennock at the start of the trial to consider whether he wished to a apply to amend to seek in the alternative a personal claim for breach of the joint venture agreement based upon either such rights not being vested in GMC as promised and/or a failure to ensure that they were so vested and/or to grant the same and/or to continue the same. I had in mind (among other possibilities) that an agreement that rights would continue, might (as a matter of construction) amount to a contractual agreement that rights that were otherwise precarious (e.g. a revocable licence) might continue.*

[134] Ms Linklater [then Counsel for the Second and Third Defendants] *indicated that she would oppose any such application to amend. Mr Pennock, having had an opportunity to consider the position over an extended lunch adjournment, informed me that his clients would not seek permission to amend, either along the lines I had raised as a possibility or in any other way. The claim that GMC has such exclusive rights is therefore dependent on Mr Hague being able to prove that they had been vested in GMC prior to May 2014.*

….

[138] So far as the Far Shay is concerned, Mr Greenwood accepts that prior to May 2014, and indeed after May 2014, he personally licensed GMC to exploit the minerals (including for these purposes clay) at the Far Shay. He denies any vested proprietary right in GMC to do so, other than this personal licence, which, he says, was revocable and has been revoked. (I leave aside for the moment the issue as to whether GMC was entitled to retain these proceeds or had to repay the same to Mr Greenwood, and if the latter whether or not on the basis of a retention for the loading work carried out by GMC and if so in what amount). On the balance of probabilities, I am not satisfied that GMC had any vested proprietary right to the minerals in, or to tip at, the Far Shay as at May 2014.

---

[144] If GMC had relevant rights to work the minerals in the Far Shay then that right has been infringed by SHQL who would be liable accordingly. In a sense any liability for diversion of the Galliford Try contract would be parasitic on the infringement of GMC's proprietary rights to win and sell the clay.

[145] I have found that I am not satisfied that there were such rights in GMC. At most its rights amounted to a revocable licence, which had been revoked. I have considered whether GMC might be said to have any greater right or interest by virtue of the joint venture agreement on the basis of the Hagues' case that it was agreed that GMC would continue to have rights to exploit the Far Shay. I have found that the agreement as to enjoyment of rights by GMC as a matter of right was dependent on a price being agreed for Mr Greenwood's interest in the Far Shay and that interest being bought out. The interest to be bought out was, as I have discussed, the interest not just in the land shorn of or excluding the minerals but the minerals too (and indeed, any right to tipping). Pending that, the only rights in GMC were precarious and revocable at any time. I am also satisfied that it was clear to the Hagues that Mr Greenwood was in effect subsidising GMC with clay sales. I do not need to decide whether or not this was on the basis that the subsidy was a "loan" or whether it was, in effect, an injection of capital by way of gift. For what it is worth, I incline towards the latter view."

9. As regards the revocable licence (as I found it) which GMC had had the benefit of, the position was that that was revoked.

10. In my judgment I explained the inception of the Galliford Try contract, its diversion and the revocation of GMC's revocable licence as follows:

"[68]On 12 August 2014, Mr Matthew Langford, senior buyer, at Galliford Try, sent an email to Mr Brian Hague in which he said that he believed that "you" are "looking to price us for the Skipton tender. By all means send in a quote to me with what you can offer, and I will be in touch if we are successful in winning the job". The reference to the "Skipton tender" is a reference to a tendering process run by the Environment Agency for flood relief works in relation to Skipton. These had been planned for some time but in about 2013 to 2014 the funding finally became available to carry them out.

[69] By return email Mr Brian Hague enclosed a letter on GMC notepaper also dated 12 August 2014, enclosing a quote for the Skipton Flood defence. It referred to the fact that "we have been suppliers of clay to the brick and pipe industry for over 40 years from our lands at Soil Hill near Queensbury, we have also been successful in supplying clays for both tip lining and capping of landfill sites". Various analyses of the clays were enclosed. The offer was to have clays loaded on the wagons at £2.25p per ton, alternatively, if Galliford Try wished to load it themselves they could do so at £1.75p per ton. Pausing there, that indicates that GMC would be charging 50p per ton for loading.

[70] By email dated 16 November 2014, Mr Murphy emailed the Environment Agency on behalf of GMC regarding the Skipton Flood alleviation scheme, essentially looking to supply clay for the scheme and to take material for tipping.

[71] On 1 December 2014, permission was granted to allow a control cabin to be established on the Shay.

….

[74] On 17 February 2015, a revised letter to that sent earlier on 12 August 2014, was sent to Galliford Try on GMC notepaper. The rates for clay, and indeed the terms of the letter were identical to the earlier letter but with the addition of a small section at the start of the letter referring to a conversation that afternoon when a tipping price of "£90 per load (8 wheeler) inert waste only" had been put forward.

[75] On 11 March 2015, the permit to tip inert waste at the Shay was granted by the Environment Agency.

…

[77] By email dated 21 May 2015, Mr Greenwood sent to Ronnie Graham of Galliford Try, laboratory reports from 1991 regarding the clays at Soil Hill Quarry. There was a site meeting between them before this date.

[78] By email dated 19 June 2015, with the subject matter "Re Clay material to Skipton", Mr Langford asked for Mr Greenwood to forward to him "your company details so I can get an account set up for payment. I will need on letter headed paper your VAT & reg and bank details so we can pay you."

[79] Later that day, Mr Greenwood forwarded by email a letter on GMC headed notepaper including its VAT number, together with bank details as set out. The account number of GMC bank account was mistyped and on 22 June 2015 a further letter was sent correcting that mistake.

[80] On 23 June 2015, 4 truck loads of clay from the Far Shay were supplied to Galliford Try. These were eventually invoiced by SHQL at a price of £240 (including VAT). On 24 June 2015 a further 35 truck loads were provided. These were eventually invoiced by SHQL at a price of £2,100 (inc VAT). As at June 2015, there was an unresolved issue about price because it was unclear whether there was a liability for Aggregate Levy. Ultimately, Galliford Try agreed to shoulder any such tax.

[81] On or about 30 June 2015, the date is disputed, Mr Greenwood announced to the Hagues that he was now going to invoice for the clay from the Far Shay through his own company and that the arrangement under which clay and other sales from the Far Shay had been put through GMC was ended. However, Mr Greenwood would allow GMC to invoice for sales of certain minerals that had already been extracted from the land and which were, in effect, stockpiled on site.

[82] Also on 30 June 2015, SHQL was incorporated on 30 June 2015 under the name Soil Hill Quarries Limited. Mr Greenwood was sole director and Shareholder.

[83] On 10 July 2015 Mr Greenwood purported to grant a lease to SHQL of the Far Shay for a period starting on 10 July 2015 and continuing. Under the lease the "Use Allowed" is described as "extraction of minerals, clay, coal, sand, gravel and other minerals or any other used which the Landlord consents (and the landlord is not entitled to withhold that consent unreasonably) the rent is stated to be a peppercorn per year.

[84] By email said to have been sent on 18 July 2015, Mr Greenwood sent to Mr Langford of Galliford Try, on headed notepaper of SHQL, a letter regarding clay. In that letter he said that the address at the head of the letter was "for you to create an account for the clay". It then set out details of a Santander bank account. It referred to the fact that approximately 2500 tonnes had been sent out already in the last month or so and that no invoice had been raised for it as he didn't know where to send the invoices or have any order numbers. It confirmed that he had been told by Ronnie Graham of Galliford Try that Galliford Try would pay any aggregate tax that might be payable…"

[85] Sometime in mid-July 2015, Mr Hague (primarily through Mr Brian Hague) and Mr Greenwood agreed that GMC would invoice SHQL for any clay that GMC loaded and which SHQL was selling to Galliford Try. There was some negotiation over price but eventually 70p per ton was agreed.

[86] Between 20 July 2015 and 5 November 2015, GMC issued invoices to SHQL for the loading of clay at the rate of 70p per ton. One of these invoices was for "loading clay to Skipton" in June. The invoice was for £1,898 (including VAT). There were some 14 invoices in total totalling in excess of £23,000.

[87] A purchase order, number 5022011267/0, dated 27 July 2015 was issued by Galliford Try to SHQL. The quantity is said to be 100,000 tons of "Dug clay" at a rate of £2.50 per ton. The order is therefore for £250,000 worth of clay. Between August 2015 and September 2017, a total of in excess of £838,000 (inc VAT) was paid by Galliford Try to SHQL for clay.

[88] At or about the start of September, Galliford Try ceased to use GMC for loading clay and brought on its own contractors, Whitelocks. Mr Greenwood says this was because of problems at GMC, such as the quality and speed of loading and the absence of relevant certifications in the case of the drivers, the two Mr Hagues. In his witness statement Mr Paul Hague asserted that Mr Greenwood had employed Whitelocks and ended the contract for loading with GMC but in oral evidence accepted that it was Galliford Try who refused to accept loading by GMC and who employed Whitelocks. He also accepted that the reasons he understood at about this time were as later confirmed in writing by Ronnie Graham of Galliford Try in April 2016 (see below). Mr Brian Hague asserted in his witness statement that Mr Greenwood had dishonestly made sure that GMC did not receive the loading fees and that a complaint by Galliford Try was made up by Mr Greenwood and Mr Graham as an excuse to break the deal whereby GMC received payment for loading. Having heard the evidence in the case I find that there were genuine complaints by Galliford Try at the time and this is why GMC contract to load and receive payment for loading was ended.

> *[89] On 3 September 2015, Mr Brian Hague taped a conversation between him and Mr Greenwood recording discussions around the disagreement between them. Mr Greenwood was unaware that the conversation was being recorded. Mr Greenwood's case is that complaints about breach of an alleged agreement that GMC would benefit from the full proceeds of all clay sales from the Far Shay only surfaced at this point, in effect when the Hagues found out that GMC was no longer to be employed to load, and to be paid for loading, clay for loads for Galliford Try.*
>
> *[90] Also on 3 September 2015 Galliford Try confirmed to Mr Greenwood the disposal of their excavated material at the Quarry at an agreed rate of £90 per ton. The works were to be treated as a variation of the existing purchase order dated 27 July 2015. In due course a new purchase order dated 21 October 2015 was issued to GMC.*
>
> *[91] Fifteen invoices for tipping by Galliford Try at the Shay, dated between 7 September 2015 and 14 October 2015 were issued by GMC. In total a sum of £51,948 (inc VAT) was invoiced for tipping by GMC to Galliford Try. This tipping by Galliford Try came to an end in October 2015 for reasons evidenced by a letter from GMC to Galliford Try dated 14 October 2015. Essentially the material sought to be tipped by Galliford Try was too wet which was bogging down the bulldozer that GMC was using. A willingness to take the material at £150 per load was indicated but it was pointed out that "I wont be able to take much before the tip is unusable and we will have to stop tipping".*"

11. The Claimant's position, as set out clearly by Mr Pennock in his closing written submissions is that the relevant licence to GMC to take coal or clay was terminated on 30 June 2015:

> "*19. D1 has not sought to have that termination of its licence set aside and it remains effective so that D1 cannot extract and sell clay from the Far Shay without Ds's further renewed/permission This is not and cannot be in dispute.*"

I understood the Relevant Defendants to agree with this date.

The course of the inquiry and development of the claimant's case

12. I do not set out the full history of events between my Order of 18 June 2019 and the holding of the inquiry. Some of the key events are as follows. Delays in the process until the inquiry was actually held have primarily been caused by the conduct of the Claimant in the manner in which his case has been formulated over time.

13. The need for the Claimant to make an election between an account of profits and equitable compensation for loss, as soon as possible, had been referred to in my Order of June 2019 (see paragraph (18)). In the meantime I ordered Scott schedules starting with one from the Second and Third Defendants regarding an account of profits and one from the Claimant regarding equitable compensation for loss, such schedules then to be answered by the other relevant party(ies).

14. One of the matters leading to confusion has been that the Claimant, as regards its loss schedule, failed to start from the position of identifying the net profit that GMC would have made from the GT contract (that being the loss asserted) by reference to what the relevant costs of the contract to GMC would have been. Instead, parasitically, it started with the Relevant Defendants' case (and detail) as to the profit that it was said the Third Defendant had made from the GT contract and then tried to attack the elements of the costs said to have been incurred by the Third Defendant on various bases.

15. On 3 December 2019, DDJ Atkinson varied the timetable for delivery of Scott Schedules (or entries therein) by the Claimant, setting a revised date of 10 January 2020.

16. In an early reiteration by way of Scot Schedule of the Claimant's case as to loss (dated 20 January 2020), the case was put that the income from the GT Contract was £698,810 and that from that sum, expenses and outgoings had to be deducted in order to ascertain what net profit GMC would have made, that being the measure of its loss suffered by the diversion of the GT Contract.

17. The expenses and outgoings that, it was said by the Claimant, should be deducted from the assumed income was set out under 4 alternatives, each described as an "option". Option 1 was on the basis that the total costs were capped at 50p per tonne (as quoted to GT as the cost to GMC of extracting/loading the clay in August 2014). Option 2 was on the basis of capped costs of £0.25p per tonne on the basis of a £0.50 per tonne quote with an allowance for the benefit to the Relevant Defendants of further tipping on the Far Shay. Option 3 was capped costs at £0.70 per tonne, being the price for loading and extracting the same as agreed with GT. Option 4 was costs capped at £0.35p per tonne on the basis of the price agreed with GT of £0.70p per tonne with an allowance for the benefit to the Relevant Defendants of tipping at the Far Shay. Under these "options", the asserted loss was between, at the highest, £632,030 (Option 2) and, at the lowest, £511,826 (Option 3).

18. Among the responses to this Schedule by the Relevant Defendants was the point that the costs to GMC of obtaining the clays had to be factored in as a relevant cost (and that the relevant costs to be subtracted from the "income figure" would have been the actual costs that GMC would have incurred in performing the GT contract had it not been diverted). The calculations put forward by the Claimant, it was said, might relate to a case on the profit that the Relevant Defendants might have made from the diversion of the contract but was not a basis for calculating the loss suffered by GMC as a result of the diversion of the contract.

19. On 9 June 2020, I ordered that what had been called the "Excluded Rights Inquiry" (regarding any rights GMC had in relation to the Shay) and the account of profits/inquiry as to loss to be listed and gave further directions in respect of each.

20. By a further Order dated 10 June 2021 made on a PTR before each inquiry (then listed for July 2021), it was recited that, by his 13th witness statement dated 3 June 2021, the Claimant had elected to seek equitable compensation for alleged loss suffered by GMC as a result of the diversion of business in question and that he discontinued any claim for an account of profits. As regards what was now an inquiry as to loss, I gave further directions.

21. A revised Scot Schedule as to loss was put forward by the Claimant. At this point the case put forward was restricted to a methodology by which, from the total income that had been made under the GT contract, there would be deducted certain costs and expenses to reach a net profit figure said to equate to the loss suffered by GMC. The costs and expenses appeared to be, in large part, a percentage of the costs actually incurred by the Relevant Defendants on the GT contract with a different figure (or a nil figure) in some cases based on points particular to GMC. The overall loss was put at just under £664,000.

22. By order dated 4 November 2021, on the Excluded Rights Inquiry, I found GMC had no relevant exclusive proprietary rights to occupy and use the Shay as a quarry and/or landfill site. I gave further directions on the Loss Inquiry, including directions requiring certain Further Information to be provided and permitted the Claimant's loss Scott Schedule to be amended so far as necessary to bring it into line with the responses to a relevant request for further information. The relevant order giving directions on the loss inquiry, and requiring proper responses to be given by the claimant by a certain time and date, was an unless order with the sanction in default being the striking out of the relevant derivative claim and judgment in default being granted in favour of the Relevant Defendants.

23. An amended Scott Schedule followed. That brought the claimed loss to just over £653,400. The replies to various requests for further information included the following:

"Of: The Claimant's case on loss:
1. Please state:
1.1 The Claimant's case as to the owner and source of the clays which D1 would have drawn on to supply the GT contract.
1.2 The price or prices that D1 would have paid to the owner of the clays.
1.3 If the price or prices of the clays in respect of 1.2 are alleged to have been £nil please state all facts and matters to be relied on at the final hearing to demonstrate that D1 would have paid nothing for the clays to be supplied to GT.
1.4 If the prices or prices of the clays in respect of 1.2 are alleged to have been more than £nil:
1.4.1 please state all facts and matters which will be relied on at the final hearing to demonstrate the prices contended for;
1.4.2 how the prices contended for have been calculated; and
1.4.3 what each price contended for is alleged to include in terms of the state and location of the clays at the point of sale.
In reply to Questions 1.1 to 1.4 inclusive, all the Replies made in this document, are founded upon the now hypothetical scenario, that Mr. Greenwood had not breached his duties owed to D1. In that scenario, D3 would not exist, D1 would have undertaken the GT Contract, as well as the business it did conduct in the Period. The business of D1 would have continued to have been conducted as in the previous year. Therefore, the reason we expect the clay to come from Far Shay for nothing is as per the agreement between Mr. Paul Hague and Mr. Greenwood (it being Mr. Greenwood's contribution to the deal and Mr. Hague's money being the quid pro quo) and as previously acted upon with the constant course of conduct whereby clay was sold for the sole benefit of D1.

This position is supported by HHJ Davis-White at various stages of his judgement, as follows:
P 145 I do not need to decide whether or not this was on the basis that the subsidy was a " loan" or whether it was, in effect, an injection of capital by way of gift. For what it is worth, I incline towards the latter view.
P 150. In short, the opportunity with Galliford Try was both one that came "to his attention through his role as a director" and which he "could and should" have exploited for the benefit of GMC (see Sharma v Sharma (supra) at paragraph 52(i)).
P 160. As regards the derivative claim:
(2) I have found there to be a breach of duty by Mr Greenwood as a director of GMC in diverting the Galliford Try contract to SHQL and that SHQL is also liable in respect thereof. I will hear submissions on the appropriate form of relief.
But for Mr Greenwood's unlawful act, there is no evidence to suggest that the conduct of D1's business would have changed in any material way.

1.5 If the Claimant's case is that D1 would have sourced the clays from Far Shay please state whether it is alleged that D1 would have acquired those clays from D2/D3:
1.5.1 at the quarry gate i.e., after they had been excavated, hauled and loaded;
1.5.2 in the ground i.e., still to be excavated, hauled and loaded;
1.5.3 in a different state to those described above and if it is so alleged, please provide full particulars.

Reply to Question 1.5 to 1.5.3 inclusive – In this hypothetical scenario, D2 would not have personally owned any plant or machinery, and D3 would never have been incorporated. Therefore, in accordance with the way in which the business of D1 had been performed since it had obtained the necessary planning permissions to operate, until the end of June 2015, all clay from Far Shay was offered for sale and sold by D1, and D1 alone. All clay to be offered for sale and sold to GT, was in the ground. The clay always was and would have been excavated, hauled across the site (if necessary) and loaded by D1. Therefore, in Reply to Q1.5, option 1.5.2 is the most appropriate response."

24. By an Order dated 13 January 2022 I found that the Claimant was in breach of the "unless order" directed at procuring from him details as to his case with regard to certain specific matters. The sanction, of the inquiry being struck out, therefore applied subject to an application for relief from sanctions. On that application I granted relief but on strict terms, by which the case was to be limited to what was defined in the order as the "premise" as follows:

"***AND UPON*** *the court recording that the premise of it being prepared to grant the Claimant relief from sanctions (in respect of his failure to answer request 1.6 in compliance with the Unless Order) is that (the "Premise"):-*

(1) *Counsel for the claimant has confirmed that the Claimant's case hereinafter, in relation to the time and costs which would have been incurred by the First Defendant in performance of the GT contract, is that such time and costs would be equal to (a) to the extent that it in fact carried out work under the GT contract, the time and costs that it incurred in doing so together with (b) the time and costs in fact incurred by the Third Defendant in its execution of the GT contract;*

(2) *Counsel has confirmed that that now represents the Claimant's sole positive case, with no alternative case advanced by him in that respect; and*

(3) *the Claimant has, by his counsel, expressly disavowed any ability in future to resile from the way in which he has now put his case on quantum and, to the extent necessary, will not seek to amend his case on quantum hereafter."*

25. The substantive order (so far as relevant) was as follows:

"*1. The Claimant be granted relief from sanctions for his non-compliance with the Unless Order on the Premise recited above subject to the conditions:*

a. The Claimant shall file and serve his Re-Amended Replies to the Part 18 Request verified by a statement of truth. The time by which this should happen is adjourned to a further hearing.

b. The Claimant shall hereafter be debarred from seeking to amend (whether formally or otherwise) his case on loss, including by seeking to advance an alternative case in response to the Second and Third Defendant's response or position.

The question of any further conditions is adjourned to a further hearing.

2. For the avoidance of doubt, if each of the conditions set out in paragraph 1 are not strictly complied with, the relief from sanctions granted to the Claimant shall be withdrawn and the claim shall stand struck out without further order and judgment shall be entered for the Second and Third Defendant with the Claimant to pay their costs on the indemnity basis to be assessed in default of agreement.

3. *The Claimant shall, on the Premise recited above, be relieved from any further obligation to answer request 1.6 of the Part 18 Request*."

26. Although the "premise" was limited to time and costs incurred, the order is clear that the conditions on which relief was granted included a freezing of the Claimant's case as then put.

27. As regards the costs of the clays, the Relevant Defendant's position was as follows as set out in what is described as their "reply to C's amplification document served 6.12.21".

"*Cost of clays*

10. The Second and Third Defendants repeat that the First Defendant would have had to acquire the clays necessary to supply GT with the 267,120 tonnes of clay under the GT contract, and the First Defendant did not own and was not entitled to the clays at Far Shay. The First Defendant would have been liable to pay for that clay at its prevailing value of £5.50 per tonne for shale clay and between £6.00 and £8.00 per tonne for blue clay, further or alternatively, the Second Defendant would have accepted a minimum price of £2.50 per tonne and £6.00 per tonne for his shale and blue clays respectively."

28. The alternative position put forward by the Relevant Defednants was not adopted by or relied upon by the Claimant, even as an alternative to his main case that no payment for clays would have had to have been made.

The cost of the clays

29. The question of whether, had the GT contract not been diverted, GMC would have had to acquire clays at a price to fulfil the contract and what that price would have been is therefore the first key issue on the inquiry.

(a) Expert evidence

30. Expert evidence was given by Mr Stuart Jefferies BSc (Hons), MRICS, MIQ. He is a director of the well-known firm of Savills (UK) Limited ("Savills") and head of Savills' national Mineral and Waste Management department with over 25 years' experience in the valuation and estate management of mineral and waste management properties. There had been a possibility that he would be instructed on a joint basis but in the end he was instructed by the Relevant Defendants alone. His report is dated 30 September 2020.

31. Mr Jefferies was asked to give his expert Opinion as to various matters relating to, but most importantly on the question of, the open market price or value, as at June 2015 and thereafter during the relevant period of the GT contract, of the clays supplied by the Third Defendant to GT and the cost at which GMC could have acquired clays from an alternative source on the open market.

32. His instructions (among others) were that the GT contract involved the sale to GT of 267,127 tonnes of shale clay at a rate of £2.50 per tonne and 8,856 tonnes of blue clay at a rate of £6.00 per tonne.

33. Having considered various bases of valuation and various comparables, in reasoning which is careful but entirely convincing, he comes to the conclusions in his report that (1) the market price for clays at Far Shay as at June 2015 was in the order of £5.00 - £5.50 per tonne; (2) there was little change to market conditions within the period June 2015 to September 2017 and accordingly in his opinion that range was valid throughout that period; (3) he was unaware of what factors affected the price agreed for the contract to supply clays to Galliford Try but he was of the opinion that they were sold at below market price levels. He assumed that the prospect of clay tipping might have influenced the clay contract; (4) if GMC were to acquire clays from an alternative source then he would expect the purchase price to be within the range set out above.

34. In his skeleton argument for the inquiry, Mr Pennock attacked Mr Jefferies' report on a number of bases but hardly any of these points were put to Mr Jefferies in cross-examination. Nothing raised in that skeleton argument persuaded me in any respect that Mr Jefferies' expert opinion is weakened let alone fundamentally undermined in any respect.

35. Nothing that emerged in cross-examination changed my assessment of the reliability of Mr Jefferies' expert opinion set out in his report, which expert opinion I accept in full. I deal below in a little more detail with the question of whether the possible

explanation for the below market sale price in the GT contract was the possibility of an advantage to be gained from tipping where GT would have spoil to dispose of (and which brought in considerable sums and made transport more cost effective as lorries would be loaded in each direction). I conclude that it probably was. However, even if that is not the explanation, I am satisfied that the market prices at the relevant time were as concluded by Mr Jefferies and that that conclusion is not undermined by the fact of the price in fact negotiated for clays under the GT contract.

36. In earlier correspondence with the Relevant Defendants' solicitors Mr Jefferies had also been asked as to whether a landowner might sell clay to an operator at the landowner's site on a royalty type basis of remuneration and if so what that royalty might have been in the factual circumstances here. He was not asked to deal with that in his expert report for the court. Nevertheless, Mr Pennock asked him questions about this. However, the claimant's case was that no sum would have had to be paid for the relevant clays for the reasons I have already set out. It was too late to seek to raise an alternative case that GMC might have negotiated a royalty rate.

37. In opening, Mr Pennock's skeleton argument on behalf of the claimant, so far as the clays were concerned, was based wholly on the argument set out in the documents that I have already referred to, that had the GT contract not been diverted, then the clays would have been provided by the Second Defendant to GMC at no cost to GMC. His skeleton argument did not condescend to much detail on this but was largely devoted to demonstrating that clays had been provided/made available to GMC at no cost to GMC, prior to the revocation of what I had found to be a revocable licence.

38. Mr Pennock went on to assert that the Relevant Defendants case was that they were now alleging that they were entitled to a "just allowance" for the cost of the clays and that they were estopped from raising this issue. These confusing submissions were flawed. The Relevant Defendant's claim for a just allowance arose in relation to the claim for an account of profit, which claim had been abandoned. It was for the Claimant to establish what loss GMC had suffered, on the basis of the net profit that GMC would have made had the GT contract not been diverted from it. Further, the issue of whether the costs of the clays should be taken into account in that inquiry had simply not arisen before the inquiry had been ordered and there were no grounds for saying that the issue could and should have been raised by the Relevant Defendants at the trial. Mr Pennock also alleged lack of clean hands, and that bringing the cost of the clays into account would have been an unauthorised profit by the Second Defendant as a director of GMC and would involve the Second Defendant in being in breach of s175 of the Companies Act 2006. None of these points have any merit, legal or otherwise.

39. I should also make clear that I do not accept Mr Pennock's submission that, as he put it, "the burden of proof lies on he who makes the assertion", and so the burden of proof lies on the Relevant Defendants to establish that the costs of clays are properly taken into account in assessing what net profit GMC would have made from the GT contract had it not been diverted. The burden of proof throughout lies on the Claimant to satisfy the court as to the relevant loss. For completeness, I should add that in any event my decision does not turn on the incidence of the burden of proof.

(b) the new alternative case

40. I required written closing submissions, to be served sequentially, because I wanted to be quite clear what Mr Pennock's submissions were and that Mr Gunaratna had a fair opportunity of dealing with them. In his closing submissions, as had been a tendency throughout the case and the inquiries, Mr Pennock raised a completely new (further alternative) case. That case, so far as I understand it, and put in essence is as follows:

    (1) Mr Greenwood and his company (the Third Defendant) had no right of access across the Shay. Any right of access would have to have been granted by the beneficial owners: Mr Greenwood and the Greenwood Company.

    (2) The taking of clay from the Far Shay to perform the GT contract required access across the Shay.

    (3) Whilst GMC was benefitting from the clay on the Far Shay it, as a quid pro quo of some sort, had no difficulty in granting access across the Shay for the purpose of fulfilling contracts such as the GT contract (In fact as it was performing or fulfilling such contracts I do not see that rights of access arose).

    (4) There is disputed evidence as to whether Mr Greenwood did have a right of access across the Shay. He has at different times asserted that he did have and that he did not have an acquired right. The court (said Mr Pennock) should now decide that there is not and never was any such right (whether acquired historically as an easement attaching to the Far Shay or otherwise).

    (5) Once the licence to take clay from the Far Shay was revoked, there was no reason for GMC to grant any right of access to Mr Greenwood and/or his company over the Shay. The clay on the Far Shay would have been "landlocked".

    (6) Mr Greenwood would therefore have come to a deal with GMC to enable it to supply the clay and would have charged GMC nothing in return for the grant of a right to cross the Shay, also granted for nothing. Both parties would have benefitted from their shareholding in GMC.

    (7) Alternatively, if a royalty would have been agreed then the level of royalty would have been 40p per tonne for a combination of eight reasons.

41. It is par for the course that such an alternative case should be brazenly and I would add shamelessly raised by way of written closing submissions for the first time with no prior warning and notwithstanding an order fixing the case in its form as previously put forward with the sanction of the case on the diverted contract (or more accurately of there being any causal loss to GMC flowing from such diversion) to be struck out, if it was attempted to alter the same. It is clear that the alternative case being put (of a deal at no financial cost to GMC other than permitting access over the Shay or at the cost of a small royalty payment) is one that raises a number of factual and legal matters that have never been pleaded nor relied upon and that it is a wholly new case based on consideration for the clays being provided by GMC in exchange for permission to use a right of way and/or a royalty payment. It would be wholly unfair to the Relevant Defendants were this new case to be permitted to be raised in

this manner, after cross-examination and with no opportunity to deal with many of the legal/factual points now relied upon.

42. No application has been made to vary my earlier order nor has any application for relief from sanctions been made. In those circumstances, the sanction has come into effect. However, I would, of my own motion, grant relief from sanctions and permit the case as originally put forward at the start of the inquiry hearing and being the main case relied upon to continue. The reason for that is the application of the third limb of the test laid down by *Denton v T H White* [2014] EWCA Civ 906, I being satisfied that the first two limbs of that test in the form of questions are to be answered adversely to Mr Hague. In short, and as regards the third limb of the *Denton* test, no great extra time or disruption to the inquiry hearing has resulted from the breach and the matter is proportionately dealt with by way of an appropriate costs order.

43. However, and for the avoidance of doubt, I am not prepared to allow Mr Pennock in the manner that he has sought to do to raise any case based on any likelihood of a deal being agreed between the parties whether on the basis of no royalty payment at all for the clays, but instead the grant of some right of way (whether just permissive or otherwise) and/or some royalty payment resulting in the notional costs of the clays being such that the diversion of the GT contract did cause a loss to GMC. There is no need for me to deal any further with the arguments that he has raised in relation to such alternative case. Some of the points he raised I consider to be demonstrably wrong but many others turn upon determinations which cannot be fairly made on the limited relevant material before me.

(c) conclusion as to costs of clays, if applicable

44. On the basis of Mr Jefferies' evidence and opinion, assuming GMC would have had to pay for the clays (taking Mr Jefferies lowest figure of £5.00 a tonne), the market cost would have been some £1,379,915. The contract would have been a loss making contract and GMC's loss flowing from the diversion would be nil. This is because the sale price was only £698,810.

45. Before considering further the issue of whether it is to be assumed that GMC would have had to pay for the clays that it would have had to supply under the contract to GT had the GT contract not been diverted, I should briefly deal with the other factual evidence in the case.

(d) factual evidence as to the cost of clays

46. Mr Hague in his nineteenth witness statement, being his evidence for the inquiry, falls into the same error as Mr Pennock's skeleton argument for the inquiry. He asserts here that as regards the determination of GMC's loss there are four issues of which the third and fourth are "(3) what profit was made by Mr Greenwood from the GT contract ? and (4) should the court provide Mr Greenwood with an equitable allowance as he claims or at all?" These issues may have been issues on an account of profits but are not issues as to what loss (if any) was suffered by GMC from the diversion. The loss suffered on the diversion was said to be the net profit that GMC would have made had it retained the GT contract. That is not necessarily the same as the profit someone else made from the contract nor is there any question of whether the profiting party should be given a "just allowance"; the issue of a just allowance is

relevant when ascertaining the quantum of profit that the defaulting, accounting party should account for. The question that I have to deal with is what, if any, net profit GMC would have made had it retained the GT contract and, if it had, whether part of the costs of carrying out the contract would have been the cost of acquiring the clays to be supplied under the GT contract (whether from the Second Defendant as owner of the Far Shay or on the open market) which clays GMC did not own or have any right to. The difference between an allowance for the cost of the clays on the taking of an account of profits on the one hand and the calculation of the net profit from a contract, had it not been diverted, and whether the costs of the clays would have to be deducted as an expense that GMC would have incurred, was clearly made in plain English in Mr Greenwood's 6th witness statement dated 28 February 2020.

47. As regards profits made by the Second Defendant, Mr Hague's witness statement amounts to an attack on the credibility of Mr Greenwood: it being said that Mr Greenwood minimised any personal profits that he had made from the diversion of the GT contract when in fact he had made (it is said) substantial profits personally by way of dividends and other sums from the Third Defendant. As such this point is therefore one going solely to credibility. None of this was put to Mr Greenwood in cross-examination.

48. As regards the question of costs of the clays, Mr Hague, in his witness statement goes on at length by reference to documents to the effect that no fees were charged for clays under the licence originally granted to GMC. That however is not really the issue. The question is how GMC would have acquired the clays to provide them under the GT contract to GT, after the original licence had been revoked.

49. I should note that Mr Hague's witness statement is somewhat odd. The last page appears to have been signed by itself and goes from what is apparently paragraph 45(c) on the preceding page to start with sub-paragraph (d) and then go onto paragraph 37. This was not picked up at the trial but raises real issues as to the identity of the document that Mr Hague actually signed. In any event, and as such, the evidence is submission on documents rather than any relevant factual first hand evidence.

50. In cross examination, Mr Hague was unable to give much helpful evidence on the question of the cost of the clays and how the First Defendant would have acquired clays had it retained the GT Contract, although I consider that he was doing his best to assist the court. He accepted that it was unlikely that Mr Greenwood would simply have given up his valuable clays without any charge but tended to fall back on what had been and had not been agreed in fact and that really it was his father (who did not give evidence on the inquiry) and Mr Greenwood who were at the centre of things. In short, Mr Hague's evidence was of very limited materiality or assistance.

51. Mr Greenwood gave evidence over a number of witness statements. Cross examination was very limited and directed primarily at the issue of whether there was or was not a right in the owner of the Far Shay (or in Mr Greenwood) to gain access o the Far Shay over the Shay. Given this was an issue first raised in cross-examination it is unsurprising that the evidence was unclear. In my view it was inconclusive and Mr Pennock did not establish this element of his case that he wished to run but that I have already held he should not be permitted to run. I have already dealt with the need

for caution when considering Mr Greenwood's evidence but there was nothing in his cross-examination that caused me to disbelieve the evidence that he gave orally. I will deal with the other relevant evidence on which Mr Greenwood was not tested in cross-examination, separately.

(e) the claimant's case on the cost of the clays

52. On one reading of his submissions. Mr Pennock appears to be suggesting, or come close to suggesting, that a termination of the revocable licence granted by Mr Greenwood to GMC as regards clays was a breach of duty by Mr Greenwood as a director of GMC and/or part and parcel of the wrongdoing involved in the diversion of the GT contract. Whether or not this is the case, this court has never been asked to make a ruling in this respect and, as Mr Pennock acknowledges, the termination of the revocable licence to GMC to take clays from the Far Shay has never been sought to be overturned.

53. The factual basis upon which the court must decide what, if any, profit GMC would have made from the GT contract must, in my judgment, be one in which the relevant licence was capable of being validly revoked as a matter of law.

54. In essence, the Claimant's case is that Mr Greenwood would have gifted the clays to GMC, had the GT contract not been diverted. The basic proposition put forward is that but for the unlawful diversion of the GT contract, the previous position whereby coals or clays were made available to GMC at no (immediate) cost would have simply continued and not changed in any material respect. Mr Pennock goes on to say that, as found by me following the earlier trial, the value of the clays would have formed an injection of capital by Mr Greenwood into GMC. There are a number of points raised in this respect but it is convenient to deal with them one by one and with the Relevant Defendants' submissions at the same time.

55. First, it is undoubtedly true that, prior to the Summer of 2015, Mr Greenwood had permitted GMC to extract clays from the Far Shay without GMC making any immediate payment therefore. As I have said, in my judgment after the trial, it was not necessary for me to decide whether the provision of clays in this respect involved a transaction in the nature of a loan which GMC would in due course have to repay (as Mr Greenwood asserts) or an injection of capital (which at the end of the trial I indicated was the conclusion I inclined to). Even if the clays involved a loan like-transaction (in the sense that they would have to be paid for later) that would have involved the provision of assets to assist with GMC's cash flow. The question however is not the basis upon which clays were supplied during the period that they were so provided but whether that provision would have continued thereafter.

56. Whatever the basis on which clays <u>had</u> been supplied however, it was always intended that this arrangement would not continue forever and that it was to assist GMC in what was in effect a start up business. Further, the arrangement was in question a revocable licence.

57. I accept Mr Greenwood's evidence and find that by the Summer of 2015 GMC was in a position where it no longer needed the subsidy or injection of assets and where Mr Greenwood's change in the arrangement was not and would not have been a breach of any joint venture agreement and one that he would probably have made in any event.

58. I do not accept that as a matter of law it would have been a breach of Mr Greenwood's duty as a director to terminate the revocable licence. As such he would have been acting as owner of the land and not as a director of the Company.

59. As regards the positive reason for Mr Greenwood to terminate the revocable licence, quite independently of any diversion of the GT contract, I have in mind, among other things, the large nature of the supply required under the GT contract compared with previous contracts (identified by Mr Greenwood, and not challenged, as being, in the case of the GT contract, equivalent to 120 loads a day compared with previous contracts equivalent to 20 loads a day at most) and the fact that GMC was able to and did pay directors' salaries at about this time.

60. Further, and most importantly, my finding in my previous judgment had been that Mr Greenwood was not obliged to transfer the Far Shay to GMC or the joint venturers (directly or indirectly into some other joint venture vehicle). That had been discussed but no final agreement reached because any agreement was dependent first on a price being agreed for any such interest being transferred. If any transfer of the interest in clays was one that depended on Mr Greenwood being paid for them (and a price being agreed) it is counter intuitive to say that he was obliged or would have provided them free to GMC in perpetuity.

61. As it happens, on the evidence before me, I also accept Mr Greenwood's case that the prospect of obtaining the benefit of valuable tipping for the benefit of the Soil Hill Quarry was a factor in negotiating the price for the clays as ultimately agreed with Galliford Try. That Galliford Try already had the relevant account details for GMC for payments to it in respect of tipping was adverted to in, for example, the email of 18 July 2015 sent from SHQL to Galliford Try and giving account details of SHQL to Galliford Try for payment to SHQL for the clays. Agreement on tipping price appears to have been reached in September 2015 as evidenced by an email from Mark Wedge of Galliford Try to SHQL dated 3 September 2015. Further, as I understand it, it was not only envisaged that GMC would benefit from the tipping, even though SHQL would get paid for the clays, but GMC in fact did so benefit. I am not entirely clear whether the income from "tipping" of over £630,000 relied upon by the Claimant in its Scott Schedule is solely referable to tipping from Galliford Try, but in any event it gives an indication of the sort of income it was making from tipping.

62. Further, I do not consider that submissions as to what had taken place prior to the revocation of the revocable licence from Mr Greenwood to GMC with regard to clays from the Far Shay or as regards the arrangements put in place between Mr Greenwood and SHQL advance the Claimant's case. Essentially, the circumstances were fundamentally different.

63. A major point that Mr Pennock made was why would SHQL enter into a loss making contract and why would Mr Greenwood divert a loss making contract. In part the answer may be that the contract was only loss making if SHQL (or Mr Greenwood) had to pay for the clays. In fact Mr Greenwood already owned the clays and he sold them to SHQL (his solely owned company) at a peppercorn. Had full market price for the clays been charged a greater profit would have been made but I do not think it is correct to say that the GT Contract was "loss making". Further, although GMC would have (and did benefit) from tipping at the Shay (in terms of payments), the

freeholders also benefitted from the fact of any site restoration consequences and Mr Greenwood was a shareholder of GMC.

64. Accordingly, I consider that independently of the diversion of the GT contract Mr Greenwood would have terminated the revocable licence as he in fact did and that such revocation would have been (and in fact was, as it has never been challenged) valid. GMC would therefore have had to buy in the clays to complete the contract with GT. The Claimant's case is that it would have been given the clays for free by Mr Greenwood but that makes no sense and I hold that it would not have happened. There is no alternative case as regards a negotiated price with Mr Greenwood. The case falls on the basis that GMC would have received the clays for free from Mr Greenwood. It would not have done. The case as to GMC suffering loss from the diversion of the GT contract fails.

Other costs which would have been incurred by GMC

65. It is strictly unnecessary to decide the issues raised on this point. The Relevant Defendants say that the Claimant has, amongst other failings, sought to create a new case nowhere before set out and breaking down the contractual earnings/costs of the contract between different period of time and also departing from the "Premise" in putting forward new cases as regards certain items. The Relevant Defendants also attack various figures leaving aside their primary case that the figures/case asserted by the claimant is in breach of the premise and also assert double counting.

66. To resolve these issues I would have had to have called for further oral submissions to explain the respective cases of the parties on each item in the Scott Schedule. As far as I can tell, these issues (or the majority of them) do not appear to turn on the oral evidence but on the written evidence before the court.

67. The difference between the parties in terms of the expenses that GMC would have incurred (leaving aside any issue about the costs of the clays), according to Mr Pennock's written closing submissions (and taking account of a concession made by the Relevant Defendants for the purposes of saving costs arguing about certain invoices), is £381,612.75 (Relevant Defendants' case) as against the Claimant's case of £181,993.37 (increased from the Scott Schedule figure of £45.372. 74).

68. Given the conclusions I have reached in relation to the costs of the clays, it seems to me disproportionate to bring the matter back for further argument to resolve maters which are academic.

Form of Order

69. The parties should attempt to resolve a form of order to give effect to this judgment. By 10am on 20 July 2023 either an agreed draft form of order should be lodged with the Court or the Relevant Defendants should lodge a form of proposed order (agreed so far as possible) but setting out any alternative wordings proposed by each party and indicating clearly which party is proposing which alternative. In the latter eventuality the parties should lodge respective availability for a 10am remote hearing in the three weeks from 22 July 2023.