



Neutral Citation Number: [2021] EWHC 3421 (TCC)

Case No: HT-2020-000107

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN’S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice Rolls Building London, EC4A 1NL

Date: Friday 17th December 2021

Before :

MR ROGER TER HAAR QC
Sitting as a Deputy High Court Judge

Between:

OMYA UK LIMITED

Claimant

- and -

(1) ANDREWS EXCAVATIONS LIMITED
(2) DANIEL ANDREWS

Defendants

Ian Bridge and Adam Porte (instructed by **Geldards LLP**) for the **Claimant**
Caroline Shea Q.C. and Philip Sissons (instructed by **Gentle Mathias LLP**) for the **Defendants**

Hearing dates: 5-7, 11-13 October and 30 November 2021

Approved Judgment
.....

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties’ representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on Friday 17th December 2021.

Mr Roger ter Haar QC :

1. In this action the Claimant seeks judgment against both Defendants for £765,094.40 together with interest and costs
2. It is the Claimant's case that between the end of 2016 and February 2017 the First Defendant trespassed on a parcel of the Claimant's land in Cliffe, Kent known as Francis Quarry, and there deposited 19,435 tons of waste. The Second Defendant is sued as alleged joint tortfeasor with the First Defendant.
3. The dumped waste included odorous processed household and commercial waste including trommel fines, which indicates material that has passed through waste transfer stations. The Claimant says, and as will be seen below the comment is very well justified, that this was organised tipping on a vast scale.
4. There is no issue between the parties that the tipping occurred. The quantum of the claim, which is in essence the cost to the Claimant of removing the tipped waste, is not in dispute. Liability is fully disputed.

The Site

5. On the first day of trial (4 October 2021) I had the benefit of a site visit: counsel for both Claimant and Defendants had strongly advocated that a site visit would be advantageous, and they were entirely right about that.
6. I was attended on the site visit by all four counsel for the parties. The Second Defendant also attended, but in the absence of any representative of the Claimant other than counsel, I decided that I should be accompanied only by counsel on my tour of the site.
7. I say "site" but there are really two sites. The land owned by the Claimant is a part of a former chalk quarry (known as Francis Quarry), but it appears that it has not been worked as a chalk quarry for over 50 years. It is clear from aerial photographs that before the tipping with which this case is concerned, Francis Quarry had become heavily vegetated with relatively mature trees growing in it.
8. On my visit we gained access to Francis Quarry from the western end which is reached via a footpath on land owned and/or managed by the Royal Society for the Protection of Birds. The area to the west of the quarry includes large ponds which I understand to be Sites of Special Scientific Interest.
9. On gaining access to the quarry from the western end, there is no longer a quarry road as such: a footpath through recently grown vegetation leads to a chalk cliff running roughly south west to north east at the end of the Francis Quarry area. The Southern boundary to the Francis Quarry is a large bund close to twenty metres high which is now vegetated. This bund has been referred to in these proceedings as "the boundary bund".
10. On the other side of the boundary bund is an area referred to as Thameside Terminal. This was also in the past an area of what appears to me to have been one large chalk quarry. It has a chalk cliff at the eastern end running in a north south direction a little

further to the east of the chalk cliff which I have referred to in Francis Quarry and another chalk cliff running east west along the Southern end of the area.

11. Thameside Terminal was used for many years by an oil company, Conoco, as an oil terminal. It was acquired from Conoco by a company owned by the Second Defendant's father. Since acquisition from Conoco, Thameside Terminal has been used by the Second Defendant and companies associated with him. The extent of that use in particular in the period between November 2016 and February 2017 is a significant issue as I explain below.
12. Access to the Thameside Terminal is also from the western end. The south western section of the Thameside Terminal area is occupied by a company called Nationwide Platforms Limited. This company has a small office block on the outside of which are positioned CCTV cameras.
13. Having passed the Nationwide Platforms operation on the right, the visitor heading pretty much due east along a spine access road sees on the right another bund much lower than the boundary bund ("the New Bund"). The New Bund runs in a north south direction roughly from the southern boundary to the middle spine road. There is fencing either side of the spine road running along the middle of the site until it reaches substantial gates which with the fence effectively bar vehicular entry to the eastern half of the site.
14. As already indicated, the boundary bund runs along the boundary of Thameside Terminal and Francis Quarry running east to west.
15. As seen by me on my site visit, the boundary bund is vegetated, and when in place would prevent any vehicular access from the Thameside Terminal to the Francis Quarry and would make any pedestrian access very difficult.
16. It was obvious to the naked eye that the vegetation to an area at the eastern end of the boundary bund was differently vegetated from the rest of the bund.
17. It is the Claimant's case that access was gained to Francis Quarry from Thameside Terminal by cutting a hole in the boundary bund. I return to examine that claim below.
18. Above both Francis Quarry and Thameside Terminal are farmland and scrubby bushy perimeters belonging at all material times to the Claimant. It is possible in a number of places to look down from on high where the perimeter vegetation is absent or thin and look into the two areas. However, because of the vegetation, locations from which a view can be obtained are somewhat sporadic.

Photographic Evidence

19. A considerable number of photographs were placed before me. The most important were gathered together, printed in as good a state of resolution as possible, in a bundle referred to as the digital bundle of photographs. The photographs in that bundle include photographs taken by a former employee of the Claimant, Mr. Dhillon, by a present employee of the Claimant, Dr. Barrett, by a representative of the Environment Agency, Mr. Hamilton, and others.

Witness Evidence called by the Claimant

20. I heard evidence from a number of witnesses for the Claimant, and from the Second Defendant on behalf of the two Defendants. There is a very intense contest as to the reliability of the central parts of the witness evidence.
21. The witnesses (other than expert witnesses) called by the Claimant in order of appearance were as follows:
- (1) Dr. Nigel Barrett: Dr Barrett is employed by the Claimant as Head of Quality, Safety, Health and Environment, Area West, and Head of Legal Entity. He provided two witness statements. His evidence in cross-examination was that it was on 3 February 2017 that he was first told by Mr. Mortley (the witness who followed him into the witness box) that there had been dumping of waste into Francis Quarry and that this had been going on since November 2016¹, although Mr. Mortley had previously told him on 19 January 2017 that there was possible bulldozing and tipping taking place on the Claimant's land.² By 8 February 2017 he was certain that the Defendants had gained access from the neighbouring Thameside Terminal and were responsible for dumping the waste³. He visited the site following the dumping of waste for the first time on 20 July 2017 accompanied by Mr Peter Schwere, Omya Group Risk Manager⁴. In the digital photograph bundle were photographs taken by Dr. Barrett on a number of occasions:
- a) 20 July 2017: pages 23-24, 29-30;
 - b) 21 September 2017: page 31;
 - c) 8 January 2018: pages 19-22.

Photographs taken by Mr. Schwere on the 20 July 2017 visit are in the bundle at pages 39-40.

- (2) Mr. John Mortley: it was Mr. Mortley's job to carry out a daily check of the Claimant's land at Cliffe. His evidence is of importance and is hotly contested: I return to it below as appropriate. Mr. Mortley is now 86 years old, and sadly is not in the best of health physically. In consequence I acceded to an application that his evidence should be received remotely. This proved to be somewhat problematic because of connection problems, but I am satisfied that in the end his evidence was clearly received and an adequate opportunity was given to Ms. Shea Q.C., who represented the Defendants, to test his evidence. Despite his physical health problems, his mental faculties were entirely satisfactory and he gave his evidence clearly and in a straightforward manner. I assess below how far I can accept the reliability of his recollection.

¹ Transcript, day 1/73

² Second witness statement, paragraph 20

³ First witness statement paragraph 17

⁴ First witness statement paragraph 22

- (3) Mr. Christopher Down: Mr Down is a retired planning consultant. He had been familiar with the Claimant's land at Cliffe since the 1960s.⁵ After a gap of some years he visited the site on 31 May 2017. He recorded what he had noticed about the boundary bund:⁶ "...The boundary bund was up to around 10m high and stretched for about 250m. I stood right next to the filled-in corridor for several minutes. I could see that, next to the cliff, the vegetation had been disturbed. An area of scrub appeared to have been removed. There was fresh earth in place and it was clear where the bund had been dug into. The area of chalk covering went almost up to the edge of the bund entrance. The entrance through the bund had been largely filled in with soil and other material. It showed signs of new weed growth....."
- (4) Mr. Down also saw the "new" bund. He described it as follows:⁷ "...On my site visit I also saw the "new bund", which is referred to in the Defence. While walking on Omya Land around the TT periphery I was able to observe it from distances of around 200-300m from Omya Land. I took a photograph of it on my visit ... The bund is also visible on the left hand side in the centre of my photograph taken showing the chalk covered waste in the foreground at page 8. I recall that the bund was sited within about 80-100m of the Salt Lane entrance to Thameside Terminal and ran across the Thameside Terminal. It was probably up to about 4m high and around 80m long. I saw exposed large pieces of concrete, such as kerbstones, railway sleepers and similar. There was a light covering of soil or chalk over it. There was little or no vegetation on it."

He was tested on the evidence relating to the New Bund in cross-examination and confirmed what he had set out in his witness statement.⁸ The photographs which he took are in the digital bundle at pages 27 and 28.

- (5) Mr Ranjit Dhillon: in February 2017 Mr. Dhillon was the Claimant's Plant Manager based at their Steeple Morden premises at Royston, Hertfordshire. He has since left the employment of the Claimant. He attended site on 6 and 7 February 2017. His evidence concerns what he saw on those two occasions and is very much in dispute, it being the Defendants' case that he was not an honest witness. I reject that suggestion. In my judgment he was an entirely honest witness: however I do have to consider whether his recollection of what he saw is accurate. Importantly, he took a large number of photographs. These are at pages 2-18 and 34-38 of the digital photograph bundle. Further copies of the same photographs are in bundle 5 of the Trial Bundle: in this series Mr. Dhillon has added comments. I refer to Mr. Dhillon's evidence in more detail below.
- (6) Mr. James Hamilton: Mr Hamilton has worked for the Environment Agency for over 20 years. He and his employer were unwilling for him to provide a witness statement: accordingly the Claimant provided first a "Witness Summary" and then an "Amended Witness Summary" of the evidence which it was expected he would give. His evidence then took a somewhat unusual form, in that he was taken at

⁵ Witness statement paragraph 6

⁶ Witness statement paragraph 17

⁷ Witness statement paragraph 23

⁸ Transcript day 1/pages 179 to 183.

some length through the contents of the Environment Agency file, which contained evidence from his own personal experience (including photographs taken by him on 14 February 2017 at pages 50-60 of the digital photograph bundle and on 24 February 2017 at pages 61-71 of the digital photograph bundle) and matters reported to him or the Agency from various sources. This gives rise to the need to consider the status of this hearsay evidence.

Evidence from the Second Defendant

22. The only non-expert witness called by the Defendants was the Second Defendant himself. He provided a witness statement and also signed a Statement of Truth in an Amended Defence dated 7 October 2021 (the Statement of Truth in the original Defence was signed by the solicitor retained by the Defendants, but was, of course, authorised by the Defendants).

23. Until the first day of trial it was the Defendants' case that the waste might have been brought into Francis Quarry other than through or over the Thameside Terminal. Thus in the original Defence at paragraph 4(2) it is pleaded:

“Access to the Omya Land is obtained along a road which runs from the public highway, Salt Lane, to the East of Thameside Terminal and ending at the Quarry (“the Omya Access Road”). The Omya Access road is of sufficient width and quality to accommodate large vehicles, including lorries. The entrance to the road is clearly visible to any member of the public using Salt Lane.”

24. Then at paragraph 11(4) it was said:

“It is denied, as stated in sub-paragraph 19 b, that a “corridor” had been cut through the Bank. The photograph at page 9 of Annex E to the Particulars of Claim shows the full length of the Bank and was, according to the time stamp on the photograph, taken at 13.26 on 7 February 2017. The photograph does not show any “corridor”, nor any indication of recent excavation of the Bank either in the position alleged or at all. The photograph does not show any lorries or other vehicles in the vicinity of the Bank, despite the Claimant’s assertion that works to the Bank were ongoing on the date the photograph was taken.”

25. On the first day of trial, Ms Shea made this concession⁹:

“...following yesterday’s very helpful site inspection, which is helpful for all of us, I think, even those who have been before. The position of the defendants is as follows: we do not maintain that there must have been another access over the Omya land. We no longer maintain that. When we pleaded that we knew there was a road there, we didn’t realise it had been put in for remediation purposes, and so we can see that if that wasn’t put in until remediation took place, there wasn’t another access. So we withdraw that.

“We accept that the most likely explanation is that the lorries must have come through Thameside Terminal, that the waste must have been delivered by lorries coming through Thameside Terminal and the most likely explanation is that

⁹ Transcript day 1, page 8

somehow they were transferred from Thameside Terminal through or over the boundary bund, if you remember the boundary bund. We have no case, and it is for the claimant to suggest, how that happened, to establish how that happened, where that happened and when it happened, but we too cannot see any other way it could have been done.”

26. This concession was followed by an amendment to the Defence in the Amended Defence to which I have already referred. Paragraph 4(2) now read:

“Access to the Omya Land is obtained along a road which runs from the public highway, Salt Lane, to the East of Thameside Terminal and ending at the Quarry (“the Omya Access Road”). The Omya Access road now is of sufficient width and quality to accommodate large vehicles, including lorries, but it is admitted that as at the date the tipping is alleged to have occurred, there was no vehicular access to the Quarry along this route. The entrance to the road is clearly visible to any member of the public using Salt Lane.”

27. Paragraph 11(4) now read:

“It is admitted that the most likely route by which the waste material was brought into the Quarry was through ~~denied, as stated in sub-paragraph 19 b, that a~~ “corridor” had been cut through the Bank. It is denied that the Defendants created or subsequently filled in any corridor. No admissions are made as to the precise location of the “corridor”, its dimensions, nor the dates when it was created and in-filled. It is noted either in the position alleged by the Claimant or at all. that Tthe photograph at page 9 of Annex E to the Particulars of Claim shows the full length of the Bank and was, according to the time stamp on the photograph, taken at 13.26 on 7 February 2017. The photograph does not show any “corridor”, nor any indication of recent excavation of the Bank. The photograph does not show any lorries or other vehicles in the vicinity of the Bank, despite the Claimant’s assertion that works to the Bank were ongoing on the date the photograph was taken.”

28. In the light of this concession, aside from general evidence as to the running of the Second Defendant’s business interests through the First Defendant and other companies, the thrust of the Second Defendant’s evidence was that the Thameside Terminal had been dormant for a considerable period apart from some works to create the New Bund which were carried out on 7 February 2017. It was not the First Defendant or the Second Defendant who were responsible for the tipping of the waste: he could not say who did it, but it was not the Defendants.

29. The Second Defendant’s evidence simply cannot stand with the evidence of Mr. Mortley and Mr. Dhillon. It follows that, if I accept his evidence, I must reject that of those two witnesses, and, conversely, if I accept the evidence of those two witnesses, I must reject his evidence.

Expert Evidence

30. There were reports and a joint statement from two Civil Engineering Experts, Mr. Richard Spencer and Mr Stephen Swift. Neither was called to give evidence orally.
31. There were reports and joint statements from two Geologists, Mr. Adrian Wilkinson and Dr Graham Daws. They both gave evidence orally, Mr Wilkinson by remote link, and Dr Daws, after an initial unsuccessful attempt to adduce his evidence remotely, in person.
32. In the event little turns upon this expert evidence.
33. Before turning to consider the factual evidence in more detail, there are some general points with which I should deal.

Similar Fact Evidence

34. In paragraph 140 of the Claimant's written closing submissions, it is submitted: "There is a considerable amount of evidence relating to unlawful activities on the Thameside Terminal site before and after the trespass on Francis quarry was facilitated by access through the Thameside Terminal site. There is evidence of land use and development requiring planning permission and in respect of which no planning permission was granted and waste processing activity requiring permits issued by the Environment Agency and in respect of which no permits were granted."

Then at paragraph 155:

"It is submitted that the court may take account of D2's conduct in managing the operation of Thameside Terminal over 20 years and it is clearly probative when answering the question of whether or not he is the kind of individual who would lend himself to this serious environmental offending. The court may need to consider whether D2 is the kind of individual who might be involved in the unlawful dumping of c20k tonnes of waste. It is submitted that previous actions demonstrate that D2 has no regard for planning and environmental regulation. Despite previous court proceedings he continues unashamedly to undertake large scale unlawful activity (waste processing) on the site"

35. The Defendants take issue with the admissibility of this evidence.
36. On the view I take of the facts as I find them to be, I do not need to resolve this dispute. I have come to the conclusions which I have for the reasons which I give below without the need for assistance from this body of evidence.

Circumstantial Evidence

37. Relying upon the evidence from Mr. Hamilton as to matters on the Environmental Agency file, the Claimant relies upon matters which can be categorised as circumstantial evidence. Most of this evidence related to the source of the waste which was tipped into the Francis Quarry.

38. The Defendants object to the deployment of this evidence and, in any event, contend that little weight should be given to it.
39. Again, on the view which I have taken, it has not been necessary for me to seek to gain assistance from this evidence.

Hearsay/Anonymous Evidence

40. A further category of evidence to which the Defendants object is the body of evidence coming principally from Mr. Hamilton, but also from Mr. Mortley about reports from unidentified third parties of tipping going on said to be carried out using lorries bearing the “Andrews” marking.
41. Given the seriousness of the allegations in this case, and the very limited opportunity for the Defendants to test this evidence, I would be slow to place much if any reliance upon this evidence. In the event, with one exception, I do not find it necessary to do so.
42. The exception is that Mr. Mortley told the Court that his attention to the tipping that was going on resulted from what he was told by a woman walking her dog in the vicinity. I accept his account that it was this conversation which alerted him to the fact that something was going on and caused him to pay attention to what was going on. I do not rely upon the evidence of what the dogwalker said as being evidence in itself of what was actually going on.

The central factual core

43. Given the significant disagreements as to the reliability of the eye witness evidence, it seems to me important to start by considering the facts which by the end of the trial were not in dispute.
44. The first point is simply the volume of what was dumped: the quantity of waste was 19,345 tons. This would have taken about a thousand lorry movements if standard 20 ton lorries were used.
45. Not only was this an enormous logistical exercise in itself, the handling of the waste itself would have involved at least one if not more than one bulldozer.
46. Secondly, it appears to be common ground that the tipping took place over a period of some months. I accept Mr. Mortley’s evidence, which in this respect was not seriously challenged by the Defendants, that the tipping took place from about November 2016 and was complete by 7 February 2017.
47. Thirdly, it is now common ground that the waste was brought into Francis Quarry over the Thameside Terminal and via a corridor driven through the boundary bund.
48. Fourthly, in order for the volume of waste to be transported, the corridor must have been wide enough to accept tipper trucks.
49. Accordingly, creating the corridor was in itself a significant engineering exercise.

50. Fifthly, covering the waste with chalk was also a significant engineering exercise: the photographs show that after the waste had been dumped, the resultant pile was very neatly levelled off and covered in chalk. There is a dispute as to when this was done: in my judgment it is not necessary to decide exactly when this was done. For present purposes I note that this was a neatly and efficiently carried out exercise.
51. Sixthly, the refilling of the corridor was also in itself a significant engineering exercise, carried out with some care.
52. Seventhly, the Defendants had the resources to carry out these works. The First Defendant and other companies effectively controlled by the Second Defendant owned a large fleet of tipper trucks as well as owning suitable bulldozing equipment.
53. Finally, the Defendants were in the business of waste management – indeed on the day of the site visit which I attended there was work going on to break down waste into smaller elements.
54. The consequence of these uncontested and incontrovertible facts is that there are only two possibilities:
- Either
- (1) the Defendants were responsible for the dumping of the waste (at this stage I do not consider the position of the Second Defendant separately from that of the First Defendant);
- or
- (2) some person or persons unknown entered upon Thameside Terminal, carried out the substantial exercise of creating the corridor, over a period of several weeks dumped the waste in about 1000 lorry movements, then carefully covered up the waste with chalk and finally carefully closed off the corridor.
55. In considering these alternatives, it seems to me important to consider the submission made in paragraph 7(h) of the Claimant’s Closing Submissions, namely that the Defendants’ case involves the proposition:
- “That the unidentified perpetrators concealed the waste and rebuilt the bund for altruistic purposes there being no other discernible motive for remaining at the scene once the dumping had ceased.”
56. As the point was put by Mr. Bridge in his oral closing submissions on behalf of the Claimant, it is a common experience in the Crown Court to hear of burglars gaining entry to premises by breaking a window pane, but there is not much experience of burglars taking time to re-glaze broken window panes on the way out.
57. These cold facts are unpromising from the Defendants’ point of view, but there is conflicting evidence from the factual witnesses which I must consider.
58. In doing so, I bear well in mind the Defendants’ Closing Submissions about the weaknesses of factual evidence from eye witnesses: it is because I have those arguments

well in mind that I have started by looking at the facts which are not in dispute or not seriously capable of being disputed.

Mr. Mortley's Evidence

59. As I have already indicated, Mr. Mortley gave evidence remotely, but, despite some connection difficulties, his evidence came over clearly.

60. In his witness statement at paragraphs 10, 12 and 13, he said this:

“10. During December 2016 and January 2017, I observed lorries with the markings of the First Defendant reversing up to what looked like a ‘corridor’ cut in the earth bund separating the quarry from the Terminal site on the North boundary and tipping what I first thought was earth into Francis Quarry, as set out below.

....

“12. I carried out these observations, having taken the routes shown by the blue lines on Photograph 1 in the area marked ‘191-192’ and ‘197-198’. During November to January, I saw that there were many lorries bearing the markings of Andrews Excavations Limited tipping what appeared to be earth on to the boundary bund. Some weeks later, I was then able to see the tipping into Francis Quarry. I also heard and then saw the bulldozer referred to by my acquaintance [this is a reference to the dogwalker] levelling the loads that were being tipped in Francis Quarry. Whilst I was there, I say that the lorries were tipping into the Quarry and there was a bulldozer continually working in Francis Quarry.

“13. Because of the levels of the quarry and the surrounding land, it was only when I was standing on the highest points that I could see these operations”

61. In cross-examination this evidence was thoroughly (and properly) tested. Mr. Mortley's evidence orally was consistent with his written evidence.¹⁰

62. I accept that from the possible viewpoints above Thameside Terminal and Francis Quarry there are obstructions and limitations as to what can be seen. In particular I find that the location of the corridor was such that witnesses on the clifftop above Thameside Terminal would not be able to see along the whole length of the corridor in the boundary bund, because of a part of the cliff obstructing such a view.

63. However, what Mr. Mortley described was so graphic that it cannot be explained away as a mistake or some figment of a fading memory. It is not suggested that Mr. Mortley was a dishonest witness. As I have said, he is a man still in possession of his mental faculties, and I have no doubt that he accurately described what he saw. It is important to note that for the Defendants' purposes it would not be enough for me to conclude that he might be mistaken in some details: it would be necessary for me to conclude

¹⁰ See in particular transcript day 2, pages 108 to 111

that the broad picture that he described was unreliable. I do not so conclude: on the contrary I have formed the view that what he told me in writing and orally was credible.

Mr. Dhillon's Evidence

64. In contrast to the Defendants' submissions in respect of Mr. Mortley, it was submitted bluntly that Mr. Dhillon set out not to tell the truth.
65. It was not entirely clear to me why it was suggested that he had a motive to lie, but as I have already said, I formed the view that he was an honest witness.
66. He attended site on 6 February 2017 and then on the following day, 7 February 2017. He had been sent to site by Dr. Barrett to find out what was going on following a conversation between Mr. Mortley and Dr. Barrett in the previous week, on 3 February 2017.
67. His evidence as to what happened on 6 February is in paragraph 6 of his witness statement:

“At Thameside Terminal (“TT”), which is adjacent to the Omya Land, we saw an excavator in a parked up position on the TT site at the far end of the site. There were 2 men sitting by a gate who looked as though they were having a snack. We drove up to them about 50 yards into TT. One said “*where are you going?*” I said, “*We have been alerted to dumping of material, we have come to investigate*”. The man then said to me, words to the effect “*I can show you where the rubbish is*”. He took us further into TT and we walked towards the chalk cliff at the far end. On the right hand side, in front of the cliff, he showed us a heap of concrete sleepers and said words to the effect, “*this is the only stuff that we have dumped*”. It seemed as though he wanted to help. We were there for around 30 minutes chatting, trying to get to know them.”
68. In cross-examination there were some discrepancies between his oral evidence and his written evidence as to exactly who said what, but in my judgment nothing turns on those differences.
69. Importantly, in cross-examination he confirmed that on that first day he saw no excavation taking place, no lorries arriving or leaving, no lorries filled with earth and no lorries transporting earth towards the boundary bund.¹¹
70. Having reported a nil return on that first day, he was sent back to have another look on the following day. The picture on 7 February 2017 was very different.
71. As I have already said, there is a series of photographs taken by Mr. Dhillon on 7 February 2017: one set of copies of these photographs has his comments on them.
72. His evidence was that he saw (and photographed) an operation where a mechanical digger was taking earth from the southern cliff face of the Thameside Terminal. The earth was then loaded into tipper trucks which he saw reverse into a corridor in the

¹¹ Transcript day 2/page 57

boundary bund. He could not see what happened within the corridor, but he says that he observed the lorries returning empty.

73. The photographs show clearly that the lorries that he saw were Andrews lorries, i.e. the First Defendant's lorries.
74. This account is challenged by the Defendants. It was the Second Defendant's evidence that he sent his team to site in order to build the "New Bund". On his version of events the digger was excavating the contents of a spoil heap, those contents were loaded onto the lorries and then dumped to form the New Bund.
75. This version of events is so radically different from Mr. Dhillon's evidence that the Defendants could not sensibly suggest that he was just mistaken.
76. As I have said, no suggestion is put forward as to why Mr. Dhillon should lie, and I formed the view that he was an honest witness. It is also significant that his evidence entirely squared with the evidence of Mr. Mortley.
77. If Mr. Dhillon formed an intention to lie, he did so at a very early stage since a couple of days afterwards he prepared the set of photographs with comments on them. Of those, the most significant seems to me the one timed at 13.26 bearing three superimposed arrows above the boundary bund. Mr Dhillon's comments are as follows:
- "The bund seems to be a recent introduction, and on my visit it seems the lorries full of top soil were headed in this direction, although at the time of the visit I was more focusing on the activities on the other side of the land. The trees had clearly been pushed over with the force of the earth being dumped on them and clearly tyre marks and visible on the area in question."
78. In those comments Mr. Dhillon was clearly describing movement of earth in the direction of the boundary bund not the New Bund.
79. In another photograph taken at 14.13 the comment is:
- "One of the dump trucks is being loaded while the other is starting to reverse to discard his load, he reverses over the road and I presume onto the bund already created."
80. The angle and position of the lorry in the photograph indicate that if the lorry was reversing, it was reversing in the direction of the boundary bund, not the New Bund. The reference to the road can only be to the spine road which runs through the centre of the Thameside Terminal: if the lorry was going in the direction of the New Bund it would be unnecessary to cross over that road, whereas if the lorry was going in the direction of the boundary bund it would be necessary to do so. Whilst in cross-examination¹² Mr Dhillon resiled somewhat from what he said in his original notes, it seems to me looking at the photograph that what he said originally was true: it

¹² Transcript, day 2 pages 6-13

the lorry had been going simply from the area of excavation to the New Bund, the angle of the lorry in this photograph would have been somewhat odd.

81. In my judgment, these near contemporaneous comments by Mr. Dhillon support the evidence given by him in writing and orally.
82. As I have said above, the differences between the Second Defendant's evidence and that of each of Mr. Mortley and Mr. Dhillon are so fundamental that there is no middle road: either I accept the Second Defendant's evidence in preference to their evidence or I reject their evidence. There is no middle road.
83. Placed in that extreme position, I have firmly concluded that I cannot accept the Second Defendant's evidence. Not only do I accept that both Mr. Mortley and Mr. Dhillon were honest witnesses, but such hard evidence as there is, namely what I have described above as the "central factual core", Mr. Dhillon's photographs, and Mr. Dhillon's near contemporaneous comments, fully support their written and oral evidence.
84. It follows that I reject the Second Defendant's evidence that what his team were doing on 7 February 2017 was constructing the New Bund. On the contrary, the evidence points all one way, namely that what was going on was closing up the corridor through the boundary bund.

The position of the First Defendant

85. As I have said, it was the Second Defendant's evidence that the Thameside Terminal had been dormant for a considerable period and that what was happening on 7 February was the creation of the New Bund.
86. My acceptance of Mr. Mortley's evidence means that I must conclude that, contrary to the Second Defendant's evidence, far from the site having been dormant, for some weeks before 7 February, a substantial exercise of dumping waste through the Thameside Terminal and into Francis Quarry had been going on using the First Defendant's lorries.
87. There is no suggestion that at any time the First Defendant's lorries and other equipment were being operated other than by the First Defendant's employees in the course of their employment, which is the inference naturally to be drawn from the fact that lorries owned by the First Defendant were being used, and, indeed, the Second Defendant confirmed in cross-examination that those driving on 7 February were employees of the First Defendant¹³.
88. Accordingly, for the above reasons I hold that the First Defendant is liable to the Claimant.

¹³ Transcript, day 4 pages 160 to 163

The Position of the Second Defendant

89. At paragraph 157 of the Claimant's Closing Submissions the Claimant sets out the principles which it says I should apply in deciding whether the Second Defendant is also liable:

"D2 as Joint Tortfeasor

"This issue is addressed above and was further dealt with in C's detailed opening submissions at para 15 onwards. As such some of the contents are repetitious but are repeated with the intent of assisting the court. A relevant section of the opening is extracted below:

- "1. At 4-03 of Clerk and Lindsell on Torts, 23rd Edition it states:

'If the same evidence would support an action against each, they are joint tortfeasors. They will be jointly liable for a tort which they both commit or for the commission of which they are both responsible, but not where each is independently responsible for a separate tort and the two torts combine to produce the same damage.'

- "2. It goes on at 4-04:

'Thus, the agent who commits a tort on behalf of his principal and the principal himself are joint tortfeasors...a company director and the company itself may be regarded as joint tortfeasors where the director "is sufficiently bound up in [the company's] acts" to make him personally liable. This will certainly occur where the wrongful acts complained of arise from a director's participation in a manner that goes beyond the mere exercise of his power of control through the constitutional organs of the company.'

- "3. The principles to be applied by the court in determining whether a company director ought to be liable as joint tortfeasor for the wrongs of their company were considered in the judgment of Pumfrey J in Koninklijke Philips Electronics NV v Princo Digital Disc GmbH [2003] EWHC 2588 (Pat). In that judgment Pumfrey J referred to the judgment of Chadwick LJ in MCA Records v Charly Records [2001] EWCA Civ 1441 at paragraphs 48-53 which gave the following guidance (abridged for ease of reference):

48. It is because there is a balance to be struck on the facts of each case that it is dangerous for an appellate court to appear to attempt a formulation of the principles which may come to be regarded as prescriptive. But I think it can be said with some confidence that the following propositions are supported by the authorities to which I have referred.

49. First, a director will not be treated as liable with the company as a joint tortfeasor if he does no more than carry out his constitutional role in the governance of the company — that is to say, by voting at board meetings...

50. *Second, there is no reason why a person who happens to be a director or controlling shareholder of a company should not be liable with the company as a joint tortfeasor if he is not exercising control through the constitutional organs of the company and the circumstances are such that he would be so liable if he were not a director or controlling shareholder. In other words, if, in relation to the wrongful acts which are the subject of complaint, the liability of the individual as a joint tortfeasor with the company arises from his participation or involvement in ways which go beyond the exercise of constitutional control, then there is no reason why the individual should escape liability because he could have procured those same acts through the exercise of constitutional control...*

“4. The third and fourth principles to which Chadwick LJ referred were specific to the context of a dispute related to intellectual property. However, it is submitted that the court may be assisted by extracting the core principle in any event:

51. *Third, the question whether the individual is liable with the company as a joint tortfeasor — at least in the field of intellectual property — is to be determined under principles identified in CBS Songs Ltd v Amstrad Consumer Electronics Plc [1988] AC 1013 and Unilever Plc v Gillette (UK) Limited [1989] RPC 583. In particular, liability as a joint tortfeasor may arise where, in the words of Lord Templeman in CBS Songs v Amstrad at page 1058E to which I have already referred, the individual “intends and procures and shares a common design that the infringement takes place”.*

52. *Fourth, whether or not there is a separate tort of procuring an infringement of a statutory right, actionable at common law, an individual who does “intend, procure and share a common design” that the infringement should take place may be liable as a joint tortfeasor...*

“5. In the present case, as set out at paragraph 39 of the Particulars of Claim, C says that D2 was bound up in the wrongdoing of D1 and is personally liable as a joint tortfeasor. C says that the dumping at Francis Quarry took place using vehicles owned and controlled by D1, across land where D1 operated under the instruction of D2. Thameside Terminal was owned by Thameside Estates Limited a company whose directors were D2’s wife and son (see paragraph 5 at [3/2]).”

90. At paragraph 222 of the Defendants’ Closing Submissions this statement of the law is accepted. The Defendants then submit at paragraphs 223 to 227:

“223. Ds emphasise the following points:

“(1) C must prove that D2 “intends and procures and shares a common design” that the trespass should have taken place (per CBS Songs v Amstrad, per Lord Templeman at p. 1058E, cited by Chadwick L.J. in MCA Records v Charly Records [2001] EWCA Civ 1441 at [51]).

“(2) In order to be liable as a joint tortfeasor, a director must have participation or involvement in the wrongdoing in ways which go beyond the exercise of constitutional control (see per Chadwick L.J at [50]).

“224. It follows that the mere fact that D2 is “hands on” in the management of D1’s business is not sufficient to establish personal liability. The issue is, rather, whether D2 had some direct involvement in arranging or directing the trespass.

“225. C’s submissions on this point (at [159] – [163]) are, therefore, directed at the wrong question. They establish only that D1 is, in a very general sense, in control of D2’s business operations.

“226. This is a very different thing from evidence which establishes that “*in relation to the wrongful acts which are the subject of complaint*” (to borrow Chadwick L.J.’s phrase), D2 had any active involvement or participation. There is simply no evidence to show D2 was so involved and it would be wrong to make that inference, particularly given the serious nature of the incident and the potential consequences that might follow.

“227. In the circumstances, C has failed to discharge the evidential burden of demonstrating that D2 was actively involved in any trespass, even if the Court finds that D1 (presumably via drivers which it employed) was responsible for trespass.”

91. I accept the central significance of the factors referred to at paragraph 223 of the Defendants’ Closing Submissions. Applying those factors, I am satisfied that the case against the Second Defendant is also established. In doing so I have in mind the following matters:

(1) At paragraphs 6 and 7 of his witness statement he said:

“6. AEL is currently the primary limited company that I operate my business through. Prior to trading through companies I was a sole trader – I originally started my haulage business with one lorry as an owner-driver.

“7. I am currently the sole director of AEL and am in charge of its operations

(2) On day 4 of the trial in cross-examination the Second Defendant gave this evidence in respect of what was happening on 7 February 2017:

“Q. Well, because there are two witnesses at least who say that they were doing something other than what you say they were doing, and they would have been able to give evidence to his Lordship about what they were doing.

“A. The drivers was in there and the machine driver under my instructions, they was told what to do and they was doing as they was told.”

(3) On the following day, the Second Defendant gave this evidence¹⁴:

“Q. How does a board meeting take place with AEL? What happens on the day of a board meeting on the day of a board meeting?

“A. We don’t have board meetings sir.

¹⁴ 14 Transcript, day 5, pages 63 to 64

“Q. Why ... not?”

“A. Why not? Because I’m the director of the company. I make the decisions. I don’t need to have board meetings.

“Q. Do you have minutes of the decisions that you make?”

“A. No I don’t sir, no.

“Q. Right. So in reality, although it is a company, its you doing what you want and then the accountants sorting it out afterwards in the appropriate fashion, dotting the Is and crossing the Ts to make sure it complies with company law?”

“A. Exactly right, my Lord.”

(4) Also on day 5 the Second Defendant gave this evidence¹⁵:

“JUDGE TER HAAR: Mr Andrews, we were told by Mr [Dhillon], and I know you don’t accept his evidence but there are parts of it that you accept, and he attended on Monday 6 and Tuesday 7 February 2017.

“A. Yes. I have seen it in his statement.

“JUDGE TER HAAR: And he described what he saw going on on both of those days.

“Now, do you take issue with his evidence that there were some of your guys on site on the 6th as well as the seventh?”

“A. There possibly was sir. They possibly - - I believe someone went down to diesel some machines up.

“JUDGE TER HAAR: Right. So if there was anybody, it was simply to fuel the machines.

“A. That’s correct sir, make sure the machines started.

“JUDGE TER HAAR: Right. So whatever operations were being carried out and being done on the 7th were being done on your instructions?”

“A. On the 7th under my instructions sir, yes.

“JUDGE TER HAAR: Can you be as precise as possible as to what it is exactly you told them to do.

“A. I told them to go to the back of our site. I believe was you calling that the east part of the site was it?”

¹⁵ 15 Transcript, day 5, pages 85 to 89

“JUDGE TER HAAR: It is the eastern end. You come in from the west and the eastern end –

“A. Go down the end of the [spine] road and where you see pictures of the machine, digging there, the excess spoil what was there when it was the old oil terminal. There I told them to dig it out of there, run it up and make a bund up there ready so we could spread it

“....

“JUDGE TER HAAR: (Inaudible) any reason at all why [if] they were carrying out your instructions faithfully, they should be going anywhere near that area?

“A. Under no circumstances they would have been in that area, my Lord.”

(5) From this evidence I conclude that the Second Defendant kept close personal control over what was being done by and within his business empire, and that in particular what was being done on site on 7 February 2017 was being done on his specific instructions: it was not suggested that there was any possibility that the team working on site on that day were doing anything other than acting on the Second Defendant’s personal instructions.

(6) If the team working on site were working on the Second Defendant’s instructions on 7 February 2017 to cover up the dumping exercise which had been carried out, it is a natural inference that the dumping exercise (and the initial exercise of opening up the corridor) were also done on his personal instructions.

Conclusion

92. For the above reasons I conclude that both Defendants are liable to the Claimant for the trespass that occurred on and into the Claimant’s land.

93. Quantum is agreed in the sum of £765,094.40.

There will be judgment for the Claimant against both Defendants in the sum of £765,094.40. I will hear submissions as to ancillary matters including interests and costs.