



Neutral Citation Number: [2024] EWHC 3215 (TCC)

Case No: HT-2024-000326

Previous Case No: HT-2023-MAN-000021

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT (KB)**

Rolls Building,  
London, EC4A 1NL

Date: 13 December 2024

**Before :**

**His Honour Judge Stephen Davies sitting as a High Court Judge**

**Between :**

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**BUCKINGHAMSHIRE COUNCIL**

**Claimant**

**- and -**

**FCC BUCKINGHAMSHIRE LIMITED**

**Defendant**

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**Justin Mort KC** (instructed by **Sharpe Pritchard LLP, London**) for the **Claimant**  
**Fiona Parkin KC & Samar Abbas Kazmi** (instructed by **Pinsent Masons LLP, Manchester**) for the  
**Defendant**

**Approved Judgment**

This judgment was handed down remotely at 10.30am on 13 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**His Honour Judge Stephen Davies:**

1. On 30 August 2024 I held a further case management conference to deal with consequential matters following the trial which took place in the Manchester TCC in April 2024 and which dealt with most, but not all, of the matters in dispute. My trial judgment can be found at the National Archive under neutral citation number [2024] EWHC 1552 (TCC).
2. As part of my judgment I awarded the claimant (**BC**) the principal sum of £8,985,790.50 against the defendant (**FCCB**). It was always known that matters of interest would need to be addressed post-judgment. That sum was paid on 2 September 2024. A further sum due following the judgment was later identified by FCCB in the sum of £91,088.89 and paid on 11 November 2024.
3. At the hearing on 30 August 2024 I was concerned that the issues in relation to interest had not been fully argued out and that they were sufficiently complex, and the claim for interest sufficiently valuable (BC was claiming £1,853,246.97, with a knock-on effect for any further recoveries following trial number two), to justify a further round of submissions and my addressing the issue in a separate judgment.
4. Counsel provided further submissions and, after a delay which appears to have resulted from difficulties in communications following the transfer back to the London TCC, I now produce this judgment on interest.
5. The claim for interest as advanced in correspondence following the trial judgment was advanced as a claim for contractual interest, with interest running from the final day in March of each of the relevant contract years in respect of which the court has determined that BC was underpaid by FCCB, and with interest being claimed at 2% above Bank of England base lending rate (the “**prescribed rate**”, as defined in the waste management project agreement (**the PA**) entered into on 17 April 2013) on a compounded basis.
6. FCCB accepts that BC is entitled to interest on the sums awarded at the prescribed rate, but denies that it is entitled to interest from the dates claimed or to compound interest. FCCB’s case is that interest should only run from the date when I handed down judgment (on 21 June 2024) and that interest should not be compounded.
7. The claim for interest is pleaded at paragraph 60 of the Amended Particulars of Claim as being made under clause 73 of the PA, with the due date for payment under paragraph 73 being identified as a specified date, in some cases amended, following the end of each financial year. These dates are not all the same and BC did not explain in the Amended Particulars of Claim how they are arrived at. FCCB made the same point in its Amended Defence, which included various denials and non-admissions in relation to interest, but no positive case. In its Amended Reply BC pleaded that the parties had agreed the amended dates following an agreement between the parties that these were the due dates. Nothing further was said about this by either party.
8. Clause 73 of the PA, headed “Late Payments”, simply provides that: “Unless otherwise provided, the Parties will pay interest on any amount payable under this Contract not paid on the due date for the period from that date to the date of payment at a rate equal to the Prescribed Rate ...”

Approved Judgment

9. It does not, therefore, provide for payment of compound interest. Nor does it define the “due date”.
10. The principal payment provisions are to be found in clause 71 of the PA, headed invoicing and payment.
11. Clause 71.1 provided that: “The Authority shall pay the Contractor (or (where such amount is a negative sum) the Contractor shall pay the Authority) the Monthly Unitary Charge in respect of each Payment Period, calculated in accordance with Schedule 15 (Payment Mechanism). The Annual Unitary Charge shall be the sum of these Monthly Unitary Charge payments in the relevant Contract Year”. (I shall refer to the Monthly Unitary Charge for short as **MUC** and the Annual Unitary Charge for short as **AUC**).
12. Clause 71.2 required FCCB to submit to BC no later than 10 business days following the end of each Payment Period a report showing “individually, each item taken into account in calculating the Monthly Unitary Charge pursuant to paragraph 3 of Schedule 15 (Payment Mechanism)” and “an invoice for the amount (if any) shown by the report as owing by the Authority to the Contractor or by the Contractor to the Authority (as applicable)”.
13. Paragraph 3 of Schedule 15 made clear that the MUC was to include the Third Party Income Share (**TPIS**) which, as I held in my trial judgment, FCCB had failed to do to the full extent that it was required to do, on a proper interpretation of the PA, for each of the relevant contract years the subject of the claim.
14. By clause 71.6 of the PA payment was to be made “no later than the final Business Day of the Month relating to the Payment Period which is the subject of the relevant invoice”.
15. FCCB in its submissions identifies a discrepancy between the payment date and the report and invoice dates, on the basis that paragraph 71.6 would appear to require payment to be made at month end, whereas under paragraph 71.2 the report and invoice would not be due until 10 business days after month end.
16. BC has not fully engaged with this point in its submissions. It is not a point which has been pleaded by FCCB, however it must be said that the interest claim has not been pleaded out in detail by any party and this does appear to be a point of pure interpretation of the PA which I am satisfied I should, therefore, entertain.
17. In my judgment the answer to this is to be found in the procedure in relation to disputed amounts, at paragraphs 71.7 and following of the PA, under which BC was obliged to give notice of disputed amounts within 10 business days of receipt of the report and invoice and pay the balance “on the due date as set out in clause 71.6”. Applying a logical and purposive construction in my judgment the only credible answer is that the due date must be the final business day of the month following the payment period month in question. That allows the report and invoice to be submitted, disputes identified and communicated, and payment made on the last business day of the month.
18. I appreciate that this involves a certain amount of re-writing of clause 71.6. Nonetheless, on the basis that something must have gone wrong with the drafting of this clause, which makes little or no sense on a literal reading, it is a preferable construction to reading the due date as being the actual month end, for the reasons identified by FCCB. It is also

Approved Judgment

consistent, in the context of this case, with paragraph 11.6 of Schedule 15 which requires FCCB to “calculate the Third Party Income Share no later than ten Business Days after the end of the relevant Contract Year, which shall reflect the agreed actual figures for the relevant Contract Year”. An obligation to pay on the last business day of the end of the month following the end of the relevant contract year is more consistent with what the parties must have intended, looking at matters objectively, in relation to the ascertainment and payment of TPIS at the end of the year.

19. If I am wrong about this, then the due date must be either 10 business days following the end of the month, i.e. the date of the report and invoice or, alternatively, by adopting a literal reading of clause 71.6 and taking the actual month end, both of which are less favourable to FCCB. On any view, I refuse to accept that on a proper interpretation of the PA the end result is that there is no due date at all. This point is not, therefore, a knock-out blow to BC’s interest claim.
20. Further, however, FCCB submits that BC did not follow the disputed amounts procedure in clauses 71.7 to 71.11. It is not disputed that it did not. Insofar as BC may say that this is because FCCB did not disclose the true position in relation to TPIS, that is irrelevant. As FCCB submits, this is not a case where BC has pleaded a case that FCCB was acting in a deliberately underhand manner in this respect and, as I held at paragraph 84 of my trial judgment, it followed that it was not a matter for determination at trial.
21. FCCB also submits that in the circumstances clause 71.12 cannot apply, because that clause only applies: “If the determination of any dispute conducted pursuant to Clause 71.11 (Dispute) shows that: 71.12.1 the Authority has withheld any amount which the Contractor was entitled to be paid; or 71.12.2 the Contractor has claimed under Clause 71.2 (Report and Invoice) any amount which it was not entitled to be paid”.
22. I accept that submission. It follows, I also accept, that BC has no right to claim compound interest under clause 71.12.
23. However, I am satisfied that clause 71.17 applies. This provides: “In the event that any amount ascertained under this Clause 71 (Invoicing and Payment) is subsequently adjusted or corrected as a result of any error, further information, agreement or determination of a dispute, an appropriate balancing payment shall be made (together with any interest payable thereon at the Prescribed Rate) to or from the Contractor as agreed or otherwise required by this Contract”. This clause applies regardless of whether or not the disputed amounts procedure was implemented.
24. This clause also provides a separate and freestanding right to recover interest at the prescribed rate, which does not in terms require a due date to be identified. It follows that the start point may simply run from the date the actual payment in question was made. I accept that if necessary BC should be entitled to rely on clause 71.17, even though it has not pleaded reliance on that clause. As indicated, I am going to determine the interest claim on the basis of the submissions made, based upon the true interpretation of the PA and upon facts which are plainly undisputed, although I will not make findings on facts which were not pleaded nor the subject of determination in the judgment trial. In any event, clause 71.17 only assists BC to the limited extent identified above, because it does not allow a claim for compound interest.

Approved Judgment

25. As FCCB submits, it is apparent from clause 71 that the parties have chosen to delimit the circumstances in which compound interest can be recovered. They are not circumstances which apply here. It follows that compound interest is not recoverable. It is irrelevant, I am satisfied, that FCCB paid monies by way of interest following the earlier judgment of O'Farrell J on a compound basis. No proper legal basis for seeking to hold FCCB to the same approach here has been pleaded or otherwise articulated.
26. Finally, on the question of contractual interest, FCCB submits that in the context of this case the only due date can be the date when the court handed down judgment, because before this date there was no contractual obligation upon FCCB to have made a payment to BC in relation to disputed TPI amounts.
27. In my judgment this submission is misconceived. What FCCB was obliged to do was to pay the MUC and AUC calculated in accordance with Schedule 15 and to provide a report under clause 71.2.1 which showed the items taken into account in calculating both under paragraph 3 of Schedule 15. Based on my trial judgment, those ought to have included the amounts I have decided FCCB was required to include on a proper interpretation of the PA. It follows that there was a contractual obligation to pay those sums on the relevant due date (or the date when payment was actually made, one way or another).
28. FCCB cannot possibly say that because its liability to pay those amounts had not been accepted by it or determined by the court at that point it was not contractually obliged to do so. That would make a mockery of clauses 71.17 and 73 and, indeed, would be inconsistent with the disputed amounts provisions providing for payment not only of interest but of compound interest in the event that a dispute was referred to dispute resolution under those provisions. Insofar as relevant, FCCB has not pleaded or made good a case that it made the payments and issued the reports in good faith, even if – in some unexplained way – that operated so as to prevent it from being under an obligation to make payment and provide reports in accordance with its contractual obligations, properly interpreted.
29. Lastly, whilst I accept that BC cannot now run an unpleaded alternative claim under the Late Payment of Commercial Debts (Interest) Act 1998, it did plead an alternative claim under section 35A of the Senior Courts Act 1981. If I am wrong in my above analysis of the contractual position I would exercise my discretion under that section to award interest at the prescribed rate (i.e. 2% above base) from the last business day of the month following the end of the month in question.
30. It follows that BC is entitled to interest as above, which must be recalculated in accordance with this judgment.
31. In the draft judgment I invited the parties either to reach agreement and submit an agreed order, or submit written submissions with accompanying calculations following promulgation of this draft judgment. The parties have done so,