Neutral Citation Number: **[2025] EWHC 311 (TCC)**

Case No: **HT-2024-000326**

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **6 February 2025**

Before :

His Honour Judge Stephen Davies (sitting as a High Court Judge)

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Between :

Buckinghamshire Council	**Claimant**
- and -	
FCC Buckinghamshire Limited	**Defendant**

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- -

Justin Mort KC and John McMillan (instructed by **Sharpe Pritchard LLP**) for the **Claimant**
Fiona Parkin KC, Zulfikar Khayum, George Mcdonald and Samar Abbas Kazmi
(instructed by **Pinsent Masons LLP**) for the **Defendant**

Hearing dates: **5 - 6 February 2025**

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APPROVED JUDGMENT NUMBER TWO
(STRIKE OUT / SUMMARY JUDGMENT ON THE MERITS)

His Honour Judge Stephen Davies **Thursday, 6 February 2025**
(**11:44**am)

Judgment by **HIS HONOUR JUDGE STEPHEN DAVIES**

1. This is my judgment on the defendant's application for a strike out of schedule 4 of the claim under CPR 3.4 and/or for summary judgment in relation to schedule 4 under CPR Part 24.
2. It concerns the claim as advanced by claimant in what is now its amended schedule 4 of its claim dated 24 January 2025, in which it makes a claim in contract, which was initially pleaded in addition to the claim in restitution but where the claim in restitution has recently been discontinued.
3. The application as issued was made in relation to both claims, but given the discontinuance of the restitution claim, it now proceeds in relation to the contract claim alone.
4. The relevant principles in relation to striking out claims and seeking summary judgments on claims are well understood and there is no need for me to repeat them in this judgment.
5. This is not a case where there is any difference between the arguments advanced under CPR 3.4 and those advanced under CPR 24, because the essence of the defendant's case is that the claim as advanced is fundamentally inconsistent with the provisions of the project agreement as properly analysed and construed.
6. As with the previous judgment which I gave earlier today in relation to the defendant's application to strike out for abuse of process, I will not repeat my previous substantive judgment of 21 June 2024 (neutral citation [2024] EWHC 1552 (TCC)) given following the April 2024 trial. That is to be taken as read.
7. I can, however, briefly summarise the case as pleaded in amended schedule 4.
8. First, under the project agreement the defendant recovers significant income for a part of the service provided, namely haulage of third party waste from the two contract waste transfer stations (WTSs) to the waste treatment facility (WTF) at Greatmoor.
9. Second, in fact it has not undertaken that third party waste haulage from those WTSs to Greatmoor, either as envisaged under the project agreement or, since 1 April 2023, at all.

10. Third, however prior to 1 April 2023 the defendant has deducted third party waste haulage costs from TPI without giving credit for the income received under the project agreement or otherwise.
11. The claimant seeks a determination of this income and either repayment or a credit of such amounts in order to calculate TPI or deductible costs therefrom.
12. The claim refers to my analysis at paragraph 76 ff of the June 2024 judgment for a summary of the contract structure in relation to third party waste haulage. The claimant refers to the O&M model which shows the included rates for third party waste from the contract WTSs to Greatmoor and, using the figures in that model, says that this shows, in broad terms, receipt of some £900,000 per annum (before indexation) received since 2016.
13. There is also further reference to the compensation payment in relation to Amersham, covering the loss of third party waste haulage income from Amersham under the deed of variation which, since April 2017, has been paid at around £300,000 per annum (before indexation).
14. In paragraph 50, it is pleaded that under the June 2024 judgment the court has determined that the defendant is under a contractual obligation to haul third party waste from High Heavens to Greatmoor and it recovers the cost of doing so.
15. Then, coming to the nub of the pleaded case, in paragraph 55, it is contended that, as a matter of construction of the project agreement, for the purposes of calculating TPI and/or the costs of generating TPI (the deductible costs – see paragraph 192 ff of the June 2024 judgment), the defendant must give credit for third party waste haulage income received under the project agreement on the basis as pleaded in paragraph 56.
16. Paragraph 56 pleads that the purpose of the provisos in relation to the ascertainment of deductible costs, on the defendant's case, is to prevent the defendant from recovering costs twice. That purpose would be frustrated if it could retain such income. Clear words are required to achieve such a purpose. The claimant's case is supported by the definition of TPI and in particular proviso (b) as

regards the restrictions on deduction of such costs, and further in particular because the reference to costs in proviso (b) must mean net cost, i.e. cost net of income.

17. On this basis, the claimant seeks a determination of the payments from the period June 2016 to March 2024, and either repayment of such sums for breach of contract or credit for such sums in calculation of the costs of haulage of third party waste.

18. The claim value is pleaded at approximately £9 million for third party waste haulage income or deductions, and approximately £3 million in relation to the Amersham compensation. On any view, it is a relatively substantial value claim.

19. I cannot in the time available give a detailed analysis of the defence to schedule 4. It is set out in some detail in the skeleton argument produced by the defendant for this application. In summary, the primary case is that the project agreement is a detailed and comprehensive agreement which expressly and exhaustively defines the circumstances in which any repayment or credit could be made. Given the absence of any express provision for this to be done in relation to the claim asd advanced, there is no credible basis for making this claim.

20. The defendant's key arguments as summarised in paragraph 19 of its skeleton are, firstly, that the claimant has not identified any express provision of the project agreement which obliges the defendant to calculate third party income (TPI) correctly, such that an incorrect calculation of TPI by the defendant would, in and of itself, entitle the claimant to claim damages or repayment or a credit. Secondly, on a true and proper construction of the project agreement, including in particular the clause 71 payment regime, there is no obligation on the part of the defendant to calculate TPI correctly.

21. Thirdly, the defendant relies upon clause 116 of the project agreement, "Exclusive Remedies and Accrued Rights" and, in particular, section 116.1 which, as summarised, provides that save for other express rights given to the claimant under the contract the sole remedy for a failure to provide the

services is the operation of clause 71, invoicing and payment, and schedule 15, the payment mechanism.

22. Clause 71.1 is what provides for the payment of the unitary charge to be calculated in accordance with the payment mechanism in schedule 15.

23. It is perhaps also worth referring to clause 71.16, which provides that the ascertainment of payment is without prejudice to the defendant's rights under this contract to dispute any such amounts as not being in accordance with this contract, and also 71.17, which provides that in the event that any amount ascertained under clause 71 is subsequently adjusted or corrected as a result of, amongst other things, the determination of a dispute, an appropriate balancing payment shall be made.

24. The defendant refers to the payment mechanism and submits that if one works through the detailed calculation provisions of that schedule, there is nothing which would allow the deduction of the current claim that the TPI share is an addition not a deduction from the payment and that the Amersham compensation payment is also an addition and not a deduction.

25. In effect, the defendant says that the claimant's approach seeks to ride roughshod over these detailed provisions, which make clear what can be added and what can be deducted.

26. In the course of oral submissions, Ms Parkin has made a number of further specific points.

27. First, that there is no contractual obligation to transfer third party waste. That, however, in my judgment depends on a close analysis of the contract overall and the question as to what the proper interpretation and analysis of the provisions of the contract are, in particular in relation to the schedule relating to the operation of the contract WTSs and the transportation of haulage from those WTSs to Greatmoor.

28. In my judgment, especially given the views that I have expressed in my June 2024 judgment, that this is an issue which is plainly arguable as a matter of contract interpretation.

29. Second, that if one tracks through the details of the contract, in particular the amended version post the Amersham deed of variation, it is quite clear that in fact no actual payments have been made by the defendant under the payment mechanism (paymech).

30. Mr Mort has riposted that that point is only made good by reference to what are referred to as band one payments and that, on instructions, he says that that is not accepted to be the case in relation to the other bands.

31. That issues brings me onto a more general observation which I should make in relation to this application. Mr Mort has drawn my attention to the fact that the application as made did not contain witness evidence or any other detailed material in support, whether attached to the application in the form of a witness statement or in the form of a letter or a skeleton argument served with the application, which set out in clear terms the specific basis on which the application was made. It simply referred to specified paragraphs of the defence to the schedule 4 claim, without further elucidation.

32. No reference was made to the Reply to Defence to set out in terms which particular provisions of the contract were relied upon and for which particular reasons it was said that what was said in the Reply was simply unarguable.

33. In summary, Mr Mort submits that the first real detail as to the basis for this application came in the skeleton argument served by the defendant last Friday 31 January 2025 before the hearing started yesterday on the Wednesday 5 February 2025.

34. Whilst it is true of course that both parties are extremely familiar with this case, in particular the contract and the underlying circumstances, and the claimant had the opportunity to look at what was pleaded in the Defence, and thus to anticipate to a large extent what was likely to be said, nonetheless it is worth observing that that what the defendant is seeking to do on this strike-out application is to conduct a summary analysis of a very complex contract and to seek to persuade me at this stage that the contractual arguments advanced by the claimant simply cannot succeed.

35. Whilst it is perfectly entitled to do so, it is also worth noting that in the course of the April 2024 trial and in the production of my June 2024 judgment, it became clear to me and - insofar as it was not already apparent - to the parties, that this very detailed contract is not, if I may put it neutrally, entirely clear and that there are a number of complex issues to resolve.

36. Whilst the court is exhorted to be robust and to grasp the nettle where it is clear there is a short and self-contained question of contract interpretation if the court is clear that there is only one real answer, equally, in my judgment, the reverse is true. If the court is not satisfied that this is such a case, and if the court is instead satisfied that the answer can only be revealed by the sort of detailed analysis and time for reflection that took place in and after the April 2024 trial, then the court should not rush to judgment on an application such as this.

37. This consideration applies to the submissions made by Ms Parkin in relation to such matters as the change procedure in the contract and to the analysis of how, applying a proper approach to the factual matrix, the Amersham deed of variation is to be construed.

38. In short, it seems to me that if the claimant's case as to the construction of the contract in relation to credit or repayment in relation to income received for haulage from the TWSs to Greatmoor is right, then its right to repayment or to a credit is, at least arguably, an express right given to it under the contract. And if that is so, then by reference to the contractual provisions I have already indicated, those are deductions or allowances which were required under the contract to have been made at the time, even if not expressly identified in the payment mechanism. And it follows, in my judgment, that the claimant would be at least arguably entitled to recover them under clauses 71.16 and 71.17.

39. Whilst I appreciate that the claimant has a lot of hard lifting to get its construction case to work alongside and notwithstanding the detailed and complex provisions of the project agreement to which I have been referred, it does not seem to me that I can safely conclude at this summary stage that it has no realistic prospect of doing so.

40. It is also worth observing that these points were not raised as defences to the first action, which was determined by Mrs Justice O'Farrell, or in relation to the matters determined in the April 2024 trial.

41. Further, similar submissions were made in relation to some of these points in relation to the post-judgment dispute as to interest and, in my judgment on interest (at [2024] EWHC 3215 (TCC)), I held in paragraphs 23 and 24 that clause 71.17 provided a separate and free standing right to recover overpayments where any amounts ascertained are subsequently adjusted as a result of the determination of a dispute, regardless of whether or not the disputed amounts procedure was implemented.

42. Standing back, it may be observed that the defendant's case would produce a somewhat surprising result, in the sense that if the claimant was right on its case in relation to the proper interpretation of the contract, then the defendant could nonetheless simply retain these monies, even if they ought not to have been retained or if credit should have been given in the first place.

43. A further point is this. Ms Parkin has submitted that a claim for repayment for breach of contract or a claim for a credit under the contract is not a claim which is known to the common law and there is no claim as such pleaded for damages for breach of contract.

44. But I am not prepared to accept that submission as unarguably correct. If, as here, there is a detailed contract, under which a party in the position of the defendant is required to produce payment applications in accordance with the terms of the contract, then if they submit payment applications which claim amounts which are not in accordance with the provisions of the contract, then in my judgment the other party who has paid is entitled to say subsequently that the application was overstated and the payment should not be recovered. In my judgment that is at least arguably a contractual right which exists, whether it is identified as a claim for repayment, a claim for a credit, or otherwise, subject of course to any proper defences which may arise. This does not seem to me to be a fatal flaw to the claimant's case.

45. Given that this case is listed before me for an eight day trial commenting on 23 June 2024, only four months away, and given that I will have to make final decisions on these points at that trial, there is no need for me to go any further and, indeed, it would be inappropriate for me to do so.

46. If and insofar as the claimant's case is not clear, then that can be the subject of a request, formal or informal (and a number of detailed requests have already been made) and the subject of an amendment, if appropriate and justified.

47. However, in my judgment, there is nothing so patently flawed with the case at this stage which justifies it being struck out or summary judgment being entered.

48. That concludes my judgment on this point.