Neutral Citation Number: [2021] EWHC 3157 (Comm)

Case No: CC-2020-CDF-000002

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
CIRCUIT COMMERCIAL COURT (QBD)

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 26 November 2021

Before:

HIS HONOUR JUDGE KEYSER QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

NEATH PORT TALBOT (RECYCLING) LIMITED	**Claimant**
- and -	
JAMES HEYS & SONS LIMITED	**Defendant**

- -
- -

Mr Laurie Scher (instructed by **Morgan LaRoche**) for the **Claimant**
Mr Simon Hunter (instructed by **Palmers Solicitors**) for the **Defendant**

Hearing dates: 12, 13 and 20 October 2021

- -

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.

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HIS HONOUR JUDGE KEYSER QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10am on 26 November 2021.

JUDGE KEYSER QC:

Introduction and Summary

1. The claimant, Neath Port Talbot (Recycling) Limited carries on the business of the disposal and recycling of (mainly domestic) waste. It is ultimately owned by Neath Port Talbot Council, which has latterly taken the operations I shall describe back in house. At the material time, the claimant daily received about 100 truckloads of rubbish and recycling, including green waste, at its premises at the Material Recovery & Energy Centre, Crymlyn Burrows, Swansea ("the Site"). The rubbish was converted into "refuse derived fuel" ("RDF"). The recyclable materials were sorted into various categories. Both RDF and recyclables were then removed from the Site by third-party service-providers engaged by the claimant. For the removal of RDF the claimant paid the service-providers an agreed rate per tonne. For the removal of recycling, the claimant received payment from the service-providers at rates that varied depending on the nature of the material removed. The claimant paid for the removal of green waste.

2. The defendant, James Heys & Sons Limited, is a waste-disposal company based in Canvey Island, Essex. In the spring of 2017 the defendant tendered successfully for contracts to dispose of the claimant's RDF ("the RDF Contract") and recyclables and green waste ("the LOTS Contract"). The term of the RDF Contract was 12 months from May 2017. The term of the LOTS Contract was two years from 15 May 2017. Issues have arisen in respect of both contracts. The issues concern the facts and the application of the law to those facts; there is no substantial issue of law between the parties.

3. The RDF Contract required the defendant to remove 30,000 tonnes of material. In fact the defendant removed only 6,139.92 tonnes. The claimant says that this amounts to a breach of contract by the defendant, and it claims damages representing the additional costs it incurred in disposing of 23,862.84 tonnes via third parties. The defendant denies that it was in breach of contract: it says that the claimant simply never provided the material for it to collect but instead chose to dispose of it by a third party, leaving the defendant with only "the crumbs that fell from [the third party's] table." The defendant counterclaims for damages for breach of contract in the amount of the profit it says it would have made if the claimant had provided the RDF for it to remove.

4. The LOTS Contract came to a premature end in October 2018. The claimant's case is that it terminated that contract on account of repudiatory breaches by the defendant, including its failure or refusal to collect certain kinds of recyclables, or to do so at the agreed prices, and its failure to pay for the cardboard it was collecting. The claimant claims damages for the additional expenditure to which it says it was put. The defendant denies that it was in breach of the LOTS Contract and says, to the contrary, that the claimant's purported termination of the contract was a repudiation of it, which the defendant has accepted; and it counterclaims damages for breach of contract in the amount of the profit it says it would have made if the contract had continued for its proper term.

5. In addition, the parties have cross-claims against each other for moneys owing under both contracts. The figures are agreed, subject to a single issue.

6. I am grateful to Mr Scher and Mr Hunter for the co-operative way in which they conducted the trial and for their helpful written and oral submissions.

7. In the remainder of this judgment, I shall first provide a short narrative, focusing on the contractual arrangements between the parties; matters concerning the performance of the contracts will be touched on only briefly. Then I shall discuss the issues that have arisen in respect of each contract and shall provide a little more detail concerning the facts relevant to those issues. A great deal of documentary evidence was produced in the case and numerous detailed factual points were raised. I have considered all of the evidence to which I was referred and have noted the various points raised, but I shall not refer to everything that was discussed at trial as it seems to me that the real issues are quite narrow and that much of the evidence was of tangential relevance. The conclusions are summarised in the final paragraphs.

Brief Narrative

Background

8. The Site dealt with the reception, separation and recycling of non-hazardous municipal solid waste and the production of RDF for off-site use. For the purposes of this judgment it is unnecessary to go into much detail about the on-site operations; a brief summary will suffice.

    - Municipal solid waste in black refuse bags was received into a Waste Reception Hall, where it was pre-sorted and pre-shredded to 300mm (or 500mm: the evidence is inconsistent). The waste then went to the Process Hall for primary processing; here, fines were removed, ferrous and non-ferrous materials were segregated, aluminium cans were removed with an eddy current, and the remaining material was shredded to 150mm (or, perhaps, 100mm). The resulting material was RDF, which was passed to the Fuel Preparation Area, where it was dried and further shredded to 65mm or 30mm. The RDF might be sent out either loose or baled.

    - Green waste was brought to the Site in refuse collection vehicles and was tipped in a segregated area of the Waste Reception Hall, where it was stored until enough green waste had accumulated for a collection to be arranged.

    - Recycling waste was collected from the kerbside by Romaquip vehicles, which had separate compartments for different kinds of waste. The pre-sorted "recyclates" were received into the Kerbside Recyclate Building, where they were bulked up for off-site recycling or baled on-site prior to off-site disposal. In particular, plastics were taken from the Kerbside Recyclate Building to the Process Hall, where they would be baled. Cardboard would also be baled in the Process Hall.

9. At all material times the claimant's directors have been Mr Derek Davies, Mr William Watson, and Mr Gareth Nutt. Mr Davies, the chairman of the board, is a former Director of Finance and Corporate Services for Neath Port Talbot Council. Mr Watson is a former Director of Environment for the council. There were monthly

board meetings, which were attended for part of each meeting by Mr Christopher Roberts, the General Manager of the Site, who had day-to-day control of operations there. Most of the claimant's dealings with the defendant were conducted by Mr Roberts. However, decisions concerning the award and termination of contracts after tender pursuant to a procurement process were made by the board. Mr Davies, Mr Watson and Mr Roberts all gave evidence at trial.

10. The defendant is a long-established waste-disposal company, owned and controlled by members of the Heys family. Its directors include Mr Lawson Heys, who had involvement with the subject matter of this case. Two other people closely involved in the defendant's operations on site were Mr Nigel Hamer and Mr Keith Cornell. Mr Hamer was not an employee or director of the defendant but gave advisory and administrative assistance to it in connection with its contracts with the claimant. Mr Cornell was a director of an associated company, James Heys Recycling Limited, but for present purposes he can be taken to have been involved on behalf of the defendant. Mr Heys, Mr Hamer and Mr Cornell all gave evidence at trial.

11. There was, or appeared to be, some dispute between the parties as to the precise nature of their business relationship before 2017, but I do not think that the dispute illuminates the issues in the case and I shall not discuss it. During 2015 the defendant (or, at least, James Heys Recycling Limited; the distinction is irrelevant for present purposes because the same personnel were involved) was removing recyclables from the Site, and in November 2015 it placed its own baler on the Site, manned by its own staff, in order to make the removal of the materials more cost-effective. In addition, during 2016 and 2017 the defendant was removing RDF from the Site; it did not, I find, have anything in the nature of a standing contract at that time, though it appears to have been the preferred ad hoc contractor for that purpose.

The RDF Contract

12. In February 2017 the claimant issued an invitation to tender for the disposal of RDF ("the RDF Tender Invitation"). It sought tenders "for the collection and visible end market solution provision for 32,000 tonnes or two 16,000 tonnes of RDF". Tonnage was to be based on the claimant's in-house weighbridge system. The RDF was to be produced to a stated specification, which was "guaranteed for 85% of the RDF material": this included a monthly average net calorific value of at least 15 MJ/kg and a monthly average moisture content below 20%.

13. The RDF Tender Invitation included the following passages:

> "Failure to 'off take' materials in a timely manner will allow [the claimant] to utilise alternative customers; there therefore will be no penalty to [the claimant].
>
> Duration of the contract is 12 months, with an Option to Extend."
>
> "Please provide a Method Statement for the supplied services as detailed by the specification required in the Statement of Requirements."

14. The defendant submitted a tender for disposal of RDF on about 8 March 2017, giving a price of £78 per tonne for 32,000 tonnes. The tender contained the following Method Statement:

> "Description of the method of collection:
>
> 1. Collect, loose or baled, transported on Walking Floor trailers or Curtain Sider Trailers from site.
>
> 2. Ability to transport material to suit customer requirements.
>
> 3. Final destination of materials — outlets in the UK and Overseas.
>
> 4. Operating Permit attached to Tender document."

15. By a letter dated 7 April 2017 Mr Roberts wrote to the defendant in respect of its RDF tender:

> "… I am delighted to confirm that you have been successful in our latest RDF tender at the price of £78.00 to collect the 65mm material produced at the Material Recovery Energy Centre … and taken to a destination to be jointly acceptable to both parties. I understand that you are looking to commence in early May.
>
> …
>
> The tonnage of 30,000 tonnes available to James Heys (Recycling) Limited will be for a minimum period of 12 months with an option of a further 12 months roll on. The specification of the material that NPT can provide is as per the tender document you quoted on earlier."

Three features of the letter may be noted. First, it was addressed to "James Heys (Recycling) Limited"; nothing really turns on that, as it is common ground that the defendant was intended. Second, it referred to the wrong grade of RDF: RDF comes in two sizes, 65mm and 30mm, and the defendant's tender was for 30mm RDF, not 65mm. Third, it mentioned 30,000 tonnes, whereas the tender was for 32,000 in accordance with the RDF Tender Invitation. These matters were cleared up in a telephone conversation on 14 April 2017, when a contract was agreed for the collection and disposal of 30,000 tonnes of 30mm RDF in the year May 2017 to April 2018 inclusive at a rate of £78 per tonne. No formal contractual documentation was produced.

The LOTS Contract

16. Meanwhile, in March 2017 the claimant had issued an invitation to tender for the disposal of various categories of recyclable materials in numbered Lots. This document ("the LOTS Tender Invitation") contained the following passages:

> "The tender will be for the installation and running of suitable baling equipment on [the Site] for Lots 1, 5 & 7 in the table below. Collection and visible end market solution provision for the collected recyclates as described in the Price Schedule (Section 7). All materials described below are derived from either the source segregated kerbside collection scheme operated by Neath Port Talbot County Borough Council or from the co-mingled household waste delivered to the facility."
>
> "Mixed cardboard, plastics and news & palms were presented to the facility in plastic bags prior to the introduction of Neath Port Talbot County Borough Council's new Romaquip collection vehicles. With the introduction of new collection methods by Neath Port Talbot County Borough Council, every endeavour has been made to eliminate the use of plastic bags for separately collected fractions but some residual bags may remain. Green waste will still be collected in plastic bags until June 1 2017 thereafter in loose hessian sacks."
>
> "On the price that will be offered for the materials, a market benchmark should be utilised and open evaluation on baling, handling and transportation costs should be presented, to illustrate the justification for the purchase price. Transparency on this issue will score higher as this will allow further negotiations based upon market price changes going forward. Tonnage will be based on [the claimant's] in house Weighbridge system."
>
> "Failure to 'off take' materials in a timely manner will allow [the claimant] to utilise alternative customers; there therefore will be no penalty to [the claimant].
>
> Duration of the contract is 12 months."
>
> "Evidence of end market user will be required to be presented in the tender and will be handled confidentially. … To comply with duty of care audits the customer must make provision for traceability visits to all requested sites within the material loop."

17. The ten Lots in respect of which tenders were sought were identified and explained in appendices to the LOTS Tender Invitation. The text in respect of Lot 1, "Loose mixed cardboard", included the following:

> "Tender to include the installation of suitable baling equipment.
>
> The contract is to provide the provision to bale material on site …, with visible end market solutions for the baled recyclate described in the tender document …

> 1. Loose mixed cardboard will be presented loose and stored in bays at the site's kerbside recycling building. This is where the material will be available prior to the provision of baling.
>
> …
>
> 6. Baled material will have to be removed in a timely manner as not to allow the build-up of material on site. In the event of any undue delays NPT do not accept any responsibility for the condition of the material.
>
> 7. Failure to 'off take' materials in a timely manner will allow NPT Recycling to utilise alternative customers at no penalty to NPT Recycling."

That text was repeated in substantially identical terms in the appendices for Lot 5 and Lot 7. The text for Lot 9, "Bagged green waste", included:

> "Tender to include the installation of suitable baling equipment.
>
> The contract will be for the collection and visible end market solutions for the baled recyclate described in the tender document …
>
> 1. Bagged green waste will be presented loose and stored in bays at the site's kerbside recycling building. This is where the material will be available prior to loading.
>
> …
>
> 4. Collection must be made within 48 hours of notification of take-off. Beyond this period NPT do not accept any responsibility for the condition and contamination of the load.
>
> 5. Failure to 'off take' materials in a timely manner will allow NPT Recycling to utilise alternative customers at no penalty to NPT Recycling."

18. The Price Schedule submitted by the defendant in its tender dated 6 April 2017 offered prices per tonne for the various Lots, including the following:

- Lot 1: Loose mixed cardboard: £43 (paid to the claimant)
- Lot 5: Loose mixed news and palms: £50 (paid to the claimant)
- Lot 6: Ferrous scrap loose: £65 (paid to the claimant)
- Lot 7: Foil, plastic bottles, ferrous and non-ferrous cans mixed: £20 (paid to the claimant)
- Lot 9: Bagged green waste: £39 (paid by the claimant to the defendant).

19. By an email on 11 May 2017 the claimant notified the defendant that its tender had been successful in respect of Lots 1, 5, 6, 7 and 9. The terms of the email diverged from the terms of the tender in two respects. First, the email provided that the term of the contract was to be two years from 15 May 2018 rather than 12 months. Second, the email qualified the position regarding the price for green waste:

> "Lot 9 Green Waste @ £39.00 until the material is presented loose then £29.00. (Please note due to the material now being brought into reception and potential odour being an issue we may have to engage other operators to move the material to remove this problem in the high tonnage summer months.)"

Again, no contractual documentation was completed, but it was common ground in these proceedings that the LOTS Contract came into existence on the terms of the defendant's tender as modified by the email of 11 May 2017.

20. The award of a contract for a two-year term, rather than the twelve-month term mentioned in the LOTS Tender Invitation, appears to have been due to crossed wires between Mr Roberts and the claimant's board of directors. In May 2018 the claimant ran a further tendering exercise in respect of the recycling materials. It was only when new contracts were about to be awarded that the board became aware that the LOTS Contract had nearly another year to run; the process of awarding new contracts was then stopped.

The operation of the RDF Contract

21. The defendant did not commence the removal of RDF in May 2017. I accept the evidence of Mr Davies (who was an impressive witness) that the board of directors was receiving regular complaints from Mr Roberts about the defendant's delay and that after about three months the board instructed him to tell the defendant to commence removal of the RDF immediately. As a result, on 1 August 2017 a meeting took place at the Site between Mr Davies and Mr Roberts for the claimant and Mr Heys, Mr Hamer and Mr Cornell for the defendant. I accept Mr Davies's evidence that the defendant's representatives acknowledged that they had not commenced removal of the RDF because they were having difficulty securing an end destination, but they expressed optimism that removal would commence within a couple of weeks because they were on the point of finalising a contract for disposal of the RDF in Sweden. Pursuant to an unsolicited offer by the defendant, it was also agreed the price payable to the defendant for the RDF would be reduced by £3 per tonne when the defendant commenced removal. That agreement was recorded in a letter dated 4 August 2017 from Mr Cornell to Mr Davies.

22. The hoped-for contract to dispose of the RDF in Sweden never materialised. In the four-month period to the end of August 2017, the defendant had made collections of RDF on only 17 days and had collected only 997 tonnes. During the entire year of the RDF Contract, the defendant removed not 30,000 tonnes of RDF but only 6,139.92 tonnes. The claimant says that this was a breach of contract by the defendant and that in consequence it suffered loss because it had to engage more expensive contractors to remove the RDF. The defendant, to the contrary, says that the claimant was in breach of contract by not providing sufficient quantities of RDF for removal and that in

consequence it (the defendant) lost profit it would otherwise have made. This issue is considered below.

The operation of the LOTS Contract

23. During 2017 the performance of the LOTS Contract was generally without problems. However, three particular problems arose concerning, respectively, green waste, cardboard, and plastics. Each side alleges that the other was in breach of the contract: the claimant says that the defendant failed to perform, as it failed to perform the RDF Contract; the defendant says that the claimant engineered a pretext for terminating the contract. I shall summarise the relevant facts when I discuss the particular issues. For the present it suffices to say that in mid-October 2018, after the defendant had removed no plastics at all for nearly four weeks, and faced with a significant build-up of unbaled plastics on the Site, the claimant's board of directors decided that the LOTS Contract would be terminated. That decision was communicated to the defendant orally on 30 October 2018 and again in writing on 2 November 2018. The claimant asserts that it lawfully terminated the contract on account of the defendant's repudiation of it. The defendant asserts, to the contrary, that the claimant repudiated the contract by excluding the defendant from the Site and that it had no choice but to accept the repudiation.

The RDF Contract: Breach and Damages

24. In the year from May 2017 to April 2018 the defendant collected 6,139.92 tonnes of RDF from the Site, as against the figure of 30,000 tonnes mentioned in the RDF Contract. The shortfall was not due to any shortage of RDF: in the same year, the Site produced approximately 35,000 tonnes of RDF[1]. The claimant alleges that the shortfall was a breach of contract by the defendant: particulars of claim, paragraph 15.

25. The defendant avers and the claimant admits that there was an implied term of the RDF Contract that the claimant would provide RDF material for collection at a reasonably regular frequency—something of the order of 600 tonnes of material (representing 24 collections of 25 tonnes each) per week—so as to enable the defendant to collect 30,000 tonnes of RDF over the term of the contract. As RDF was a product of the regular "black bin" refuse collections undertaken each weekday by local authorities, quantities of that sort would regularly require disposal. The production of RDF was by its nature a regular, even continuous process.

26. The defendant's case is that the RDF Contract contained a further implied term, namely that the claimant would provide adequate notification of its requirement for collection. The defendant says that the claimant was in breach of contract by failing to give the notification and that, instead of providing RDF for the defendant to collect in accordance with the contract, it chose to give the bulk of the material to favoured third parties, leaving the defendant with only the remnants; and it counterclaims

[1] Only about 11,000 tonnes was produced to 30mm; the rest was produced to 65mm. However, this shows only that the contractors who removed the RDF were willing to take material that had not been shredded down to 30mm. The claimant was clearly able to provide 30,000 tonnes of 30mm material. The evidence shows that the additional shredding would have involved minimal cost.

damages for breach of contract. The claimant denies that there was an implied term as alleged and denies that it was in breach of contract.

27. In *Marks and Spencer plc v BNP Paribas Services Trust Company (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, the Supreme Court approved the traditional approach to the implication of terms. A term will be implied into a contract only if it is necessary to give business efficacy to the contract (in the sense that, without the term, the contract would lack commercial or practical coherence) or—which will often amount to the same thing—if the term is so obvious that it "goes without saying".

28. In my judgment, there was no implied term of the RDF Contract that the claimant would provide adequate warning of its requirement for collection. The alleged term was entirely unnecessary. The nature and source of the material to be collected—RDF produced from domestic waste that the local authority collected from the kerbside according to its weekly rota—were such that there would obviously be a regular and broadly consistent need for collections each week. Production of RDF could be affected by equipment malfunction at the Site; the evidence shows, however, that these occurred extremely infrequently, and there is no evidence to indicate that any such malfunction had any bearing on the performance of the RDF Contract or was likely to do so on anything other than an extraordinary basis, when notification of the extraordinary event could easily be given. All that was required for the contract to work was for the claimant to maintain steady production of RDF and for the parties to cooperate like sensible commercial entities.

29. I am satisfied that the defendant knew that RDF was available to collect and deliberately failed to collect it for its own commercial reasons. Some realism is introduced if one considers the basic factual issue as to what actually happened. The defendant says that the reason why it took so little RDF was that it was not given the opportunity to take more: the claimant failed to tell it what quantities were available, but instead went straightaway to other contractors, leaving the defendant with only the crumbs from those other contractors' tables. The claimant says that it went to other (more expensive) contractors only because the defendant was unable to remove the quantities required of it. I find, without hesitation, that the claimant's account is the correct one. The defendant's explanation makes no practical sense. The claimant had put the RDF collection out to tender and had awarded the contract to the bidder who had offered to accept the lowest price. It is not plausible that the claimant, in those circumstances, made a point of ignoring the RDF Contract (the defendant's case requires and alleges such deliberate action by the claimant) and instead gave the work to more expensive contractors. Further, if the facts had been as the defendant suggests, there would have been clear evidence in the documents of complaints by the defendant about being cut out of the collection and being deprived of the benefit of the contract. Such evidence has not been produced.

30. The way the contract actually worked in practice only serves to confirm that the implied term contended for by the defendant was unnecessary. Although there is some evidence of occasional variation in the quantities of RDF, there was for the most part a steady and consistent supply; specific "requests" by the claimant were unnecessary. Further, I accept Mr Roberts' evidence that the normal way in which the parties carried on their relationship involved regular conversations, in which the defendant made clear how much it could manage to remove in each given week, and that recourse to third parties resulted from the defendant's declared inability to take

what was available. The defendant's almost total failure to take any RDF during the first four months of the twelve-month contract has already been mentioned and is indicative of the problem, namely the defendant's inability to find an acceptable destination for the RDF. The consequence of the defendant's inability to perform the contract according to its terms was described by Mr Roberts in his witness statement, in terms substantially similar to the tenor of his evidence in cross-examination:

> "48. As Heys failed to take-off the RDF, I was forced to look for alternative off-takers. This was a weekly battle and exactly what the RDF contract was designed to avoid. Each week on a Thursday, either Rob [Cirillo, a weighbridge operator] or Paul [Taylor, the other weighbridge operator] (or Leighton [Hopkins, a junior manager]) would let me know how much RDF (and also how much recyclates) would be available to collect each day the following week. From recollection, there was generally 6 or more loads available each weekday. It was a constant stream.
>
> 49. Once I knew what need to be taken off the following week, I would contact Heys or Heys would contact me to tell me what they could take (Heys had men on site daily and therefore knew what material was there to collect at any one time). Once I knew the shortfall in what Heys could not take, I would call around various off-takers to see who could take material. Sometimes, I would send emails to off-takers to see what capacity they had but it was mostly phone calls. Sometimes off-takers would contact me (by phone or email) but that was rare. I was always shopping around for the best price but inevitably because Heys had won the tender on the basis of the most competitive price per tonne, I struggle[d] to find off-takers to match that. I tried as best I could but I had to ensure that the RDF was taken off site each week. It was a constant stream and there was limited space to store RDF on site. RDF could be stored in small amounts at the site, but it was classed as fire hazard and so we would have to ensure it was taken off site regularly to keep the RDF levels 'on the floor' down."

31. That evidence is notably similar to that contained in the witness statement of Mr Hamer for the defendant:

> "73. To summarise, throughout the period of the tender, it was always James Heys getting in touch with NPTRL specifying the amount of RDF material it required. There were occasions where James Heys had to cancel requested loads due to haulier problems, but there were also occasions where NPTRL had to reduce James Heys' requested loads due to a shortage of material."

32. Evidence to a slightly different effect was given by Mr Cornell, who described the usual course of events as follows in paragraphs 28ff of his witness statement. The defendant's broker would identify outlets for the disposal of RDF and the quantities

those outlets could take in a given week. The broker would get in touch with Mr Heys, and after they had spoken the broker would notify Mr Cornell of the quantities of RDF that would be collected and where the material would be taken. Mr Cornell would then notify the claimant of the quantities of RDF that would be collected and their destinations, and the broker would make the necessary arrangements with hauliers. "There were some occasions where we wanted to take more RDF material than [the claimant] had, and on these occasions [the claimant] would tell us the amount we could take based on what it had produced on the floor. When this did happen, [the defendant] would have to tell [the broker] and he would inform the end customer/outlet. The end customer would not be impressed as they like consistency of material and they would go elsewhere, meaning we would lose that outlet." In his oral evidence, Mr Cornell insisted that the defendant would have been able to dispose of 600 tonnes each week, because the broker would have been able to place that quantity. Mr Cornell's evidence is problematic. First, the claim that the broker could have placed 600 tonnes each week, if that quantity had been available, is belied by the defendant's failure to commence removal of RDF in any meaningful quantity for several months after the commencement of the contract. Although Mr Cornell initially denied in cross-examination that the claimant had been pressing the defendant to commence removal, he did accept the fact when confronted with documentary evidence of requests. He would not accept, however, that the offer of a price reduction in August 2017 was made in acknowledgment of the defendant's failure until that point to perform the contract. I found his evidence in that regard unimpressive. Second, as I have already said, the assertion that the claimant, though having plenty of RDF, was refusing to make available to the defendant the quantities it requested is inherently implausible. Third, in view of the massive extent of the shortfall—the defendant removed less than 21% of the contractual quantity of RDF—the procedure described by Mr Cornell would require that there were not merely "some occasions" when the claimant could not supply the defendant's requirements: such occasions would have been the norm. Fourth, if as Mr Cornell says the claimant's (necessarily, regular) failure to provide the required quantities of RDF had caused the loss of customers for the defendant, one would expect to see documentary evidence to that effect; there is none. Fifth, Mr Cornell's alleged involvement itself is not supported either by other witness evidence or by documentary evidence.

33. The defendant, in its witness evidence and in its cross-examination of the claimant's witnesses, raised a number of matters to suggest that the claimant had been in breach of the RDF Contract in other respects, notably the provision of 65mm rather than RDF and a failure to achieve the stipulated net calorific value. Those matters had not been raised by way of pleaded defence or counterclaim and had not been subject of disclosure. Accordingly I say no more about them.

34. For the reasons indicated above, I find that the defendant was in breach of the RDF Contract by failing to perform its obligation to remove 30,000 tonnes of RDF.

35. In consequence of that breach, the claimant had to find alternative means of disposal of 23,860.08 tonnes of RDF. The average cost per tonne of doing so was £13.13 in excess of the price of £78 under the RDF Contract. The claimant is entitled to damages of £313,282.85 for the defendant's breach of contract.

36. The defendant's counterclaim for damages under the RDF Contract will be dismissed.

The LOTS Contract: Breach and Damages

Termination of the LOTS Contract: general

37. The outcome of the claims and cross-claims on the LOTS Contract depends in part on the lawfulness of the claimant's purported termination of the contract on 2 November 2018. If the termination was lawful, the claimant is entitled to damages not only in respect of past breaches but for losses occasioned by the defendant's failure to perform the obligations it would have had during the remainder of the contract. On the other hand, if the termination was unlawful, it amounted to a repudiation of the contract by the claimant, and the defendant will be entitled to damages for the loss of the profit it would have made during the remaining term. (Acceptance of a repudiatory breach of contract must be clear and unequivocal; however, no particular form of acceptance is required and in appropriate circumstances acceptance can be inferred from conduct: *Vitol SA v Norelf Ltd* [1996] A.C. 800 at 811-812; *BskyB Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 86 (TCC) at [1373]. I do not consider that any difficulty over acceptance would arise in the present case.)

38. The circumstances in which breach of an innominate, or intermediate, term of a contract will be repudiatory, in the sense of entitling the innocent party to elect to terminate the contract, were considered by the Court of Appeal in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, where the following test was stated at 66: "Does the occurrence of the event deprive the party who has further undertakings to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?" In *Valilas v Januzaj* [2014] EWCA Civ 436, [2015] 1 All ER 104, Arden LJ said at [59]:

> "The common law adopts open-textured expressions for the principle used to identify the cases in which one contracting party ('the victim') can claim that the actions of the other contracting party justify the termination of the contract. I will use the formulation that asks whether the victim has been deprived of substantially the whole of the benefit of the contract. The expression 'going to the root of the contract' conveys the same point: the failure must be compared with the whole of the consideration of the contract and not just a part of it. There are other similar expressions. I do not myself criticise the vagueness of these expressions of the principle since I do not consider that any satisfactory fixed rule could be formulated in this field."

In the same case, Floyd LJ, with whose judgment Arden LJ expressed agreement, said at [54]:

> "Whether a breach or threatened breach does give rise to a right to terminate involves a multi-factorial assessment involving the nature of the contract and the relationship it creates, the nature of the term, the kind and degree of the breach and the

> consequences of the breach for the injured party: see the passage from the majority decision of the High Court of Australia in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61 (2007) 82 AJLR 345 at [54] cited by Lewison LJ in *Telford Homes (Creekside) Ltd v Ampurius Nu Holdings* [2013] EWCA Civ 577 at [50]."

39. A party to a contract may also be entitled to terminate it if the other party has, expressly or by implication, renounced the contract. In *Telford Homes (Creekside) Ltd v Ampurius Nu Holdings* [2013] EWCA Civ 577, [2013] All ER 4 377, Lewison LJ, with whom Tomlinson and Longmore LJJ agreed, approved the test in *Chitty on Contracts* (see now 34th edition, para 27-048):

> "A renunciation of a contract occurs when one party by words or conduct evinces an intention not to perform, or expressly declares that he is or will be unable to perform, his obligations under the contract in some essential respect. The renunciation may occur before or at the time fixed for performance. An absolute refusal by one party to perform his side of the contract will entitle the other party to treat himself as discharged, as will also a clear and unambiguous assertion by one party that he will be unable to perform when the time for performance should arrive. Short of such an express refusal or declaration, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions. The renunciation is then evidenced by conduct. Also the party in default … 'may intend in fact to fulfil (the contract) but may be determined to do so only in a manner substantially inconsistent with his obligations …'
>
> If one party evinces an intention not to perform or declares his inability to perform some, but not all, of his obligations under the contract, then the right of the other party to treat himself as discharged depends on whether the non-performance of those obligations will amount to a breach of a condition of the contract or deprive him of substantially the whole benefit which it was the intention of the parties that he should obtain from the obligations of the parties under the contract then remaining unperformed."

40. In *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd, "The Spar Draco",* [2015] EWHC 718 (Comm), [2015] 1 All ER (Comm) 879, in the context of payment obligations in a time charter, Popplewell J gave the following useful summary of the legal principles at [208]:

> "(1) Conduct is repudiatory if it deprives the innocent party of substantially the whole of the benefit he is intended to receive as consideration for performance of his future obligations under the contract. Although different formulations or metaphors have been used, notably whether the breach goes to the root of

> the contract, these are merely different ways of expressing the 'substantially the whole benefit' test ….
>
> (2) Conduct is renunciatory if it evinces an intention to commit a repudiatory breach, that is to say if it would lead a reasonable person to the conclusion that the party does not intend to perform his future obligations where the failure to perform such obligations when they fell due would be repudiatory….
>
> (3) Evincing an intention to perform but in a manner which is substantially inconsistent with the contractual terms is evincing an intention not to perform …. Whether such conduct is renunciatory depends upon whether the threatened difference in performance is repudiatory ….
>
> (4) An intention to perform connotes a willingness to perform, but willingness in this context does not mean a desire to perform despite an inability to do so. …"

41. The claimant contends that it was entitled to terminate the LOTS Contract on account of either or both of two breaches of contract by the defendant: first, a failure to pay invoices of about £100,000 in respect of cardboard and paper; second, a failure to collect plastics, which resulted in a large accumulation of plastics at the Site.

Non-payment as a ground for termination

42. As regards cardboard, throughout the period of the contract, the claimant raised invoices at the original contract rate of £43 per tonne. However, in May 2018—the same time that the defendant tendered in the new procurement for a price of £10 per tonne for cardboard—the defendant began paying the invoices at the rate of £10 per tonne, and shortly thereafter it stopped paying the invoices completely. By the end of October 2018, when the contract was terminated, the total amount of unpaid invoices was £103,938.91, of which very much the greater part was for cardboard.

43. The defendant's pleaded case in these proceedings was that it had reached an agreement with Mr Roberts in early February 2018 that the price payable for cardboard would reduce to £14 per tonne from 1 February 2018 and to £10 per tonne from 1 June 2018. However, that case was not pursued by Mr Hunter in closing submissions, because the defendant's witnesses ultimately accepted that there was no binding agreement (as opposed to a non-binding "gentlemen's agreement") for a price reduction.

44. The first mention of the new prices in the documents is in an email dated 26 September 2018 from Mr Cornell to Mr Roberts, which refers to "the correct pricing as agreed at our meetings". Mr Roberts replied that the matter was "complex" and that it was "easier to talk than to put it down". I think it probable that there had been some discussion with Mr Roberts about the fall in market prices for cardboard and that he had been sympathetic to a reduction in the price. Indeed, despite Mr Roberts' protestations that the matter was "complex" only because there was no agreement, I think that his response to Mr Cornell probably alludes obliquely to the fact that he had offered the defendant more comfort than was really appropriate: probably, he had

given an indication that he would seek to ensure that the price was reduced to reflect changed market conditions. However, I also find that the defendant knew well that no price reduction had been agreed; this was why it continued for a time to pay the full amount of the invoices and did not question why the invoices were being issued at the original price.

45. In my judgment the non-payment of the invoices for cardboard did not of itself entitle the claimant to terminate the LOTS Contract. In a commercial contract, time of payment is not generally of the essence of the contract. Here, it is true, there was short-payment followed by non-payment over a period of several months. The breach was serious. However, it did not affect the viability of the operations to which Lot 1 was directed, namely the disposal of cardboard to approved final destinations, and it concerned only one of the four Lots with which the contract was concerned. It is also probable, in my view, that the failure to make the contractual payments was to some extent with the connivance of the General Manager of the Site, as I have mentioned in the previous paragraph.

Failure to collect plastics as a ground for termination

46. The second ground relied on by the claimant to justify termination of the LOTS Contract is the failure of the defendant to collect plastics. (The material in Lot 7 has been referred to as "plastics" for convenience, though it also included foil and cans.) It is necessary to pause to consider what were the parties' respective obligations under the LOTS Contract. The documentation is imprecise, and the point received little attention in argument at trial. The most relevant parts of the statements of case are paragraph 33 (d) of the reply and defence to counterclaim and paragraph 9 of the reply to defence to counterclaim; I shall not set out those paragraphs. In my judgment, the position was as follows:

    1) The claimant was not under an obligation to provide a minimum tonnage to the defendant. The figures in the LOTS Tender Invitation were provided for information; they were a statement of the current level of business and, to that extent, a guide for future expectations. It is unnecessary and unwarranted to suppose that they comprised some sort of warranty of the tonnages that would be provided.

    2) However, it is an obvious implication and consequence of the tender process that the claimant would make available to the successful bidder the entirety of the relevant materials.

    3) The nature of the defendant's obligations is a little more difficult. The basic position seems clear enough: the defendant was contracting to remove the entirety of the materials of the relevant kind produced at the Site. As the approximate current tonnages stated in the LOTS Tender Invitation were for guidance, they do not themselves fix either the defendant's entitlement or its obligation. Nevertheless, I do not think that the defendant's obligation can have been unqualified. An extreme case makes the point: if the annual tonnage of plastics were to rise from 2,265 tonnes (the figure stated as current in the LOTS Tender Invitation) to 22,650 tonnes (say, because the Site became a centre for receipt of kerbside waste from a larger catchment), the defendant could not be obliged to take it all.

4) The claimant itself alleges only that the defendant was "obliged to collect all quantities produced by the claimant up to the amount stated in the LOTS Invitation to Tender": reply and defence to counterclaim, paragraph 33(d)(i). I should have been inclined to doubt that the defendant's annual liability was so limited: it seems to me more likely that the defendant was obliged to take all the material provided it did not exceed the current tonnage to an unreasonable extent. But I shall not go behind the limitation of annual obligation suggested by the claimant.

5) For my part, I would have thought that the claimant's apparent concession regarding the annual tonnage called for further consideration. The annual tonnages were collected not on a single occasion but by weekly collections over the year. An obligation to take 2,265 tonnes in the year cannot reasonably be supposed to imply an obligation to take it all at once, if it were provided that way. Therefore it would be incorrect to suppose that a failure or refusal by the defendant to take the entirety of the plastics available in any given week would constitute a breach of contract simply because the defendant had not yet taken the full amount of 2,265 tonnes in the year. In respect of the RDF Contract the claimant accepts, as being "so obvious that it goes without saying", that it was required to produce RDF "in such a way as would require collection at a reasonably regular frequency, amounting to (very approximately) 600 tonnes or 24 loads per week" (reply and defence to counterclaim, paragraph 6). The defendant's obligation to remove the entirety of the claimant's plastics, subject to an upper limit, must be construed in a similar way. The annual obligation in respect of plastics averages out at 188.75 tonnes per month. Absolute consistency cannot be required. I should think that a monthly variance of 25% was acceptable so far as the defendant's obligation was concerned. That works out at 236 tonnes per month. I should therefore have been of the view that the defendant was obligated to take the entire supply of plastics up to 236 tonnes per month but was not obligated, though it was entitled, to take more than that.

47. The evidence shows that in the first year of the LOTS Contract the defendant removed all the claimant's plastics in the following months: May 2017 (97.62 tonnes[2]), June 2017 (238.3 tonnes), October 2017 (154 tonnes), February 2018 (337.26 tonnes), March 2018 (256.26 tonnes), April 2018 (212.76 tonnes). The total amount taken by the defendant in the first year was 2,628.86 tonnes[3], which was well above the figure shown in the LOTS Tender Invitation. The evidence of Mr Davies was that the defendant did not remove all the available plastics during July, August, September, November and December 2017 and January 2018. This is consistent with the agreed figures. In the first year of the contract there were three months (August, September and November 2017) when the defendant failed to take what I regard as the reasonable requirement of 236 tonnes. The shortfall for those three months was 159.88 tonnes. I accept the claimant's evidence that the shortfall was due to the defendant's failure to remove available material; it was not due to a decision by the claimant to place the material with a third party in preference to the defendant. Nevertheless, the claimant does not advance its case on the basis of any monthly default and the shortfall does not itself ground any part of the claimant's claim. At all

[2] This was a part-month. The LOTS Contract commenced on 15 May 2017.
[3] Indeed, a little more, because the total is taken for the monthly figures to the end of April 2018.

events, the defendant's performance of the contract in the first year does not ground a right of termination, both because any breaches did not go to the root of the contract and because the claimant continued the contract for nearly five months after the end of the first year.

48. The figures for the second year of the contract, until termination, show the following:

- May 2018: total plastics 358.34 tonnes, all taken by the defendant
- June 2018: total plastics 270.28 tonnes; taken by defendant 146.18 tonnes; taken by third party (Siteserve Recycling Ltd) 124.10 tonnes
- July 2018: total plastics 227.94 tonnes, all taken by the defendant
- August 2018: total plastics 167.48 tonnes, all taken by the defendant
- September 2018: total plastics 201.16 tonnes; taken by defendant 192.74 tonnes; taken by third party (Siteserve Recycling Ltd) 8.42 tonnes
- October 2018: total plastics 440.70 tonnes; none taken by the defendant; all taken by third parties.

Thus in the five and a half months of the second year the defendant probably removed a little less than 1000 tonnes (only the second half of May being within the second year). In three months (June, September and October) the amount taken by the defendant fell short of the reasonable requirement of 236 tonnes; the total shortfall was 369.08 tonnes. The consequences of the failure to take any plastics in October were exacerbated by the fact that, as Mr Davies said and I accept, the defendant did not take any plastics after 17 September 2018.

49. There is relevant photographic and witness evidence in respect of the final six weeks of the operation of the LOTS Contract. Mr Heys accepted in cross-examination that because of the difficulty in disposing of plastics on the market the defendant was storing plastics in the hope of more favourable market conditions. He said, however, that the reason why the defendant stopped taking plastics was that the claimant gave ten loads to another contractor, Clearpoint. I reject that evidence and find that the reason that Clearpoint, Siteserve and another contractor were used in October 2018 was that the defendant was unwilling to remove plastics as it was (in an expression accepted by Mr Heys) "playing the market". I accept Mr Roberts' evidence that he repeatedly asked the defendant to remove baled plastics and that the defendant failed to do so. I also accept that, because the defendant was storing baled plastics, it reduced the amount of baling that it was doing, as it had nowhere to store the bales. This resulted in a build-up of unbaled plastics. Photographs from late September 2018 show both large amounts of baled plastics stored by the defendant and large amounts of loose plastics in the claimant's storage areas. Mr Heys denied that the defendant's failure to move the plastics interfered with the claimant's operations, but I regard that as clearly incorrect.

50. The problem with plastics led directly to the termination of the contract. On 20 September 2018 Mr Hamer wrote to Mr Roberts:

> "You and I had a conversation some months ago when we discussed the volume of plastic/cans being received at Kerbside, in the original Tender Document of March 2017 the estimated tonnage for Plastic/Cans material quoted was 2265 tonnes. At a rough guess this has almost doubled in the last 17 months.
>
> The problem is not a 'James Heys one' to quote Will Watson, I am sure that your Board of Directors is aware it is a nationwide problem. In fact there are local authorities in the South East that have resorted to landfilling their plastic. It is not logistically possible again to quote Will Watson 'to keep bales on site for more than a day or two', logistically that is not possible as if successful in moving the material we are in the hands of Haulage firms, secondly — 'bail [sic] everything quickly'. We will then have Kerbside screaming at us that the Cardboard bay is full!!
>
> We are hopeful that baled plastic will be collected on a weekly basis with confirmation expected in the next 24 hours."

However, no further plastics were removed. On 26 September 2018 there was an email exchange between Mr Cornell and Mr Roberts on 26 September 2018. Mr Cornell wrote:

> "As per our conversation yesterday 25/09/2018 I would like to confirm that mixed plastic and cans will be collected Free of charge owing to a serious downturn in market conditions."

Mr Roberts replied:

> "Yes agree with the mixed plastic & cans going free as long as you can move it we are up to our eyeballs some baling would help at moment. Also this would have to be on the understanding that if someone else comes up with a miracle they can move some."

Mr Roberts' evidence in cross-examination was that by this point the build-up of plastics, with consequent problems with leachate and flies and rats, meant that the claimant had to do anything it could to get the plastic moved, even if that meant foregoing the payments due under the LOTS Contract.

51. Matters came to a head in October 2018. At a board meeting on 11 October the claimant's board of directors decided to terminate the LOTS Contract. The minutes of the meeting contain the following record (I shall substitute names for initials):

> "Mr Roberts advised the Board of the difficulties in offloading plastics.
>
> Permit allowed for 500 tonne to be held for 12 months.

> Heys has kit in building. Mr Watson instructed Mr Roberts to give Heys 14 days notice.
>
> Want to use successful Tenderers - Siteserv Recycling Ltd and O'Brien.
>
> Need prices to be supplied today – Mr Roberts to use tender prices as a guide.
>
> Under no circumstances to use Heys.
>
> Mr Roberts reported that for the last 6 weeks plastics were being taken next door.
>
> 211 bales still left.
>
> Had to landfill 4/5 tonne."

52. In a telephone conversation on 30 October 2018, Mr Roberts informed Mr Heys of the decision to terminate the LOTS Contract and required the defendant to remove its personnel from the site by 5 November 2018 and its equipment by 13 November 2018. By an email on 31 October 2018 Mr Heys challenged the lawfulness of the claimant's decision and warned of the likelihood of legal proceedings if the matter were not quickly resolved. However, by a letter sent by email on 2 November 2018 the claimant confirmed the decision to terminate the LOTS Contract "in light of your continual and serious breaches of contract". Thus, however the matter might be analysed, the LOTS Contract was brought to an end.

53. On the basis of the board minute for 11 October 2018, it was put to Mr Watson that the claimant's reason for terminating the LOTS Contract was not dissatisfaction with the defendant but a desire to contract with the companies who had successfully tendered in the latest, abortive tender exercise (see above). However, those are not exclusive alternatives, and in fact the minute clearly indicates dissatisfaction with the defendant's performance in respect of plastics. Mr Watson explained that the reference to 14 days' notice was to the removal of the defendant's "kit", because it was no longer removing plastics from the Site. It was also put to Mr Watson that the decision to terminate the LOTS Contract was due to personal animus on his part in connection with the defendant's role in putting paid to a business opportunity for another company with which Mr Watson was connected. I reject that suggestion: first, Mr Watson denied it; second, it is unpleaded and unsubstantiated by any solid evidence; third, as Mr Davies pointed out—with a measure of indignation—decisions of this sort were for the board of directors, of which he was chairman, not for Mr Watson.

54. In any event, personal motives of individual directors seem to me to have no relevance. The real question is whether the defendant's failure to remove plastics constituted a repudiation of the contract.

55. In my judgment, the defendant's breach of contract in respect of the removal of plastics in September and October 2018 did go to the root of the LOTS Contract and entitled the claimant to terminate the contract as it did. It is true that the breach went

to only one of the Lots. However, the fundamental operational purpose of the contract was the removal of waste materials that had been received into the Site. The plastics were a very significant component of those materials. The breach was persistent and deliberate. The defendant had decided to stop the removal of plastics while it was uneconomic for it to remove them and instead to store them. This led not only to a build-up of baled plastics but, consequently, to a serious and unsanitary build-up of unbaled plastics on the Site. The defendant was, as I find, asked repeatedly to remove plastics and aware of the problems being caused on the Site, yet it took no action. It thereby evinced an intention not to perform the contract in accordance with its terms and committed a breach that went to the root of the contract. Although it is strictly unnecessary to refer to the matter, I note too that the defendant had at this time failed to pay a substantial debt in respect of cardboard; although that did not constitute a repudiation of the contract, it formed part of the context in which the breach in respect of plastics fell to be considered and tends to confirm that the defendant did not intend to treat itself as bound to perform the contract according to its terms.

Claim for damages for failure to collect plastics

56. The claimant claims damages for breach of contract in respect of plastics on the basis of the additional cost to it of disposing of plastics by alternative means. The claim is quantified on the basis of 808.46 tonnes; that figure, which is the amount by which the total tonnage taken by the defendant fell short of 4,530 tonnes, is less than the shortfall for the second year viewed alone (1,232.32 tonnes) and, of course, less than the shortfall if the obligation is viewed on a monthly basis. Therefore I am content to take the figure of 808.46 tonnes. The claimant's evidence was that it paid an average of £53.94 per tonne to third parties to remove the plastics. It therefore claims damages of £73.94 per tonne. The evidence was not contradicted and the basis of calculation was not challenged. I accept the case advanced. The damages for breach of contract in respect of plastics is accordingly £59,777.53.

Claims and counterclaims for damages for other breaches

57. The claimant also claims damages for failure to collect the required amounts of cardboard and green waste. Neither alleged breach of contract is relied on as a repudiation.

58. As regards cardboard, the annual average figure in the LOTS Tender Invitation was 3,742 tonnes (7,484 tonnes over two years), and the defendant agreed to pay to the claimant £43 per tonne. The claimant's actual production of cardboard over the two years of the contractual term was only 7,206.26 tonnes. The claimant's pleaded case (set out in the particulars of claim and corrected in the reply) is that the defendant collected 4,963.22 tonnes, so collections of cardboard fell short of the total available by 2,243.04 tonnes. There is no issue as to the amount of cardboard available and the amount collected, or as to the claimant's income from disposing of that via third parties. The loss suffered by the claimant, and the damages to which it is entitled, is £43,620.52.

59. As for green waste, it is common ground that the defendant did not remove any green waste after November 2017. It is also common ground that the cessation of removals of green waste by the defendant followed a conversation between Mr Roberts and Mr

Cornell in early December 2017; there is some important disagreement as to what was said. Each party claims damages from the other in respect of the shortfall in the offtake of green waste by the defendant. The claimant claims damages of £66,243.20 for the additional cost of disposal of green waste (the figure is arithmetically agreed). The defendant counterclaims damages of £37,567.68 on the basis that this is the profit it would have made, at £8 per tonne, if the claimant had provided it with the green waste to which it was entitled.

60. The indicative annual tonnage in the LOTS Tender Invitation was 3,945 tonnes, which is equivalent to 7,890 tonnes over the two years of the contract term and an average of 328.75 tonnes per month. The agreed figures show that in the period from the commencement of the contract until November 2017 the defendant removed 3,116.48 tonnes of green waste at an average of roughly 479 tonnes per month. During the remaining term of the contract a total of 4.084.20 tonnes of green waste was removed by other contractors at prices significantly in excess of those in the LOTS Contract.

61. The conflict as to the circumstances in which the defendant stopped removing green waste is found in the evidence of Mr Roberts and Mr Cornell. Mr Roberts' evidence was that in December 2017 Mr Cornell told him that the defendant would no longer be taking green waste, either loose or bagged: the defendant could not find anyone to take bagged waste at an acceptable price, and it did not want green waste at all after the new year. However, Mr Cornell said that the defendant had found it increasingly difficult to find outlets that would take green waste presented in black bags, because the black bags were not compostable. The defendant had initially understood from the LOTS Tender Invitation that black bags would be replaced by hessian bags from June 2017 onwards. Then it had been led to understand that the roll-out of hessian bags would be in the period June to September 2017 (a timescale set out in an email from Neath Port Talbot Borough Council, forwarded to the defendant on 15 May 2017). By December 2017 the green waste was still in black bags. (In fact, it does not appear that the hessian bags were introduced until 2019.) Mr Cornell denied that he had said that the defendant would refuse to take green waste; rather, he said that he had told Mr Roberts that it would have to charge an increased price for removing it. He said that Mr Roberts told him that he could make alternative arrangements for it to be removed more cheaply. The defendant was never asked to collect green waste thereafter.

62. For the defendant, Mr Hunter submitted (written submissions, paragraphs 58 to 60) that the claimant deliberately breached the LOTS Contract by making a positive decision not to require the defendant to remove green waste after November 2017. He referred to the decisions shown in the minutes of the claimant's board of directors. The minutes for 11 May 2017 recorded:

> "With regard to bagged green waste James Hayes [sic] had submitted best bid at £39 per tonne until 1st June when waste still in degradable bags, thereafter £29 per tonne for provisional loose. Currently split between Heyes [sic] and Potters (£35 per tonne)."

However, the minutes of the next board meeting, on 8 June 2017, recorded that the text was to be changed to:

> "With regard to bagged green waste, James Heys had submitted the best bid at £39 per tonne, whilst the waste was still in non-degradable bags thereafter £29 per tonne for loose green waste once the new scheme had been fully rolled out by the Council. Currently due to operational reasons with the contractors some waste is going to Potters at £35 per tonne."

There was then an update:

> "Update — all green waste as from 19/6/17 will be going directly to Potters at £35/t rather than Heys at £39/t until the new scheme is fully rolled out and Heys' 'contract' will start at £29/t."

63. The minutes are interesting but they do not take the matter very far. The defendant continued to take all of the claimant's green waste for nearly the next six months. The evidence of Mr Roberts and Mr Davies was that, despite what was said in the "Update" on 8 June 2017, no green waste was in fact sent to Potters. That is borne out by the agreed schedule in respect of green waste. The minutes suggest that the defendant's price for green waste in black bags was not as competitive as its price for green waste in hessian bags. But they do not cast light on the events of December 2017, particularly as the substitute contractor used by the claimant from December 2017 charged £55 per tonne until April 2019.

64. I find that Mr Roberts' account of the conversation in December 2017 is substantially correct. Mr Cornell made clear that the defendant would not continue to remove green waste. This was probably because it found it uneconomic to do so. Even on Mr Cornell's evidence, the defendant refused to take further green waste in black bags at the contract price, because it was uneconomic for it to do so. To portray the matter as a refusal by the claimant to abide by the contract in the interests of giving the work to Potters, as suggested by the minute of 8 June 2017, is accordingly incorrect.

65. This disposes of the defendant's counterclaim in respect of green waste, which relied on the averment that the claimant was in breach of contract by refusing to provide green waste after November 2017. The specific contractual term relied on the defence and counterclaim (paragraph 20.2) was that it was an express or implied term of the LOTS Contract that the claimant would not call upon the defendant to collect green waste that was not presented in hessian bags, but that if it did so "the defendant would collect green waste in black bags that would be charged for at the rate of £39 per tonne". The averment of breach was simply that the claimant was in breach of contract by refusing to provide green waste after November 2017. In the light of my finding that it was the defendant who refused to take waste, not the claimant who refused to provide it, that case must fail.

66. However, in my judgment the claimant's claim for damages in respect of green waste also fails. Although it is true that the introduction of hessian bags instead of black plastic bags was a matter for the local authority and, therefore, beyond the control of the claimant, the tender documentation did specify a time when that change would take place. The resulting position, as it seems to me, was as follows. As the claimant never received a supply of green waste in hessian bags, it had no material of that kind to provide to the defendant. However, after May 2017 the defendant was not bound

to accept green waste in black bags. It was entitled to do so, of course, if such waste were offered to it. But it was not a breach of contract for it to decline to accept the waste.

67. Therefore in respect of green waste both the claim and the counterclaim will be dismissed. I reach this conclusion without reluctance, as the proper analysis of the matter seems to me to accord with the justice of the case.

68. The defendant counterclaims for short delivery of "Loose mixed news and palms" (Lot 5). The estimated tonnage in the LOTS Tender Invitation was 2,304 tonnes per annum (4,608 over the term of the contract; a monthly average of 192 tonnes). The claimant's total production over the two-year term of the contract was 4,441.26. The defendant collected a total of 2,953.32 tonnes, which represented the total production before the contract was terminated. For reasons already indicated, the defendant was not entitled to more than it received. Accordingly this part of the counterclaim fails.

69. The defendant also counterclaims damages for short delivery of "Ferrous scrap loose" (Lot 6). The estimated tonnage was 31 tonnes per annum (62 tonnes over the term of the contract; a monthly average of 2.58 tonnes). During the two-year term of the contract, the claimant's total production of ferrous iron was 67.92 tonnes. The total production until the termination of the contract was 53.58 tonnes. For reasons that I have already explained, the defendant was entitled to receive 53.58 tonnes, being the total production before the contract was terminated. The defendant says that it was not given any ferrous scrap. The claimant says that it was given 13.22 tonnes of ferrous scrap. The dispute in that regard concerns RSJs: the claimant says they were ferrous scrap, and the defendant says that they were not. In my judgment, the claimant is clearly correct on this. Mr Heys was cross-examined on the point; he explained that the defendant was entitled to ferrous material from the black bin waste. That, however, was a different lot: "Ferrous residual" (Lot 8), which comprises small pieces of metal extracted by magnet from the black bin waste. The RSJs were precisely within the scope and meaning of ferrous scrap. Therefore the shortfall was 40.36 tonnes. The defendant was obligated under the LOTS Contract to pay £65 per tonne for ferrous scrap. The best evidence from the defendant indicates that it could have achieved a price of £170 per tonne for the ferrous scrap, a profit of £105 per tonne. This produces a loss of £4,237.80 for 40.36 tonnes.

The Cross-claims in Debt

70. On this aspect of the claim there is much agreement. The total sum owed to the defendant is £52,552.70. On the basis of my findings regarding the contractual price for cardboard, the total sum owed to the claimant is £103,938.91. Accordingly, the balance owed to the claimant is £51,386.21.

Conclusions

71. For the reasons set out above, there will be judgment for the claimant for:

a) £313,282.85 for damages for breach of the RDF Contract;

b) £103,398.05 for damages for breach of the LOTS Contract;

c) £51,386.21 for debt, after netting off the debts owed by each party to the other.

72. There will be judgment for the defendant on the counterclaim for £4,237.80 in respect of ferrous scrap. The remainder of the counterclaim, after netting off the debts owed by each party to the other, will be dismissed.