Case No: HT-2020-000363
Case No: HT-2020-000426

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2021] EWHC 2867 (TCC)

Royal Courts of Justice
Rolls Building
Fetter Lane, London, EC4Y 1NL

Date: 26/10/2021

Before:

MRS JUSTICE O'FARRELL

- -

Between:

In Claim No. HT-2020-000363

BUCKINGHAMSHIRE COUNCIL	**Claimant**
- and -	
FCC BUCKINGHAMSHIRE LIMITED	**Defendant**

And in Claim No. HT-2020-000426

FCC BUCKINGHAMSHIRE LIMITED	**Claimant**
- and -	
BUCKINGHAMSHIRE COUNCIL	**Defendant**

- -
- -

Justin Mort QC & Tom Owen (instructed by **Sharpe Pritchard**) for the **Claimant**
Roger Stewart QC & George McDonald (instructed by **Pinsent Masons LLP**) for the **Defendant**

Hearing dates: 22nd & 23rd March 2021

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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.

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Tuesday 26th October 2021 at 10:30am"**

MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. The matters before the court are two Part 8 Claims brought by the parties seeking declarations in respect of the proper construction of income sharing arrangements under a waste management project agreement and associated relief.

2. The Claimant (the "Authority") is a waste disposal authority for the purposes of section 30 of the Environmental Protection Act 1990.

3. The Defendant ("FCCB") is a special purpose vehicle created for the purposes of the project the subject of these proceedings.

4. The Authority and FCCB are parties to a Waste Management Project Agreement dated 17 April 2013 (the "Project Agreement").

5. The Project Agreement is a long term contract, intended to run until 2046, and provides for:

    i) the construction and operation of a waste to energy thermal treatment plant at Lower Greatmoor Farm, Buckinghamshire (the "Main Facility") and a residual waste transfer station (together the "Facilities");

    ii) the treatment of the Authority's waste, required to meet various statutory targets for diverting biodegradable municipal waste from landfill ("Contract Waste");

    iii) the treatment of waste which originates from third parties, including other local authorities ("Third Party Waste");

    iv) the sharing of income derived from Third Party Waste, electricity outputs, recyclate outputs, and other sources ("Third Party Income").

6. The construction of the Main Facility is complete and became operational in June 2016.

7. The waste received at the Main Facility comprises the Contract Waste, waste sourced by FCCB in substitution for Contract Waste where it falls below the specified minimum annual tonnage ("Substitute Waste"), and Third Party Waste. The Main Facility has capacity to treat approximately 300,000 tonnes of waste per annum. The Authority provides about 100,000 tonnes of waste per annum for treatment; other waste authorities and sources provide the remainder.

8. Once received at the Main Facility, the waste is thermally treated by combustion. The product from the thermal treatment is hot flue gas, which heats water to produce steam, which in turn is passed through the steam turbine generator to produce electricity. Electricity produced at the Main Facility is either used for on-site purposes or exported to the national grid.

9. The thermal treatment leaves incinerator bottom ash ("IBA") residue and air pollution control residue. The IBA contains contaminated metals which, after processing by a

third party, can be extracted and sold for further treatment. The remaining IBA residue is landfilled as quarry backfill.

10. Disputes have arisen in respect of the Third Party Income sharing provisions in Schedule 15 of the Project Agreement.

11. The Authority's case is that agreements entered into by FCC Waste Services (UK) Limited ("FCC Waste Services") and FCC Recycling (UK) Limited ("FCC Recycling"), affiliates of FCCB, for the treatment of waste at the Facilities are "Third Party Waste Contracts" within the meaning of the Project Agreement. Income received by FCCB that is derived from those contracts, including haulage income in respect of transportation of waste to the Facilities and income from the recovery of metals, is Third Party Income that is subject to the sharing arrangements in Schedule 15 of the Contract. Further, the Authority's case is that the Project Agreement provides for the threshold levels for income sharing to be increased by a fixed 2.5% per annum rather than by reference to actual price indices.

12. FCCB's case is that Third Party Income is limited to gate fee income received by FCCB for the treatment of Third Party Waste at the Facilities; it does not extend to income received by FCCB's affiliates in respect of waste sources from other parties located away from the Main Facility or for transporting the waste to the Main Facility, and does not include income derived from residue metals. Further, FCCB's case is that under the Project Agreement increases to the threshold levels for income sharing should be indexed by reference to actual inflation indices.

13. The issues for determination by the Court can be summarised as follows:

    i) whether income received by affiliates of FCCB remotely from the Facilities in respect of waste from third parties constitutes "Third Party Income" for the purpose of Schedule 15 and falls to be shared between the parties ("the Third Party Waste Issue");

    ii) whether income derived from metals in the residue from the treatment process, the IBA, falls within the definition of a "Recyclate Output" and/or "Third Party Income" for the purpose of Schedule 15 ("the Metals Issue");

    iii) whether the court should order FCCB to provide further information and documentation in respect of income received from third parties for the purpose of determining the Authority's entitlement, if any, to a share in the same ("the Documents Issue");

    iv) whether the Project Agreement provides that the guaranteed threshold levels, above which income from electricity outputs and Third Party Waste is shared, should be indexed by reference to actual indices or increased by a fixed 2.5% per annum ("the Indexation issue").

The Project Agreement

14. On 17 April 2013 the parties entered into the Project Agreement for the construction and operation of the Greatmoor Waste to Energy Facilities.

15. The Project is defined in the Project Agreement as:

> "the provision of waste management services to the Authority by the Contractor as contemplated by this Contract including the carrying out of the Works and the provision of the Services;"

16. Clauses 23 and 24 obliged FCCB to procure the design, construction, completion, commissioning and testing of the Works.

17. Eighty-five per cent of the construction cost of the Facilities was paid by the Authority on completion of the works, enabling the senior debt drawn down during development to be fully repaid. The remaining fifteen per cent of the cost was provided by the FCC Group through capital funding, to be fully amortised over the duration of the Project Agreement. On expiry or termination of the Project Agreement the remaining term of the lease in the Facilities will be transferred to the Authority.

18. Clause 41 obliges FCCB, as the Contractor, to undertake the provision of the Service.

19. The Service(s) is defined in the Project Agreement as:

> "the services required to satisfy the specification of the Authority contained in the Specification and to achieve the Contract targets";

20. Clause 43.1 entitles the Authority to deliver or procure the delivery of Contract Waste to the Facilities.

21. The Facilities are defined as:

> "(a) the Main Facility; and "(b) the Transfer Stations, "and reference to a 'Facility' shall be construed as a reference to either the Main Facility or a Transfer Station (as applicable);"

22. The Project Agreement is subject to a Deed of Variation dated 7 August 2017 which removed the second transfer station from the scope of the Project.

23. Clause 44.1 provides that:

> "Save as provided in:
>
> 44.1.1 Schedule 15 (Payment Mechanism);
>
> 44.1.2 Clause 43.1 (Delivery of Contract Waste); and
>
> 44.1.3 any other provision of this Contract that provides an express right or remedy,
>
> the Contractor shall have no right or remedy against the Authority on account of the tonnage, or volume being greater, lower or different from that which the Contractor forecasted in preparing its financial model, or for any lost Third Party

> Income arising therefrom or in making financial and operational assumptions and entering into the Contract. "

24. Under the terms of the Project Agreement, FCCB guarantees Third Party Income from a number of sources, including income from Third Party Waste and electricity output. Income received in excess of the relevant thresholds is shared between the parties as set out in Schedule 15.

25. Clause 47.1 states:

> "Subject to Clause 47.2 (Third Party Income, Third Party Waste and Off Take Contracts), the Parties agree and acknowledge that without prejudice to Clause 45 (Capacity), the Contractor shall be entitled to handle, process, treat and otherwise deal with Third Party Waste at the Facilities provided that any income derived from such handling, processing, treatment of dealing of Third Party Waste shall be dealt with in accordance with Schedule 15 (Payment Mechanism)."

26. Clauses 47.2 and 47.3 set out the conditions under which FCCB is entitled to accept, handle and process Third Party Waste at the Facility.

27. Clause 47.4 states:

> "No entry into, amendment, waiver or exercise of any right relating to a Third Party Waste Contract or an Off Take Contract shall have the effect of increasing the Authority's liabilities on termination or on the occurrence of a Relevant Event and/or have a material adverse effect on the Authority's potential share of Third Party Income, unless the Contractor has obtained confirmation from the Authority that the Third Party Waste Contract or Off Take Contract complies or continues to comply with this Clause 47.4 (Amendments to and Conditions Relating to Third Party Waste and Off Take Contracts)."

28. Clause 47.5 states:

> "At any time after the Commencement Date, if and whenever the Contractor shall enter into or any Affiliate enters into any Third Party Waste Contracts and/or Off Take Contracts the Contractor shall ensure or procure as the case may be that any such contract is in writing and:
>
> 47.5.1 is on reasonable arm's length terms including, for the avoidance of doubt, as regards the payment of income to the Contractor or Affiliate of the Contractor;
>
> …

> 47.5.4 in relation to a Third Party Waste Contract, that the provisions of Clause 47.8 (Third Party Waste Contract) are complied with."

29. Affiliate is defined as:

> "in relation to any person, any holding company or subsidiary of that person or any subsidiary of such holding company and 'holding company' and 'subsidiary' shall have the meaning given to them in Section 1159 of the Companies Act 2006;"

30. Third Party Waste Contracts are defined as:

> "contracts entered into by the Contractor and/or the Sub-Contractor in respect of Third Party Waste excluding Off Take Contracts"…

31. Sub-Contractors are defined in the Project Agreement as:

> "each of the counterparties of the Contractor to the Ancillary Documents or any person engaged by the Contractor from time to time as may be permitted by this Contract to procure the provision of the Works and/or Services (or any of them). References to sub-contractors means sub-contractors (of any tier) of the Contractor."

32. The Sub-Contractors identified in the Ancillary Documents at Schedule 5 to the Project Agreement include FCC Recycling and FCC Waste Services.

33. Off Take Contracts are defined as:

> "any contract entered into by the Contractor relating to the off take of energy or derived residues solely in relation to the Project."

34. Clause 47.6 states:

> "The Contractor shall not enter into or amend a Third Party Waste Contract or an Off Take Contract with an Affiliate unless the Authority has confirmed in writing (not to be unreasonably withheld or delayed) that it is satisfied that the provisions of Clauses 47.4 and 47.5 (Amendments to and Conditions Relating to Third Party Waste and Off Take Contracts) have been complied with."

35. Clause 47.7 states:

> "The Contractor shall:
>
> 47.7.1 afford the Authority a reasonable opportunity to conduct due diligence on any Third Party Waste Contract and/or any Off Take Contract before the

> Contractor enters into the same to enable the Authority to assess its terms for compliance with the provisions of Clauses 47.4 and 47.5 (Amendments to and conditions relating to Third Party Waste and Off Take Contracts) above and to raise comments thereon;
>
> 47.7.2 take into account any reasonable comments made by the Authority and shall use its reasonable endeavours to amend the Third Party Waste Contract and/or any Off Take Contract accordingly before such contract is concluded; and
>
> 47.7.3 on request and free of charge, provide copies of any Third Party Waste Contract and Off Take Contract and any related documents to the Authority's Representative."

36. Clause 47.8 states:

> "Where a Third Party Waste Contract is to be entered into with a local authority for a term of five (5) or more years, the Contractor shall use reasonable endeavours to ensure that the provisions of Clause 105 (Change in Law) and public liability insurances to a level of at least £10,000,000 (ten million pounds) per occurrence and compulsory insurances as required by law are included in the relevant contract."

37. Clause 47.10 states:

> "The Contractor shall liaise with the Authority and take into consideration the Authority's reasonable comments before tendering for or entering into any arrangement with a local authority for the acceptance of municipal waste (solely where such waste could be accepted or handled at the Facilities). Such discussions may include, for the avoidance of doubt, consideration of the price to be tendered or offered …"

38. Clause 48 provides that FCCB shall receive and process Contract Waste in priority to Third Party Waste.

39. Clause 71 provides that the Authority shall pay FCCB a Monthly Unitary Charge, calculated in accordance with Schedule 15.

40. Clause 77 provides that the provisions of paragraphs 3 and 11 of Schedule 15 shall apply in respect of Third Party Income.

41. Paragraph 3 of Schedule 15 sets out the calculation of the Monthly Unitary Charge payable by the Authority to FCCB, including a deduction in respect of the Third Party Income Share, calculated in accordance with paragraph 11.

42. Paragraph 11 of Schedule 15 sets out the formula for calculation of the Third Party Income Share, comprising the sum of: (i) the Recyclate Output Excess TPI Share; (ii) the Electricity Output Excess TPI Share; (iii) the Third Party Waste Excess TPI Share; and (iv) the Other Excess TPI Share.

43. Recyclates Output is defined as:

> "all products of the treatment process at the Main Facility that are sent for reprocessing into new products."

44. Electricity Output is defined as:

> "All electricity generated by the Contractor at the Main Facility and delivered to the National Grid."

45. Third Party Waste is defined as:

> "all waste received at the Facility(ies) other than Contract Waste and Substitute Waste."

46. Clause 99 provides for open book accounting on the part of FCCB:

> "The Contractor shall:
>
> 99.1.1 maintain a full record of particulars of the costs of performing the Works and the Services including those relating to the design, construction, maintenance and operation;
>
> 99.1.2 upon request by the Authority, provide a written summary of any of the costs referred to in Clause 99.1.1 (Contractor's Accounts and Open Book Accounting), including details of any funds held by the Contractor specifically to cover such costs, in such form and detail as the Authority may reasonably require to enable the Authority to monitor the performance by the Contractor of its obligations under this Contract;
>
> 99.1.3 provide such facilities as the Authority may reasonably require for its representatives to visit any place where the records are held and examine the records maintained under this Clause 99 (Contractor's Accounts and Open Book Accounting); and
>
> 99.1.4 at the request of the Authority (a) provide to the Authority copies of its annual report and accounts within twenty (20) Business Days of publication and (b) provide to the Authority a copy of the Base Case at Financial Close and (as the same may be amended)

within twenty (20) Business Days of any amendment thereto."

47. Clause 111.1 provides:

> "Notwithstanding the provisions of Clause 121 (Freedom of Information and Confidentiality) the Contractor shall co-operate fully and in a timely manner with any reasonable request from time to time of any auditor (whether internal or external) of the Authority to provide documents, or to procure the provision of documents relating to the Project (other than where such documents contain Commercially Sensitive Information). At the expense of the Contractor, the Contractor shall provide documents, or to procure the provision of documents, relating to the Project, and to provide, or to procure the provision of, any oral or written explanation relating to the same."

48. Clause 132 provides:

> "132.1 The Contractor acknowledges that:
>
> 132.1.1 the Contractor and the Authority have taken care to ensure that the payment of the Facilities Payment Sum and the granting of the long term contract to the Contractor are not state aid, do not distort the market and do not confer selective benefits on the Contractor; and
>
> 132.1.2 the Authority has invested in the Facilities to meet its own needs and to the extent those needs are satisfied, will generate a market investor return on its investment.
>
> 132.2 Given the acknowledgement set out in Clause 132.1 (Third Party Generation Income) above, the Contractor shall use the same endeavours and adopt the same principles in maximising the third party income as would a prudent commercial operator who had funded the Facilities in full from its own resources and will not lessen those endeavours or change those principles on account of its own Base Case having been satisfied.
>
> 132.3 The Contractor shall ensure that it does not set, offer, tender or agree any price for capacity, power or services which will generate third party income which the Contractor reasonably considers is an undervalue when compared with a comparable facility operating in similar circumstances and taking into account the market capacity, economic conditions and length of any contract."

49. Clause 138 contains an entire agreement as follows:

> "138.1 This Contract and all documents referred to herein set forth the entire agreement between the Parties with respect to the subject matter covered by them and supersede and replace all prior communications, representations (other than fraudulent representations), warranties, stipulations, undertakings and agreements whether oral or written between the Parties.
>
> 138.2 Each of the parties acknowledges and agrees that it does not enter into this Contract in reliance on any warranty, representation or undertaking other than those contained in this Contract, and that its only remedies available in respect of any breach of warranty, misrepresentation or untrue statement shall be any remedies available under this Contract provided that this shall not apply to any warranty, representation or statement made fraudulently, or to any provision of this Contract which was induced by fraud, for which the remedies available shall be those available under the law governing this Contract…"

Background to the dispute

50. FCCB entered into sub-contracts or ancillary agreements with other companies to provide the services required to operate the Facilities, including:

    i) a sub-contract between FCCB and FCC Recycling for operation and maintenance of the Facilities ("the Operating and Maintenance Agreement"); and

    ii) a sub-contract between FCCB and FCC Recycling, pursuant to which FCC Recycling agreed to procure supplies of waste to the Main Facility from third parties ("the Waste Supply Agreement").

51. FCC Recycling typically sources these alternative supplies of waste from other local authorities or from FCC Waste Services, which in turn obtains the waste from other third parties and local authorities. FCC Waste Services has no obligation to FCCB or the Authority to deliver all its waste to the Main Facility. It can choose to dispose of waste to other facilities or to landfill, and has a variety of different outlets both nationally and internationally.

52. FCC Waste Services has entered into various contractual arrangements for the disposal of waste at the Main Facility, including contracts with third parties, from whom FCC Waste Services receives income. FCC Waste Services has entered into corresponding contracts with FCC Recycling in respect of the waste from those third parties that is treated at the Facilities, pursuant to which FCC Recycling receives income from FCC Waste Services.

53. By a contract dated 4 April 2014, effective from 1 April 2014, made between FCC Waste Services and Hertfordshire County Council ("Herts CC"), FCC Waste Services agreed to provide for the treatment and disposal of waste from Herts CC at the Main Facility (when operational). Under the terms of the contract, Herts CC agreed to pay to FCC Waste Services a specified rate per tonne of waste delivered to the Main Facility (subject to indexation) together with a further sum for transporting the waste to the Facilities.

54. By a contract dated 1 April 2014 made between FCC Waste Services and FCC Recycling, FCC Recycling agreed to provide and make available the Main Facility for the treatment and disposal of waste delivered by FCC Waste Services, including waste from Herts CC, and FCC Waste Services agreed to pay to FCC Recycling a specified rate per tonne of the waste processed at the Main facility (subject to indexation).

55. The contract price payable by FCC Waste Services to FCC Recycling in respect of the waste from Herts CC that is treated at the Facilities is lower than the contract price payable by Herts CC to FCC Waste Services.

56. By a contract dated 9 December 2014, made between FCC Waste Services and London Waste Limited ("London Waste"), FCC Waste Services agreed to provide for the rail transfer, treatment and disposal of waste at the Main Facility (when operational). Under the terms of the contract, London Waste agreed to pay to FCC Waste Services a specified rate per tonne of waste delivered to the Main Facility (subject to indexation) together with a further sum for transporting the waste to the Facilities.

57. By a contract dated 9 December 2014 made between FCC Waste Services and FCC Recycling, FCC Recycling agreed to provide and make available the Main Facility for the treatment and disposal of waste delivered by FCC Waste Services, including waste from London Waste, and FCC Waste Services agreed to pay to FCC Recycling a specified rate per tonne of the waste processed at the Main facility (subject to indexation).

58. The contract price payable by FCC Waste Services to FCC Recycling in respect of the waste from London Waste that is treated at the Facilities is lower than the contract price payable by London Waste to FCC Waste Services.

59. The Authority's case is that the introduction of an additional contracting layer should not detract from the fact that FCC Waste Services, an affiliate of FCCB, receives income from the relevant third party in respect of the disposal of waste at the Facilities. As such, the higher rates paid by the third parties to FCC Waste Services should be used in the calculation of Third Party Income for the purpose of income sharing under the Project Agreement, rather than the income received based on the lower prices agreed between FCC Waste Services and FCC Recycling.

60. FCCB's case is that the lower rates paid by FCC Waste Services to FCC Recycling should be used in the calculation of Third Party Income for the purpose of income sharing, rather than the higher rates payable by the third parties. The higher rate payable by Herts CC covers not only disposal of waste at the Facilities but also disposal of waste at a separate facility, the Bletchley landfill site, operated by the FCC

Group. The higher rate payable by London Waste includes haulage costs associated with the provision of rail sidings for off-loading the waste from the trains using specialist vehicles. Further, the higher rates include provision for group overheads and risk allocation in respect of FCC Waste Services' contractual obligations.

Proceedings

61. On 6 October 2020 the Authority issued a Part 8 claim, seeking declarations that:

    i) each of the following agreements entered into by FCC Waste Services is a "Third Party Waste Contract" (i) as that term is defined in the Project Agreement, and/or (ii) as that term is used in clause 47 of the Project Agreement:

        a) contract between FCC Waste Services and Hertfordshire County Council dated 4 April 2014;

        b) contract between FCC Waste Services and FCC Recycling dated 1 April 2014;

        c) contract between FCC Waste Services and London Waste Limited dated 9 December 2014;

        d) contract between FCC Waste Services and FCC Recycling dated 9 December 2014;

    ii) income received by FCCB, or by any Affiliate (including FCC Waste Services), in respect of

        a) the treatment of waste from third parties at the Main Facility;

        b) the movement of such waste to the Facilities for that purpose (and/or any other handling of waste for that purpose);

        c) metals or any other residue or by-product of the process at the Main Facility;

        is (i) income "associated with the Project" and (ii) "Third Party Income" as defined in the Project Agreement.

62. Further, the Authority seeks an order that FCCB is required to provide full details of all income associated with the Project, including income received by FCCB's Affiliates, together with copies of any contractual documents and documents evidencing payments in relation to such income.

63. On 26 November 2020 FCCB issued a Part 8 claim seeking alternative relief, namely:

    i) Declarations that:

        a) the Guaranteed Third Party Waste Third Party Income is to be indexed in accordance with the formula in the definition of Retail Price Index in Schedule 15 and/or Clause 3 of the Project Agreement;

b) the Guaranteed Electricity Third Party Income is to be indexed in accordance with the definition of Retail Price Index in Schedule 15 and/or the formula in Clause 3 of the Project Agreement;

c) FCCB has overpaid the Authority in the sum of £812,633; and/or

d) such terms as the court may decide.

ii) Payment of £812,633 (being the resultant overpayment of Third Party Income to the Authority), with interest.

64. The Authority has a counterclaim in response to FCCB's claim, for payment of £504,533 plus interest if the Authority's interpretation of the Project Agreement is found to be correct.

65. The figures claimed by FCCB and the Authority are not in dispute.

66. The court has the benefit of the following witness statements, setting out the background to the dispute and the respective positions of the parties:

i) Martin Dickman, Service Director for Neighbourhood Services at the Authority – statements dated 5 October 2020, 25 November 2020 and 29 December 2020;

ii) Gillian Sinclair, Head of Development, UK Energy Division at FCC Environment (UK) Limited – statement dated 11 November 2020;

iii) Christopher Huzzey, Finance Manager, UK Energy Division (North) of FCC Environment (UK) Limited – statements dated 26 November 2020 and 26 January 2021.

The Third Party Waste Issue

67. It is common ground that FCCB is required to give credit to the Authority for a share in Third Party Income received above the specified threshold. The issue is whether, for the purpose of the calculation required by Schedule 15, Third Party Income includes income derived by FCCB's affiliates from contracts with third parties under which waste is accepted by the affiliates remote from the Facilities but ultimately treated at the Facilities.

68. Third Party Income is defined in Appendix A of the Project Agreement as:

> "the Contractor's (including for the purposes of this definition the Operating Contractor and/or any Affiliates') income from third parties (other than the Authority under the Contract and other than Substitute Waste) associated with the Project including without limitation that derived from Third Party Waste, Electricity Output and Recyclates Output. The Contractor and/or Affiliate shall be entitled to deduct from such income the costs directly incurred in generating the income provided that the Contractor is able to demonstrate that:

(a) the costs to be taken into account are specifically and solely related to the generation of Third Party Income additional to that modelled in the Base Case; and

(b) such costs are incremental costs incurred over and above those costs which were either envisaged in the Base Case or have been or will be otherwise recovered through the Payment Mechanism; and

(c) the costs are not the costs of handling or processing the Third Party Waste or Recyclate by the Contractor or Affiliate,

and for the avoidance of doubt, reference to 'Affiliates' in sub-paragraph (a) shall be deemed to include FCC Environment (UK) Limited, FCC Recycling (UK) Limited or any Affiliate of FCC Environment (UK) Limited."

69. Third Party Waste is defined in Appendix A as:

> "all waste received at the Facility(ies) other than Contract Waste and Substitute Waste."

70. Third Party Waste Contracts are defined in Appendix A as:

> "contracts entered into by the Contractor and/or the Sub-Contractor in respect of Third Party Waste excluding Off Take Contracts."

71. Schedule 15 of the Project Agreement provides for the Authority to pay FCCB a monthly unitary charge, the calculation of which allows for a deduction for the Third Party Income Share. The mechanism for calculating the Third Party Income Share is set out in paragraph 11.1 of Schedule 15:

> "11.1 The Third Party Income Share in the relevant Contract Year shall be calculated in accordance with the following formula:
>
> $$T_y = R_{TPI} + E_{TPI} + W_{TPI} + O_{TPI}$$
>
> where:
>
> R_{TPI} = The Recyclate Output Excess TPI Share as calculated in accordance with paragraph 11.2
>
> E_{TPI} = The Electricity Output Excess TPI Share as calculated in accordance with paragraph 11.3
>
> W_{TPI} = The Third Party Waste Excess TPI Share as calculated in accordance with paragraph 11.4

> O_{TPI} = The Other Excess TPI Share as calculation [sic] in accordance with paragraph 11.5."

72. The Authority is entitled to receive seventy-five per cent of the relevant Third Party Income in excess of the guaranteed levels of each of the Recyclate Output Excess TPI Share, the Electricity Output Excess TPI Share, the Third Party Waste TPI Share and the Other Excess TPI Share.

73. The Third Party Waste Excess TPI Share is calculated in accordance with paragraph 11.4, which provides:

> "The Third Party Waste Excess TPI Share in the relevant Contract Year shall be calculated in accordance with the following formula:
>
> $W_{TPI} = TPW_R \times 0.75$
>
> where:
>
> TPW_R = The Excess Third Party Waste Third Party Income derived from gate fee revenue over and above the Guaranteed Third Party Waste Third Party Income assumed in the Base Case for the relevant Contract Year, calculated in accordance with the following formula:
>
> $TPW_R = (ATPW_{TPI} – GTPW_{TPI}) + AB3_R + (AB2_R – FB2_R) – ATPW_{SW}$ provided that such sum shall be subject to a minimum of zero (0)
>
> where:
>
> $ATPW_{TPI}$ = the actual Third Party Income received by the Contractor for the treatment of Third Party Waste at the Facilities for the relevant Contract Year.
>
> …
>
> $GTPW_{TPI}$ = the Guaranteed Third Party Waste Third Party Income.
>
> …"

Parties' submissions on Third Party Waste

74. Mr Mort QC, leading counsel for the Authority, submits that the income received by FCCB or its affiliates from third parties, including Herts CC and London Waste, is Third Party Income. FCCB is not permitted to avoid the contractual arrangements for the sharing of such income simply by arranging or permitting income received from third parties to be paid to another FCC entity. Given the terms of the definition of

Third Party Income, it makes no difference whether the income is received by FCCB or by an affiliate. FCC Recycling and FCC Waste Services are "Affiliates" for the purpose of the Project Agreement. The definition of Third Party Income is widely drawn. It includes income from third parties "associated with the Project". As such, it encompasses income derived from ancillary activities and is not limited to gate fees payable at the point at which waste arrives at the Facilities. If FCCB or an Affiliate receives income from a third party in consideration for the treatment of waste at the Facilities, such income is Third Party Income.

75. Mr Mort submits that a Third Party Waste Contract is a contract in respect of Third Party Waste. If the waste from a third party is in fact received at the Facilities then it is Third Party Waste. If there is a contract relating to the treatment of waste at the Facilities then that is a Third Party Waste Contract, notwithstanding the fact that the contract will necessarily concern waste that will be arriving at the relevant destination post-contract. Income received from third parties in respect of the treatment of waste at the Facilities is income associated with the Project, Third Party Income and therefore income derived from Third Party Waste.

76. Mr Stewart QC, leading counsel for FCCB, submits that FCCB Affiliates' income from waste sourced from third parties is not Third Party Income falling within the definition of Third Party Waste Excess TPI Share. The "Contractor" is FCCB and only FCCB. It does not include any Sub-Contractors or Affiliates (as defined in the Contract). Any income received by FCC Recycling, FCC Waste Services or other Affiliates is not received by the Contractor.

77. Neither FCC Recycling nor FCC Waste Services treat the waste pursuant to the alleged Third Party Waste Contracts. They source the waste and transport it to the Main Facility. But they do not treat it. This is confirmed by the definition of "Treat" in the Contract:

> "in relation to the Main Facility only, means that the Contract Waste is actually processed by thermal treatment, except where it is Ad Hoc Waste. The action of receiving, sorting and weighing the Contract Waste is not sufficient to come within the definition of Treat."

Even if FCC Recycling (in its capacity as Waste Finder under the Waste Supply Agreement) and FCC Waste Services did "treat" the Third Party Waste, they certainly do not do so at the Facilities. At most, FCC Recycling and/or FCC Waste Services deliver waste to the Facilities.

78. The income is not "derived from gate fee revenue". Gate fee revenue refers to the payments to the Contractor for receiving the waste at the Facilities. It does not cover the sourcing of waste by FCC Recycling, FCC Waste Services or other Affiliates.

79. Mr Stewart submits that even if the Authority could otherwise show that FCC Recycling and/or FCC Waste Services' income falls within the Third Party Income Share, such income is not Third Party Income. Steps taken many miles away from the Main Facility by separate entities in respect of waste which does not belong to the Authority is not associated with "the Project". The Works and Services are not associated with income derived remotely by FCC Recycling or FCC Waste Services.

Rather they concern the construction of the Facilities and the targets for the Authority's waste. The Third Party Income sharing provisions relate to treatment of Third Party Waste by the Contractor at the Facilities. Income derived in relation to such waste before it is received at the Facility is not Third Party Income.

Discussion

80. The court's approach to contractual interpretation is now well-established. When interpreting a written contract, the court is concerned to ascertain the intention of the parties by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract. It does so by focusing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions: *Arnold v Britton* [2015] UKSC 36 per Lord Neuberger Paras.15-23; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 per Lord Clarke Paras.21-30; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 per Lord Hoffmann Paras.14-15, 20-25.

81. Schedule 15 provides a formula for calculating the Authority's entitlement to a share of Third Party Income. The material part of the definition of Third Party Income in Appendix A is:

> "the Contractor's (including for the purposes of this definition the Operating Contractor and/or any Affiliates') income
>
> from third parties (other than the Authority under the Contract and other than Substitute Waste)
>
> associated with the Project
>
> including without limitation that derived from Third Party Waste, Electricity Output and Recyclates Output."

82. The *"Contractor"* is identified as one of the parties to the Project Agreement and in paragraph 1 of Schedule 15 as FCCB. However, the definition of Third Party Income expressly includes for that purpose FCCB's Affiliates in the reference to *"the Contractor's income"*. FCC Recycling is expressly identified as an Affiliate within the definition of Third Party Income; FCC Waste Services is an affiliate within the FCC Group. It follows that FCCB's Affiliates include FCC Recycling and FCC Waste Services and, for the purpose of Third Party Income in the Project Agreement, the reference to *"the Contractor's income"* includes income received by FCC Recycling and FCC Waste Services.

83. The relevant source of the income is *"income from third parties"*. There are express exclusions of income from the Authority under the Contract and income from Substitute Waste. The income received by FCC Waste Services from Herts CC and London Waste is income from third parties that does not fall within these exclusions.

Therefore, such income is *"income from third parties"* within that part of the definition of Third Party Income.

84. The type of income within scope is *"income from third parties … associated with the Project"*. As Mr Mort submits, that is a broad description. The Project comprises the provision of waste management services to the Authority, including the construction of the Facilities and satisfaction of the requirements in the Specification, but the income referred to as Third Party Income is deliberately stated to extend beyond that derived from FCCB's performance of its contractual obligations under the Project Agreement. The natural and ordinary meaning of the words *"associated with the Project"* indicates that the definition is concerned with income from a wide range of activities related to the availability of the Facilities. It is not confined to income payable only from the activities of waste treatment or disposal after waste arrives at the Facilities; no doubt such income is included; but it is capable of extending to income from ancillary activities of collecting waste at a site remote from the Facilities and transporting it to the Facilities for the purpose of treatment and disposal.

85. The definition of Third Party Income expressly includes income *"derived from Third Party Waste…"* Third Party Waste is defined as: *"all waste received at the Facility(ies) other than Contract Waste and Substitute Waste".* The definition could have stated that it was limited to income generated from the time at which waste arrived at the Facilities, or income generated directly by the treatment and disposal processes at the Facilities provided by FCCB to the Authority; it does not do so. The natural and ordinary meaning of income *"derived from Third Party Waste"* is that it extends to all income arising from waste that is ultimately received at the Facilities, regardless of the point in time at which the sums from which the income is derived become payable. The Waste that is the subject of the Herts CC and London Waste contracts falls within the definition of Third Party Waste if it is received at the Facilities.

86. It follows that the income received by FCC Waste Services from Herts CC and London Waste, in respect of waste that is delivered to the Facilities for treatment and disposal, falls within the definition of Third Party Income.

87. Mr Stewart relies on the formula for calculating Third Party Income Share in paragraph 11 of Schedule 15 in support of his submission that the Authority's entitlement is limited to the specified share of excess gate fee income received by FCCB for the treatment of waste from third parties at the Facilities. However, although the formula in paragraph 11 sets out the steps in the calculations required and the components to be used in such calculations, it does not purport to override the defined terms set out in Appendix A of the Project Agreement and must be read subject to those express terms.

88. TPW_R is described in paragraph 11.4 of Schedule 15 as: *"the Excess Third Party Waste Third Party Income derived from gate fee revenue … calculated in accordance with the following formula …"* The income received by FCC Waste Services from Herts CC and from London Waste is not revenue paid at the point of delivery of the waste to the Facilities. However, gate fee revenue is not a defined term in the Project Agreement. Its ordinary and natural meaning is revenue from charges for waste received for treatment or disposal at the Facilities. It does not necessarily exclude

charges for ancillary services provided for the purpose of delivering the waste to the Facilities. Further, the formula set out for the purpose of calculating TPW_R includes *"the actual Third Party Income"* as considered above. In the absence of clear words to the contrary, the mere reference to gate fee revenue would not override the references to the defined terms, "Third Party Waste" and "Third Party Income"; in particular, it does not displace the clear and express definition of Third Party Income in Appendix A of the Project Agreement.

89. $ATPW_{TPI}$ is described in paragraph 11.4 of Schedule 15 as: *"the actual Third Party Income received by the Contractor …"* However, those words must be read against the defined term, Third Party Income, which explicitly includes income from Affiliates as part of the Contractor's income.

90. The waste is not treated by the Affiliates at the Facilities but that is not what the calculation in paragraph 11.4 of Schedule 15 requires. $ATPW_{TPI}$ is described as: *"the actual Third Party Income received by the Contractor for the treatment of Third Party Waste at the Facilities…"* It is not a requirement of the Third Party Income definition that the third party waste should be treated by the Affiliates or that it should be treated by the Affiliates at the Facilities. It is sufficient that the Affiliates receive income from third parties that is derived from waste received at the Facilities for the purpose of treatment. The income received by FCC Waste Services from Herts CC and from London Waste is *"for the treatment of Third Party Waste at the Facilities"* in that the purpose of the contracts under which such payments are made is the treatment of waste at the Facilities.

91. Mr Stewart raises a concern that if $ATPW_{TPI}$ includes Affiliates' income as well as the Contractor's income, it could lead to double-counting. However, that argument does not stand up to scrutiny. The two agreements entered into by FCC Waste Services, with Herts CC and London Waste respectively, are Third Party Waste Contracts (because they are contracts entered into by a Sub-Contractor in respect of Third Party Waste). Likewise, the two corresponding agreements entered into by FCC Recycling and FCC Waste Services are also Third Party Waste Contracts. Once income is received by the Affiliate from a third party in respect of Third Party Waste, it is treated as Third Party Income for the purpose of Schedule 15. If payments are then made in respect of the same waste by the Affiliate to another Affiliate or to FCCB, such payments are not from a third party, even where they occur pursuant to Third Party Waste Contracts. Thus, the contracts between FCC Waste Services and FCC Recycling are Third Party Waste Contracts, because they are contracts entered into by Sub-Contractors in respect of Third Party Waste, but the income received by FCC Recycling is not Third Party Income because FCC Waste Services is not a third party. Therefore, the income derived from those contracts would not be included in the calculation of the Authority's share of Third Party Income.

92. FCCB contends that inclusion, in the Third Party Income definition, of income derived from waste before it is received at the Facilities could give rise to uncertainty as to when waste is, or is not, Third Party Waste. Examples cited include waste placed in a householder's bin, waste sent to recycling or degraded in transit, or diverted from the Facilities. None of those scenarios poses any real difficulty. It is a matter for the Contractor or Affiliate to decide what waste is delivered to the Facilities for treatment or disposal, together with the arrangements necessary to effect delivery. If the waste is

in fact delivered to the Facilities for treatment or disposal, then the income derived from such waste, whenever generated, is Third Party Income.

93. FCCB contends that the Authority has not paid or contributed to the Affiliates' costs, such as transporting the waste to the Facilities and, therefore, it should not derive benefit from the Affiliates' income so generated. However, that commercial argument does not override the terms of the Project Agreement, which provide for the allocation of costs and risks between the parties. It also ignores the wider commercial context of the Authority's contribution to the opportunity for earning income from transporting waste by making the Facilities available. The Project Agreement permits FCCB to deduct costs directly incurred in generating Third Party Income from the funds to be made available for income sharing. Although the Court has not been asked to construe the costs proviso to the Third Party Income definition, or to determine any specific categories or items of costs relied on by FCCB, as a matter of principle, such costs would include costs incurred by the Affiliates in generating the income from Herts CC and London Waste.

94. Finally, FCCB contends that, if all income derived from contracts between the Affiliates and third parties falls within the definition of Third Party Income for the purpose of income sharing under the Project Agreement, that would act as a disincentive to those Affiliates to use the Facilities for the treatment and disposal of waste. However, such argument would not be sufficient to override the express terms of the Project Agreement. In any event, it ignores the obligation on the part of FCCB to maximise third party income pursuant to clause 132 of the Project Agreement, as part of the parties' justification of their position that the Authority's investment in the project is intended to produce a market return and does not amount to state aid.

The Metals Issue

95. There is a further dispute between the parties as to whether income from metals derived from the IBA falls within the definition of Third Party Income under the Project Agreement.

96. The Authority's position is that income received from third parties is Third Party Income if it is income *"associated with the Project"*. If money is obtained from third parties as a result of the recovery of metals, that is Third Party Income for the purpose of Schedule 15, as either Recyclates Output or Other Excess TPI Share.

97. FCCB's position is that it pays a third party, FCC Recycling, to dispose of the IBA. FCC Recycling transports the IBA from the Main Facility to an area within the landfill site where there is a plant run by a Fortis entity. FCC Recycling does not treat or otherwise process the IBA. Fortis then recovers metal residues from the IBA at the plant. Those metals residues are contaminated and are sent to a specialist metals contractor, where they are separated into less contaminated metals and the IBA residue. The metals contractor sends the less contaminated metals on to a smelter or another third party. Therefore, none of FCCB, FCC Recycling or any other Affiliates derives income from recycling metals.

98. Schedule 7 of the Project Agreement contains FCCB's method statement for service delivery, which states:

> "The solution proposed has the advantage of generating secondary materials and products that can be placed into well established and stable markets in order to improve value for money to the Authority. The principle product is energy, in the form of electricity, where there is an attractive, secure market and where there is expected strong demand during the Contract Period, and heat where markets need to be developed.
>
> Secondary products will include recovered metals and recycled bottom ash as secondary aggregate. This will account for the bulk of the material in the Waste input."

99. The products and residues from the Main Facility identified in the method statement include ferrous and non-ferrous metals from IBA recycling. Table 2 of the document states:

> "The Contractor's proposal incorporates the recovery of both ferrous and non-ferrous metals from the bottom ash…
>
> The ferrous metals recovered from the bottom ash will be of medium quality and depending on the ultimate end market may require further processing to improve their quality…
>
> The non- ferrous metals recovered from the bottom ash will be of medium quality and depending on the ultimate end market may require further processing to improve their quality."

100. Section 2.1.2 states:

> "Ferrous and non-ferrous metals will be recovered from the IBA and this would typically account for approximately 3% of the process inputs, non-ferrous will typically account for approximately 1.5% of the process inputs (these figures are dependent upon the effectiveness of the Waste Collection Authorities' recycling activities).
>
> The metals will be of low grade and will be sold for reprocessing; the Contractor has through its materials marketing unit established contractual arrangements with reprocessor of metals and these arrangements will if necessary isolate the Contractor from market fluctuation in this area."

101. Schedule 7 shows that the parties contemplated that metals would be recovered from the IBA and, although they might require further processing to improve their quality, it was intended that they would generate income as part of the Project.

102. As a matter of construction, income derived from the metals recovered from IBA would fall within the definition of Third Party Income as: *"the Contractor's … income from third parties …associated with the Project"* for the reasons set out above in respect of Third Party Waste. It is immaterial that the metals are extracted and/or reprocessed at a separate facility after the waste has been thermally treated; they

become capable of being extracted and generating income as a result of the thermal treatment of waste at the Main Facility. Therefore, the income generated is directly associated with the Project.

103. I accept Mr Stewart's submission that recovered metals would not fall within the definition of Recyclates Output because they are not: *"products of the treatment process at the Main Facility that are sent for reprocessing into new products."* The metals are recovered from the IBA and may be reprocessed to improve quality but they are not recycled by conversion into new products.

104. However, it does not follow that the income derived from recovered metals is not Third Party Income. As Mr Mort submits, the definition of Third Party Income is inclusive and the calculation in paragraph 11.1 of Schedule 15 provides for *"Other Excess TPI Share"* which is based on "Other Third Party Income" as set out in paragraph 11.5.

105. FCCB's case is that it does not in fact derive any income from the extraction and reprocessing of metals from the IBA; alternatively, that it already accounts for any benefit from metals extracted from the IBA through gate fee income at the Main Facility. The court has not considered what, if any, income has in fact been derived from metals extracted from the IBA; nor whether FCCB already accounts for such income through other payments or allowances. The court would require detailed evidence and submissions on this issue before making any observations as to the merits of such arguments. They are matters for the detailed accounting process that the parties agree this court has not been asked to determine.

Conclusion on Third Party Income

106. In conclusion, income received by FCCB, or by any Affiliate (including FCC Waste Services), in respect of the treatment of waste from third parties at the Main Facility, including the collection and transportation of such waste to the Facilities for that purpose, and metals or any other residue from the IBA, is Third Party Income as defined in the Project Agreement.

Documents and information

107. The Authority seeks an order for specific performance, requiring FCCB to provide information and documents in relation to income associated with the Project as set out in Schedule 2 to the Authority's Part 8 Claim.

108. The court's power to grant such remedies is discretionary and depends on all material circumstances, including whether the Authority is entitled to the information under the Contract and whether the relief sought is proportionate to the Authority's interest in such information: *Cavendish Square Holding BV v Makdessi* [2016] AC 1172 per Lord Neuberger at [29]:

> "the law will not generally make a remedy available to a party, the adverse impact of which on the defaulter significantly exceeds any legitimate interest of the innocent party".

109. The material circumstances include the court's findings set out above that the Authority is entitled to its contractual share of Third Party Income, including such income derived from FCCB's Affiliates and including haulage and metals recovery from IBA.

110. Clause 99 of the Project Agreement imposes on FCCB an obligation to maintain a full record of the costs of performing the Works and the Services. It is required to provide a written summary of such costs upon request by the Authority, afford the Authority opportunities to examine its records and provide on request copies of its annual report and accounts. Those provisions are wide in scope but the open book accounting relates to FCCB's costs, rather than income. Beyond the annual report and accounts, this does not encompass details of Third Party Income that is the subject of the information sought in Schedule 2 to the Part 8 Claim.

111. Clause 111.1 is much broader in scope and extends to the provision of documents relating to the Project. This would encompass documents relating to Third Party Income, including information relating to the same, subject to the proviso that FCCB does not have to provide Commercially Sensitive Information (as set out in Schedule 24 of the Project Agreement).

112. The court is satisfied that the Authority is entitled to details from FCCB of all income associated with the Project received from third parties to date, together with supporting documentation, as set out in paragraphs 6, 7, 8 and 9 of Schedule 2. Accordingly, the court will grant an order in those terms as requested.

113. Contrary to concerns expressed by FCCB, this does not require disclosure of all accounts from all affiliates within the FCC Group. The order will affect only those companies which receive income from third parties associated with the Project.

114. The court is not prepared to extend the order to cover all documents identified in paragraphs 10, 11 and 12. On its face, this would amount to very extensive disclosure of financially sensitive and confidential documentation. It is too wide and unspecified; it is not necessary or proportionate for such documentation to be provided. The information and documents that the court is prepared to order, as set out above, will enable the Authority to interrogate FCCB's accounts and consider the details of income received from third parties associated with the Project. That is sufficient for the Authority to make any claim against FCCB in respect of its contractual entitlement to its Third Party Income Share.

115. Further, the details and documents relating to haulage requested in paragraphs 13 to 18 of Schedule 2 are unnecessary and disproportionate to the Authority's legitimate interest in establishing its entitlement to its Third Party Income Share. The relevant information and documents should be available through disclosure of the documents and information ordered above.

The Indexation Issue

116. The issue is whether the Project Agreement provides that the guaranteed threshold levels, above which income from electricity outputs and Third Party Waste is shared, should be indexed by reference to actual inflation indices, as contended by FCCB, or increased by a constant 2.5% per annum, as contended by the Authority.

Background

117. As Mr Huzzey explains in his witness statement, the Project Agreement is based on a modified standard form of Private Finance Initiative ("PFI") contract. HM Treasury has published guidance on the key issues arising in PFI projects in order to promote the achievement of commercially balanced contracts and enable public sector procurers to meet their requirements and deliver best value for money, including version 4 of the Standardisation of PFI Contracts dated 2007. The purpose of such guidance is stated at section 1.2.1 of the document as follows:

> "The three main objectives of the guidance remain unchanged. First, to promote a common understanding of the main risks which are encountered in a standard PFI project; secondly, to allow consistency of approach and pricing across a range of similar projects; and thirdly, to reduce the time and costs of negotiation by enabling all parties concerned to agree a range of areas that can follow a standard approach without extended negotiations."

118. Section 15 contains guidance on potential approaches to indexation:

> "15.1.1 The Contract will set out the Unitary Charge for the entire Contract term. However, due to the uncertainties of inflation rates and certain operating costs over a long-term contract, it is usually in the interests of both Authority and Contractor to set out provisions for varying the Unitary Charge in certain specified circumstances. The Contractor should always be encouraged to control its costs, but if there are mechanisms for addressing unforeseeable changes in costs, the Contractor can reduce the contingency in its bid price for such risk. Similarly, although the Authority should ensure it obtains a competitive price initially by holding a well-run competition, it will take additional comfort if there is some means of ensuring the price it has agreed to pay in future years will not be in excess of future market prices for such Services.
>
> …
>
> 15.2.1 The Contractor will be concerned to protect itself against its costs inflating over the course of the Contract, rendering the Unitary Charge insufficient to meet its operating costs and financing obligations. The payment mechanism should therefore usually include arrangement for indexing the Unitary Charge to this extent. If there is no indexation mechanism, the Contractor is likely to have to build a contingency into its price to cover operating-cost inflation risk and this is unlikely to give the Authority value for money (as the risk is outside the control of the Contractor and, historically, has been difficult to forecast accurately). It is highly unusual for prices to be fixed (i.e. without indexation) throughout the term of any Contract for

> periods for which PFI Contracts are typically let. Conversely, it is not usual for the whole Unitary Charge to be indexed, and such "over-indexation" should not be used as a method for artificially reducing the initial Unitary Charge.
>
> …
>
> 15.2.6 For more detailed guidance in this area, please see HMT Application Note – Interest-Rate and Inflation Risks in PFI Contracts (May 2006)."

119. The 2006 Application Note includes the following:

> "3.2 … the value for money baseline should be a matching of indexation of the Unitary Charge to the underlying inflation exposure of the Contractor's costs during the service delivery period of the PFI Contract …
>
> …
>
> 3.4 … When evaluating bids for the purpose of establishing value of money … four key indexation related factors influence the calculation of the net present value (NPV) for a given bid:
>
> 1) The proportion of the Unitary Charge which is indexed.
>
> 2) The inflation index or indices applied to the Unitary Charge e.g. RPI or RPI_X
>
> 3) The assumptions made about the value of the index (indices) for the life of the PFI Contract, in order to derive the nominal costs to the Authority.
>
> 4) The deflator used to transform the nominal cash flow into real cash flow, before the application of the public sector real discount rate of 3.5% …
>
> …
>
> The fourth factor is not project specific. The deflator currently used in appraising PFI projects is 2.5% …
>
> Footnote 41
>
> Best practice is for the Authority to provide a set of forecasts of values for the index (indices) which bidders must use in preparing their financial projections to help Authorities carry out bid evaluations on a consistent basis."

120. In 2008 the Department for Environment, Food and Rural Affairs ("DEFRA") published guidance on payment mechanism principles for residual waste treatment projects. Section 3.1 of such document refers to guidance in the 2007 Standardisation

document and the 2006 Application Note, including suggested drafting reflecting the following principles:

> - "The Base Payment should typically be partially indexed as it covers some underlying costs which are fixed in nominal terms (principally debt service obligations) and other costs which will vary in nominal terms over the course of the Contract; and
>
> - Other components of the unitary charge should be fully indexed to ensure their real value is maintained throughout the Contract."

121. The Authority's case is that these documents are irrelevant and in any event inadmissible on the issue of interpretation of the Project Agreement. Reliance is place on the entire agreement and non-reliance provisions contained in clause 138:

> "138.1 This Contract and all documents referred to herein set forth the entire agreement between the Parties with respect to the subject matter covered by them and supersede and replace all prior communications, representations (other than fraudulent representations), warranties, stipulations, undertakings and agreements whether oral or written between the Parties.
>
> 138.2 Each of the parties acknowledges and agrees that it does not enter into this Contract in reliance on any warranty, representation or undertaking other than those contained in this Contract, and that its only remedies available in respect of any breach of warranty, misrepresentation or untrue statement shall be any remedies available under this Contract provided that this shall not apply to any warranty, representation or statement made fraudulently, or to any provision of this Contract which was induced by fraud, for which the remedies available shall be those available under the law governing this Contract."

122. In *The Inntrepreneur Pub Company v East Crown Limited* [2000] 2 Lloyd's Rep. 611 Lightman J decided that an entire agreement clause precluded one of the parties to the lease from asserting a collateral agreement:

> "[7] The purpose of an entire clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to

> conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document. The operation of the clause is not to render evidence of the collateral warranty inadmissible in evidence … it is to denude what would otherwise constitute a collateral warranty of legal effect.
>
> [8] … the formula of words used in the clause is abbreviated to an acknowledgement by the parties that the agreement constitutes the entire agreement between them. In my judgment that formula is sufficient, for it constitutes an agreement that the full contractual terms to which the parties agree to bind themselves are to be found in the agreement and nowhere else and that what might otherwise constitute a side agreement or collateral warranty shall be void of legal effect. That can be the only purpose of the provision."

123. In *Barclays Bank plc v Unicredit* Bank AG [2014] 2 Lloyd's Rep 59 the Court of Appeal considered the ambit and effect of an 'entire agreement and understanding' clause. The material provision in that contract was wider in ambit than the Project Agreement which contains an 'entire agreement' provision but not an 'entire understanding' provision. In holding that the clause did not have any relevance to the way in which the parties might exercise rights given to them by the contract, Longmore LJ stated:

> "[27] The entire agreement clause is concerned with identifying the terms of the contract. The use of the phrase 'constitute the entire agreement and understanding' is intended to exclude any evidence or argument to the effect that the terms of the contract are to include any mutual understanding that is not recorded in the contract. It is not intended to exclude admissible evidence or argument about the way in which parties exercise rights given to them by the terms of the contract.
>
> [28] Courts have tended to construe entire agreement clauses strictly. A clause framed in the way in which it is framed in the contract with which this case is concerned would not, for example, preclude a claim for misrepresentation because that is not a claim which depends on a term of the contract which is not expressed in the contract. … Consistently with this approach, the clause has, in my view, no relevance to the way in which parties may exercise rights given to them by the contract."

124. In *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2019] 1 WLR 637, the issue was whether section 3 of the Misrepresentation Act 1967 applied to a non-reliance clause, so as to defeat the contractual estoppel and permit a claim for misrepresentation. In the context of that consideration, Leggatt LJ (as he then was) stated at [94]:

> "I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear…"

125. The above cases indicate that entire agreement or non-reliance clauses may prevent the use of extrinsic evidence to establish additional terms and collateral agreements, or claims based on warranties or misrepresentations. However, subject to the wording of the provision in question, they do not exclude the use of extrinsic evidence as part of the factual matrix in the contractual interpretation exercise to ascertain the meaning of the express terms set out in the contract.

126. That this is a permissible approach in principle has been re-affirmed by the Supreme Court in cases such as *Rainy Sky* (above), in which Lord Clarke stated:

> "[14] … the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the *Investors Compensation Scheme* case [1998] 1 WLR 896, 912H, the relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> …
>
> [21] The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

127. However, although regard may be had to the factual and commercial context when interpreting the express terms of a contract, the court must also bear in mind the cautionary words of Lord Neuberger in *Arnold v Britton* (above) at [20]:

> "… while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

128. In this case, it is recognised that, although the Project Agreement is based on the structure of a PFI contract, it is not a standard term, PFI contract. Further, the guidance notes referring to indexation are not incorporated into the Project Agreement. However, they form part of the background facts and circumstances known or assumed by the parties at the time that the Project Agreement was executed. As such, they do not override express terms of the Project Agreement but they may be used as part of the factual matrix in construing such terms.

129. It is common ground that in the invitation to submit final tenders for the Project at Appendix 3, for comparison purposes, the Authority instructed bidders to assume RPI_x to be a constant 2.5% per annum throughout the contract period:

> "11.4 Bidders must clearly specify the unitary charge per annum required from the Authority. The index (or basket of indices) used to index the unitary charge should be set out clearly in the Payment Mechanism. Where RPI_X or RPI is used this should be assumed to be a constant 2.5% per annum throughout the Contract Period …
>
> 11.13 Model Specification and Assumptions Book …
>
> List of key assumptions used in the model: … Proportion of the unitary charge subject to indexation in each Contract Year. For the proportion subject to RPI or RPIx indexation, the indexation rates should be assumed to be a constant 2.5% per annum throughout the Contract Period."

130. FCCB used a constant inflation rate of 2.5% per annum in the Base Case financial model (the financial model used to determine the unitary charge) for the purposes of

its tender. The Base Case financial model was incorporated into the Project Agreement at Schedule 20.

131. In its Final Business Case, prior to execution of the Project Agreement, the Authority stated:

> "5.6 Key Risks
>
> … Inflation risk on the unitary charge remains with the Council for the duration of the contract.
>
> …
>
> 8.3.3 Third Party Income
>
> … the Contractor will seek a relatively large volume of non-council waste from third parties in order to fill the Facility to capacity. The base case financial model assumes a guaranteed commercial gate fee of … (real 2010 prices), subject to indexation at …
>
> The base case financial model guarantees a real electricity price of … (real 2010 prices) subject to indexation …"

However, from the redacted version before the court, the Authority did not spell out whether such indexation would be by reference to the figures included in the Base Case, using a constant rate of 2.5%, or by reference to specific indices. Therefore, this does not assist in the interpretation of the relevant provisions.

132. Further, the pre-contractual drafts, showing tracked changes to the provisions, even if admissible, would not assist because there is insufficient evidence as to the reasons for changes to the drafting and there is no evidence before the court of any other exchanges between the parties on this point.

Material terms of the Project Agreement

133. Under the terms of the Project Agreement, FCCB guarantees income from the sale of electricity ("GE_{TPI}") and income from Third Party Waste ("$GTPW_{TPI}$"). The effect of the guarantees is that FCCB takes the risk that it will receive at least that level of contribution to its costs, including repayment of its share of the capital funding, which has been taken into account when fixing the unitary charge payable by the Authority. Over and above the levels of those guarantees, the income is subject to income sharing arrangements, calculated in accordance with Schedule 15, as set out above in relation to the Third Party Waste issue.

134. Schedule 15 sets out the formula for calculation of the Unitary Charge:

i) The formula for calculation of the Unitary Charge in paragraph 3.2 includes the Monthly Base Payment and other components, subject to various performance deductions, and includes by way of deduction the Third Party Income Share.

ii) The formula for calculation of the Third Party Income Share in paragraph 11.1 includes the Electricity Output Excess TPI Share and the Third Party Waste Excess TPI Share.

iii) The formula for calculation of the Electricity Output Excess TPI Share in paragraph 11.3 includes by way of deduction the Guaranteed Electricity Third Party Income.

iv) The formula for calculation of the Third Party Waste Excess TPI Share in paragraph 11.4 includes by way of deduction the Guaranteed Third Party Waste Third Party Income.

135. Guaranteed Electricity Third Party Income (GE_{TPI}) is defined in Schedule 15 as:

> "the nominal Third Party Income in relation to Electricity Output set out [in] row 42 of the "Financials" sheet in the Base Case in the relevant Contract Year."

136. Guaranteed Third Party Waste Third Party Income ($GTPW_{TPI}$) is defined in Schedule 15 as:

> "the nominal Third Party Income in relation to gate fee revenue in respect of Third Party Waste, as set out [in] row 41 of the "Financials" sheet in the Base Case in the relevant Contract Year".

137. Clause 3 of the Project Agreement states:

> "In this Contract, except where it is expressly provided that certain sums are inflated in accordance with paragraph 15 of Schedule 15 (Payment Mechanism), references to amounts expressed to be "Indexed" are references to such amounts, multiplied by
>
> $\underline{Index_{y-1}}$
>
> $Index_{base}$
>
> where $Index_{y-1}$ is the value published for RPI_x for the January immediately preceding Contract Year y (as published by the Office of National Statistics) and $Index_{base}$ is the value of 222.00 being the value published for RPI_x as defined in Schedule 15 (Payment Mechanism) at 1st April 2010."

138. "Index" is defined in Schedule 15 of the Project Agreement as:

> "Any of the Retail Price index, the Average Weekly Earnings Index and Indices means all of them."

139. "Retail Price Index (RPI_x)" is defined in Schedule 15 as:

> "the retail price index of all items (excluding mortgage interest payments) published by the Office of National Statistics from time to time in reference table "RP05 RPI" or, failing such publication, such other index as may replace or supersede the same…"

Parties' submissions

140. Mr Stewart submits that, properly construed, GE_{TPI} and $GTPW_{TPI}$ are indexed by reference to "RPI standard inflation" (i.e. RPI_x) as identified in row 26 of the "Financials" sheet and row 10 in the "Assumptions" sheet in the Base Case. Rows 41 and 42 are based on and incorporate row 10 of the "Assumptions" sheet in the Base Case. Row 10 clearly states, as used elsewhere in the Project Agreement to identify RPI_x, that the figures should be increased by *"RPI (std inflation)"*. That interpretation reflects the Final Business Case and standard industry guidance that the agreement was based upon, namely, that the contractor should not bear inflation risk in these projects. He further submits that the Authority's interpretation would place the entire contract at risk and produce commercial consequences that are unlikely to have been intended. The guaranteed income levels would be skewed away from the actual income levels and the Authority could profit simply due to inflation differences which plainly was not the purpose of the income sharing mechanism.

141. Mr Mort submits that the Project Agreement does not apply indexation to the values for Guaranteed Electricity Third Party Income ("GE_{TPI}") and Guaranteed Third Party Waste Third Party Income ("$GTPW_{TPI}$"). The values for these items are contained in rows 41 and 42 in the "Financials" spreadsheet. The values for $GTPW_{TPI}$ and GE_{TPI} are then used in the calculations in paragraphs 11.3 and 11.4 of schedule 15. The Project Agreement contains no provision for adjustment to, or re-calculation, of the values in rows 41 and 42 for the purposes of these two definitions or the calculations shown in paragraphs 11.3 and 11.4. Rows 41 and 42 do not contain an amount which could be expressed to be indexed but a row of calculated values, cross-referred to different points in time. There are a number of examples within schedule 15 where full indexation applies to other parts of the unitary charge but this does not include $GTPW_{TPI}$ or GE_{TPI}. The values for $GTPW_{TPI}$ and GE_{TPI} are not expressed to be indexed and therefore clause 3 of the Project Agreement has no application.

Discussion

142. A number of values in Schedule 15 used in the calculation of the Unitary Charge are subject to the Full Indexation Factor ("I_F"), which is stated to represent the increase or decrease in the Retail Price Index (RPI_x) over the period since the Base Date. The Full Indexation Factor is a blend of indices and is calculated in accordance with paragraph 15.1 of Schedule 15. The calculation of I_F includes a proportion of costs that are subject to RPI_x and a proportion of costs that are subject to the Average Weekly Earnings Index.

143. The values subject to the Full Indexation Factor include the Monthly Base Payment and various performance deductions used in the calculation of the Unitary Charge. However, they do not include the Guaranteed Electricity Third Party Income (GE_{TPI})

or the Guaranteed Third Party Waste Third Party Income ($GTPW_{TPI}$) used in the calculation of Third Party Income Share.

144. Therefore, for the purpose of Clause 3 of the Project Agreement, these guarantees do not fall within the proviso as sums expressed to be inflated in accordance with paragraph 15 of Schedule 15.

145. The issue that then arises is whether the guarantees are amounts *"expressed to be 'Indexed'"* for the purpose of Clause 3.

146. The Schedule 15 definitions of Guaranteed Electricity Third Party Income (GE_{TPI}) and Guaranteed Third Party Waste Third Party Income ($GTPW_{TPI}$) respectively refer to: *"nominal Third Party Income ...set out* [in] *row* [41 or 42]*... of the "Financials" sheet in the Base Case ..."* The definitions do not state explicitly that the guaranteed income values should be indexed. The "Financials" sheet in the Base Case contains row 41 entitled *"Commercial revenue"* and row 42 entitled *"Power revenue"*. Rows 41 and 42 each contain a series of calculated values at quarterly intervals for the period throughout the Project.

147. The reference to the values as *"nominal"* does not provide any elucidation because it is ambiguous. It could mean that the values are 'nominal' rather than 'actual', reflecting the fact that they concern guaranteed levels rather than actual income; alternatively, it could mean that the values are 'nominal' in that they are subject to change, for example, by way of indexation.

148. More assistance is provided by consideration of the nature of the Base Case. The Base Case is not just a fixed spreadsheet of figures; it is a financial model containing formulae and stated assumptions, providing a working tool that can be adjusted as set out in Schedule 19 of the Project Agreement. The figures in row 41 and row 42 are shown increasing throughout the duration of the Project at a rate of 2.5% per annum, in line with the incremental changes shown in row 26 entitled *"RPI (std inflation)"* under the heading *"Indexes"*. The formula boxes for each of rows 41 and 42 contain cross-references to entries in the "Assumptions" sheet. Row 10 of the "Assumptions" sheet is entitled "*RPI (std inflation)"* under the heading *"INDEXES"* against which is a figure of 2.5%.

149. An objective reading of the Base Case financial model indicates that the parties intend the values for Guaranteed Electricity Third Party Income and Guaranteed Third Party Waste Third Party Income to be indexed for inflation and that the figures inserted in the "Financials" sheet are based on an assumed inflation rate of 2.5%. Therefore, they are amounts that are expressed to be indexed.

150. It follows that the values for Guaranteed Electricity Third Party Income and Guaranteed Third Party Waste Third Party Income are subject to indexation as set out in clause 3 of the Project Agreement.

Conclusion

151. In conclusion, the Authority is entitled to the following declarations:

i) each of the following agreements entered into by FCC Waste Services is a "Third Party Waste Contract" (i) as that term is defined in the Project Agreement, and/or (ii) as that term is used in clause 47 of the Project Agreement:

   a) contract between FCC Waste Services and Hertfordshire County Council dated 4 April 2014;

   b) contract between FCC Waste Services and FCC Recycling dated 1 April 2014;

   c) contract between FCC Waste Services and London Waste Limited dated 9 December 2014;

   d) contract between FCC Waste Services and FCC Recycling dated 9 December 2014;

ii) income received by FCCB, or by any Affiliate (including FCC Waste Services), in respect of

   a) the treatment of waste from third parties at the Main Facility;

   b) the movement of such waste to the Facilities for that purpose (and/or any other handling of waste for that purpose);

   c) metals or any other residue or by-product of the process at the Main Facility;

   is (i) income "associated with the Project" and (ii) "Third Party Income" as defined in the Project Agreement.

152. The Authority is entitled to the information and documents set out in paragraphs 6, 7, 8 and 9 of Schedule 2 to the Authority's Part 8 Claim.

153. FCCB is entitled to declarations that:

i) the Guaranteed Third Party Waste Third Party Income is to be indexed in accordance with the formula in the definition of Retail Price Index in Schedule 15 and/or Clause 3 of the Project Agreement;

ii) the Guaranteed Electricity Third Party Income is to be indexed in accordance with the definition of Retail Price Index in Schedule 15 and/or the formula in Clause 3 of the Project Agreement.

154. FCCB is entitled to payment of £812,633, the sums overpaid in respect of Third Party Income with interest.

155. Following hand down of this judgment, the hearing will be adjourned to a date to be fixed for the purpose of any consequential matters, including any applications for permission to appeal, and any time limits are extended until such hearing or further order.