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Case No: HT-2023-MAN-000021

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ

Date handed down: 21 June 2024

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

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

- -

Justin Mort KC and Tom Coulson
(instructed by **Sharpe Pritchard LLP, London**) for the **Claimant**

Fiona Parkin KC, George McDonald & Samar Abbas Kazmi
(instructed by **Pinsent Masons LLP, Manchester**) for the **Defendant**

Hearing dates: 15 - 19 April, 1 May 2024
Draft judgment circulated: 30 May 2024

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APPROVED JUDGMENT

Remote hand-down:
This judgment was handed down remotely at 10am on 21 June 2024 by circulation to the parties or their representatives by email and by release to The National Archives.
I direct that pursuant to CPR PD 39A paragraph 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.
His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

Introduction and summary of decision

1. This judgment is produced after a five day trial running from 15 to 19 April 2024 followed by written closing submissions and, finally, oral closing submissions on 1 May 2024.

2. The claimant (**BC**) and the defendant (**FCCB**) are in dispute in relation to the proper interpretation of, and other matters arising from, their entry into a waste management project agreement (**the PA**) on 17 April 2013.

3. Previous litigation between the same parties in relation to the PA (**the previous proceedings**) resulted in determinations by O'Farrell J as to: (a) BC's entitlement in principle to share in certain categories of third party income (**TPI**); and (b) BC's entitlement to be provided with information and documents in relation to such TPI. Her judgment (**the O'Farrell judgment**) is reported at [2021] EWHC 2867 (TCC).

4. I cannot improve on O'Farrell J's introduction to the parties and the PA in her judgment, which I adopt here with gratitude and with some minor modification as necessary.

5. BC (referred to in the PA as the **Authority**) is a waste disposal authority for the purposes of section 30 of the Environmental Protection Act 1990.

6. FCCB (referred to in the PA as the **Contractor**) is a special purpose vehicle (**SPV**) created for the purposes of performing the PA.

7. The PA is a long term contract, intended to run until 2046, and provides – in summary – for the following matters.

8. First, the construction and operation of an energy from waste (**EfW**) thermal treatment plant at Lower Greatmoor Farm, Buckinghamshire (referred to in the PA as the **Main Facility** and in this judgment as **Greatmoor**) and two waste transfer stations (**WTSs**) at High Heavens and Amersham. (In the end, as envisaged as a possibility in the PA, the Amersham WTS was not built.) In the PA all three were referred to collectively as the **Facilities**.

9. Second, the treatment of BC's waste (i.e. domestic and other waste for which it was responsible – referred to in the PA as **contract waste**) at Greatmoor, in circumstances where treatment by such means was an important part of its strategy for meeting various statutory targets for diverting biodegradable municipal waste from landfill.

10. Third, the treatment of waste originating from third parties, including other local authorities (referred to in the PA as **Third Party Waste - TPW** for short);

11. Fourth, the sharing of TPI derived from TPW, from electricity outputs, from recyclate outputs and from various other sources.

12. The construction of the Main Facility was completed and it became operational in June 2016.

13. The waste received at Greatmoor comprises contract waste[1] and TPW. Greatmoor has capacity to treat approximately 300,000 tonnes of waste per annum. It was envisaged that BC should provide about 100,000 tonnes of waste per annum for treatment. Waste from other sources provided by FCCB would provide the remainder.

14. Once received at Greatmoor, 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 Greatmoor is either used for on-site purposes or exported to the national grid.

15. 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.

16. The two issues for determination before O'Farrell J which are relevant for this case were described by her as follows:

17. First, "Whether income received by affiliates of FCCB remotely from the Facilities in respect of waste from third parties constitutes TPI for the purpose of Schedule 15 and falls to be shared between the parties (**the Third Party Waste Issue**)".

[1] As well as substitute waste, sourced by FCCB in substitution for contract waste where the latter falls below the specified minimum annual tonnage, although that does not figure in this case.

18. Second, "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**)."

19. Her conclusion in relation to the Third Party Waste Issue was at paragraph 151(ii) of her judgment, and was embodied in paragraph 2 of her consequential order, and was that: "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".

20. Her conclusion in relation to the Documents Issue was that BC was entitled to some, although not all, of the information and documents it had sought.

21. FCCB duly provided information and documentation pursuant to that determination and, in consequence, made substantial payments to BC in respect of TPI for the accounting years 2015-16 onwards. By the current proceedings BC contends that the payment made did not properly reflect its full contractual entitlement. It became clear that there were a number of disputes between the parties which required determination and which will, potentially, have substantial long term ramifications for the parties. This judgment will, subject to any need for further working out, resolve the issues in dispute insofar as they are the subject of and to be determined at this trial. Unless the parties are able to resolve their remaining differences out of court (which is surely in their best interests) it seems inevitable that there will be further proceedings.

22. These proceedings were issued in the London TCC in August 2022 and, following the close of statements of case, directions were given by consent by Veronique Buehrlen KC, sitting as a deputy High Court Judge, in April 2023. Those directions included a transfer to the Manchester TCC for a week's trial in April 2024, which was the earliest convenient date, given the competing demands on listing in the London TCC and given the mutual desire of the parties to have their disputes resolved as soon as practicable. The directions also included provision for disclosure to be given by way of an agreed sampling protocol and for ADR to proceed in tandem with the agreed court timetable.

23. There have been a number of disputes between the parties in relation to disclosure and in relation to various amendments to the statements of case which I have had to resolve since November 2023. These have included a fully contested application by FCCB for the trial to be adjourned, which I heard and refused on the basis that I was satisfied that the key issues in dispute could and should fairly be determined within the 5 day trial to which the parties had committed in April 2023, especially in the light of a pragmatic concession made by BC not to pursue disputes in relation to a large number of small individual claims.

24. Nonetheless, the parties' respective legal advisers have had to work extremely hard to prepare for and to conduct the trial to what was a very demanding timetable and I am very grateful to them for their hard work, for their efficient conduct of the trial and for their extremely detailed and impressive written submissions, running to 147 and 194 pages respectively by way of opening submissions and 112 and 127 pages by way of closing submissions. Although the majority of the cross-examination was undertaken by leading counsel each junior counsel involved also cross-examined various witnesses with skill and to effect.

25. This is not a case where I can with complete confidence identify the precise sum to which BC is entitled as a result of this judgment. It will be substantial but the precise amount will need to be ascertained once my findings are translated into figures. Further, there are already certain issues which have been hived off for a further trial and, in the course of this judgment, I have identified a number of further issues which may most conveniently be determined at the same time. There are also number of issues which I have had to determine which do not readily translate into immediate money terms.

The parties and other significant entities

26. I have already identified (paragraphs 5 and 6 above) BC and FCCB. FCCB is 51% owned (and thus controlled) by the FCC group of companies (**the FCC group**) and 49% owned by a separate investment group.

27. Of the FCC group, the principal UK business company is FCC Environment (UK) Limited (**FCCE**) (previously named Waste Recycling Group Limited, and sometimes referred to as WRG). Within the FCC group, as relevant to this case, also sit FCC Recycling (UK) Limited (**FCCR**) (previously named Waste Recycling Limited) and FCC Waste Services Limited (**FCCW**). The ultimate parent company of the FCC group in the UK is a Spanish company, Fomento de Construcciones y Contratas SA (hence, presumably, the source of the abbreviation FCC in the FCC group companies).

28. In this judgment I will refer to **FCC** as shorthand for the FCC group and its individual companies, save where it is necessary to distinguish between the position of FCCB, the other individual companies and the FCC group.

29. Three other local authorities are of particular relevance to this case, because each have entered into contracts with FCC companies for waste treatment where there are issues between the parties as to what income falls within the scope of relevant TPI and what costs are properly deductible from such income.

30. Herts. In paragraph 53 of her judgment O'Farrell J identified that by a contract dated 4 April 2014, effective from 1 April 2014, and made between FCCW and Hertfordshire County Council (**Herts**), the former agreed to provide for the treatment and disposal of waste from Herts at Greatmoor, once operational. Under the terms of the contract Herts agreed to pay FCCW a specified rate per tonne of waste delivered to Greatmoor (subject to indexation), together with a further sum for transporting the waste to the Facilities. In paragraph 54 she identified that by a contract dated 1 April 2014 made between FCCW and FCCR the latter agreed to make Greatmoor available for the treatment and disposal of waste delivered by FCCW, including waste from Herts, and FCCW agreed to pay to FCCR a specified rate per tonne of the waste processed at Greatmoor (subject to indexation). In short, these two contracts were effectively back to back with each other and also (as regards FCCR) back to back with its waste finder agreement with FCCB, considered later in this judgment.

31. NLW. In paragraphs 56 and 57 of her judgment O'Farrell J identified similar back to back contracts, made between FCCW and a company known as NLW Waste Limited, a company providing waste treatment and disposal services for North London Waste Authority (**NLW**), and between FCCW and FCCR, both dated 9 December 2014.

32. These two contractual arrangements were the subject of the previous case.

33. Luton. The Luton contracts were not the subject of the previous case. Insofar as it matters, and it does not because there is no pleaded (nor would there have been any sustainable) case based on res judicata or

abuse of process, the reason appears to be because in the previous case particular emphasis was placed upon the presence of FCCW in the chain of contracts and the impact of this in terms of the rates passed on, whereas this is not a factor in relation to the contracts with Luton. It is, however, worth noting that in relation to the O'Farrell judgment nothing of significance so far as this case is concerned turned on the involvement of FCCW as the contracting party being interposed between FCCR and Herts or NLW.

The evidence

34. In addition to the voluminous documentation contained in the trial bundle I also heard evidence from a number of witnesses of fact as well as two accountancy experts.

35. BC served witness statements from 9 witnesses and FCCB served witness statements from 12 witnesses. I shall refer to the evidence given by the witnesses as and where necessary. This is not a case which turns to any significant extent on resolving disputed issues of witness evidence.

36. Although some witnesses were not called who might have been able to add to the evidence on some points of relevance, there is no basis for or reason to draw adverse inferences against either party in that respect.

37. The two accountancy experts were Ms Perks for FCCB, who produced the first report and Mr Cowan for BC, who produced a responsive report, following which they held discussions and produced a helpful joint statement. Their evidence was relatively limited in scope, not least because I only gave FCCB permission to adduce expert evidence on limited issues at a late stage in the case. They were able to agree on most matters within their expertise and, where unable to agree, that was largely because the particular issues were heavily dependent on the proper interpretation of the PA and other matters of law, or matters of fact, on which they could not give expert evidence.

The issues for trial

38. By reference to the respective lists of issues produced by the parties pre-trial, the principal issues can broadly be summarised as follows.

The overarching issue

39. The overarching issue is what, on the proper construction of the PA, is the correct calculation of excess TPI (**Excess TPI**) for the contract years 2016-17 to 2022-23. And, thus, what is BC's 75% share of that excess TPI? And, therefore, to what extent if at all has it been underpaid its excess TPI share?

40. It is more logical to ask first what is the relevant income and second what are the relevant deductible costs. However since, as Mr Mort KC leading Mr Coulson for BC suggested in oral closing submissions, the most important issue in the case in terms of value is which, if any, categories of costs identified by FCC is it entitled to deduct against income, it makes sense to deal with this issue first.

The costs issues

41. The categories of costs in issue are conveniently summarised in the witness statement of Mr McKenzie as follows: (1) Haulage and contractors; (2) Manpower; (3) Site costs; (4) SHE costs; (5) Hire costs; (6) Fuel costs; (7) Plant repair and maintenance; (8) Fixed rent, rates and licensing; (9) Site overheads; (10) Depreciation; (11) Divisional Overhead; (12) Corporate Overhead;(13) Operational support charge.

42. As to these costs categories the following questions arise.

43. First, upon whom does the burden of proof lie, BC or FCCB?

44. Second, whether the costs have been "directly incurred" in generating TPI as that phrase is used in the PA?

45. Third, whether the costs are "specifically and solely related to the generation of TPI additional to that modelled in the Base Case" (proviso (a))? As to which the specific issue arises: what does "modelled in the Base Case" mean for these purposes; and what if any evidence other than the PA itself, including the Base Case, is admissible and relevant for this purpose?

46. Fourth, whether the 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" for the purposes of proviso (b)? As to which the specific issue arises: what does "envisaged in the Base Case" mean for these purposes; and what if any evidence other than the PA itself, including the Base Case, is admissible for this purpose?

47. Fifth, whether the costs are "the costs of handling or processing the Third Party Waste or Recyclate by the Contractor or Affiliate" for the purposes of proviso (c)? As to which the specific issue arises: does TPW mean TPW handled or processed anywhere or only TPW handled or processed at the Facilities.

48. Specific issues in relation to costs have been referred to in relation to: (a) the impact, if any, of the Deed of Variation dated 7 August 2017 as regards the omission of Amersham; (b) three specific cost sub-categories, namely: (i) manpower; (ii) overheads; and (iii) insurance.

The income issues

49. The Luton unitary charge. In terms of value the most important issue is whether or not all, or some part, of the unitary charge paid by Luton in respect of TPW (i.e. waste from Luton that is received at and disposed of at the Facilities) is TPI and, if part, what part and/or how should it be calculated? I have already ordered, when giving BC permission to amend to introduce this claim, that if and insofar as the answer to this question is "Yes", because it was not practicable in the time available for the question of deductible costs to be fully investigated and determined in this trial, there would need to be a separate and subsequent trial in order to determine what, if any, costs are properly deductible from any such TPI. In the course of oral closing submissions I indicated that if my decision is that part of the Luton unitary charge is TPI, but that it was not possible for me on the evidence adduced at this trial to determine what part, then it may be necessary to adjourn that issue to be dealt with at the same time as the question of the properly deductible costs is also determined.

50. A subsidiary question as regards Luton is what, if any, adjustment is required to TPI arising from "residual contamination" as referred to in invoices issued to Luton.

51. The blended waste issue. Has FCCB correctly calculated the relevant portion of the income due to BC from income received by the Affiliates for the operation of various waste transfer stations? FCCB has calculated income on the basis that all municipal solid waste is sent to Greatmoor in priority to other commercial and industrial waste, but this is disputed by BC.

52. The management fees allocation issue. By what amount should TPI from TPW treatment be reduced as a result of allocating the management fees for the Herts' waste transfer stations by reference to the actual rather than anticipated tonnages of waste (it being agreed in principle that such a reduction should be made, if quantified)? Should such management fees be included in the calculation of TPI from TPW treatment at all?

53. Understatement of IBA. Has FCCB understated the tonnes of IBA that generated income from Fortis as alleged by the Claimant and, if so, by how much? (It appears that a separate and very minor dispute of £5,187 in relation to the sale of IBA to a Mr Einig has been resolved by FCC agreeing this item.)

54. Bletchley negative tonnages. Should the negative tonnages recorded as being received at Bletchley material recycling facility be included or excluded from the calculation of TPI from TPW treatment?

55. Income from metals. Should any income from metals be included within the calculation of TPI from TPW treatment?

56. The Fortis contract. Whether the contract made between FCC Recycling (UK) Limited and Fortis IBA Limited dated 21 November 2018 is an "Off Take Contract" as that phrase is defined in the PA.

57. Obligations under clauses 99 and 111. Whether BC is entitled to a declaration as to the extent of FCCB's obligations to provide information and documents under clauses 99 and/or 111 of the PA and if so in what terms.

Waste collection, transfer and disposal

58. This section deals with the general landscape of waste collection, transfer and disposal, which is relevant in that it was part of the factual matrix - as known to both parties with long familiarity in and experience of the waste sector - within which the PA was entered into.

59. Local authorities of course collect domestic waste, which is often referred to as municipal waste or municipal solid waste (**MSW**). This is the typical black bag rubbish collected on domestic rounds, whether by an in-house waste collection department or a contracted-out private waste company. In addition, local authorities will typically also collect green waste and other recyclable waste, the latter described as mixed dry recyclables (**MDR**), but these types of waste are not directly relevant to this case. Local authorities also operate household waste disposal / recycling centres (**HWRCs**) where local residents can typically dispose of all of the above as well as bulky non-recyclable waste, one example of which is unwanted mattresses. Finally, local authorities may collect commercial waste from local businesses under contract, often as part of their domestic rounds. Again this will often be black bag waste from, for example, pubs and restaurants, although it may also be bulky waste.

60. Historically, non-recyclable waste would go to landfill sites. However, as part of the drive to greener waste disposal, there has been a move to treating such waste in a purpose built EFW waste treatment facilities (**WTFs**), such as that at Greatmoor, the operation of which was described by O'Farrell J as recounted above.

61. Depending on the nature of the waste, how it is collected, whether it needs separating, and its distance from the ultimate WTF, waste may either be delivered direct to the intended WTF or delivered first to a WTS where it is unloaded, separated as necessary depending on its intended treatment destination, and then loaded into and transferred by a suitably sized vehicle to the WTF. The costs of transport, which will vary according to the size of vehicle and the transfer distance, will have an impact on the point at which it becomes uneconomic to transfer waste to a distant WTF. There may also be planning considerations where, for example, a new WTF is intended to serve large numbers of large waste vehicles delivering large quantities of non-local waste, especially from out of the local planning authority area.

62. In addition to municipal waste there is also commercial and industrial (**C&I**) waste collected by private companies from commercial and industrial customers which will be transported to a suitable WTF, again direct or via a WTS depending on the various factors identified above.

63. Typically, a WTF will charge a "gate fee" for taking in waste for treatment. The gate fee is typically charged on a price per tonne (**£/t**) basis.

64. Also, typically, a customer, be that a local authority or a private company, will expect to pay a fee for the cost of transporting waste to the WTF as well as the gate fee for the cost of the treatment. This is referred to as a haulage fee for the transport itself and may, depending on the individual arrangement, also include the cost of loading the waste and unloading at the WTF as well as any similar transfer costs if it is sent via a WTS.

65. So far as local authorities are concerned, they may enter into a contract with one waste management company to provide a full service for the disposal and treatment of all of their waste, often delivered via a publicly procured long term public private finance (**PPF**) type contracting arrangement, or they may enter into a number of different standalone contracts with different companies, which could range from a limited contract for a limited purpose to a contract for a range of services, even if not for a full service, where the nature and complexity of the contract could vary according to the service to be provided as well – no doubt – the wishes of the particular contracting parties.

The project agreement (PA)

66. It would not be an efficient use of time or space to provide a comprehensive recitation of each and every one of the various clauses of the PA which is relevant, or said by the parties to be relevant, to its construction or to the disputes which I have to resolve. This section is, therefore, more of an overview of the PA and a more detailed reference to the key clauses in dispute, borrowing in many respects from the summary in the O'Farrell judgment.

67. The PA represented the culmination of a protracted public procurement exercise, beginning in 2007 and ending with the entry into the PA in April 2013. I shall refer to the procurement exercise, so far as relevant to the factual matrix, in more detail below. For present purposes it suffices to say that after various twists and turns in the procurement process FCCE emerged as the preferred and eventual successful bidder. However, it was agreed that the eventual contract would be awarded, as indeed it was, to FCCB as a project-specific SPV which would, in turn, enter into contractual arrangements with other companies, including FCC group businesses, to perform its obligations under the PA.

68. The PA is an extremely lengthy document, comprising: (1) the conditions of agreement, of which there were 141 separate clauses, together with an appendix A entitled "Definitions"; (2) 35 supporting schedules, which themselves are also, in some cases, extremely lengthy and incorporate further defined terms[2]; (3) a number of what were referred to as "Ancillary Documents" listed in Schedule 5.

69. The length and complexity of the contract is not surprising, since it provided both for the construction and the operation over a 30 year period of three separate Facilities.

[2] Clause 2.2 made the schedules part of the contract, although clause 5.1 provided for an order of precedence in case of inconsistency, with the conditions taking priority over schedule 15 (the paymech) and schedule 15 taking precedence over the remaining schedules (save for one, immaterial to this case).

70. Thus, it provided for the construction of the EfW WTF at Greatmoor, near Aylesbury[3] as well as the construction and operation of the two WTSs at Amersham and High Heavens. However, it was anticipated even at the time of entry into the PA that it might not be possible for the Amersham WTS to be delivered, so that provision for this contingency was made in the PA itself. When that transpired to be the case a deed of variation made 7 August 2017 was entered into, with the consequence that the High Heavens WTS was the only WTS which was constructed and operated.

71. In commercial terms, BC was to pay 85% of the cost of constructing the Facilities, with the remaining 15% to be provided by the FCC group through capital funding and amortised over the lifetime of the PA and to be funded, ultimately, by BC through payment of the unitary charge (see below).

72. As summarised above, the waste to be treated comprised: (a) the contract waste to be provided by BC, defined principally by reference to the definition of municipal waste; (b) any substitute waste; and (c) last, but not least, the TPW.

Introductory

73. It is helpful to explain at the outset the shared commercial understanding behind the way in which payment for the treatment of contract waste was provided for and how this inter-related with the provisions for the treatment of TPW and the profit share on excess TPI, because: (a) it is important to an understanding of why the PA was drafted as it was; (b) this shared commercial understanding is not in dispute and is part of the relevant factual matrix; and (c) it is convenient to summarise it now, without the need to refer in unnecessary detail to the specific provisions of the PA which carry it into effect.

74. In short, the EfW facility to be constructed and operated at Greatmoor had the capacity to treat approximately three times as much contract waste as BC envisaged (by the time of entry into the PA) it would need to treat over the lifetime of the PA. BC would bring its own contract waste either direct to Greatmoor or to one of the two WTSs from where FCC would transfer it to Greatmoor for treatment. It followed, however, that there was around two thirds spare capacity which FCC could use to treat TPW which it could obtain itself through other sources. It was prepared to guarantee to provide this quantity of TPW on the basis that it could use the income generated from treating TPW to subsidise the cost which it would charge BC to treat its contract waste and also to generate a reasonable profit margin. It would also arrange for the TPW to be delivered, again either direct to Greatmoor or to one of the two WTSs from where it would then transfer it to Greatmoor for treatment.

75. The PA therefore provided for the unitary charge to be paid by BC to be discounted by reference to this guaranteed TPW income stream and, further, for the parties to share in any profit on excess TPI above the guaranteed level in an agreed share, 75% to BC and 25% to FCC. It follows that the PA contained provisions which dealt with FCC's obligation to treat and transfer the contract waste and BC's obligation to pay for that treatment at the discounted unitary charge and separate provisions which dealt with FCCB's entitlement to use the excess capacity to treat TPW for its own financial benefit, save for the obligation to share any excess profit on excess TPI with BC in the agreed split. I shall address each in turn.

Contract waste

76. By clause 41.1 FCCB was to provide "the Service", which was a term defined by reference to the contract specification, to be found at Sch. 1 to the PA. In summary, as appears from the introductory paragraph, it included the operation of the EfW plant at Greatmoor and the operation of the WTSs as delivery points

[3] And adjacent to an existing landfill site operated by FCC known as the Calvert landfill.

for contract waste, including the haulage of waste from the WTSs to Greatmoor for treatment. It did not have to, and thus did not, deal with the operation of these WTFs for TPW.

77. Under Sch. 1 FCCB was required to accept contract waste at each of the WTFs during the specified opening hours. By clause 41.1 FCCB was also to provide the service in accordance with the service delivery plan. This plan comprised a number of separate plans, each of which was a schedule to the PA. Sch. 7(9) was entitled "method statement 9 – transport plan". It identified the haulage requirement as including bulk haulage of contact waste and TPW from the WTSs to Greatmoor, with projected tonnages for both being provided. The specified assumption was that all contract waste would be delivered to the Facilities by the waste collection authorities and HWRC contractor vehicles, whereas it was for FCCB to move waste from the WTSs to Greatmoor. Thus, the only waste haulage activity required under the PA was the haulage of waste, contract and TPW, from the WTSs to Greatmoor.

78. In return for providing the service, clause 71 provided for BC to pay FCCB a monthly unitary charge, calculated under schedule 15 (referred to as the payment mechanism – the **paymech**) by reference to a formula dependent on the tonnage of BC's contract waste which FCCB disposed of.

TPW

79. Additionally and separate from the obligation to provide the above defined services the PA permitted FCCB to treat and dispose of TPW. This was provided for by clause 47.1, which provided that: "Subject to Clause 47.2 (Third Party Income, Third Party Waste and Off Take Contracts), the Parties agree and acknowledge that … 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)".

80. Clause 47 contained detailed provisions intended to protect BC's interests in its receipt of its TPI share by imposing certain obligations and imposing certain restrictions on FCCB's freedom (and, in some cases, those of other FCC group companies – referred to as Affiliates) to enter into Third Party Waste Contracts, defined as "contracts entered into by the Contractor and/or the Sub-Contractor in respect of Third Party Waste excluding Off Take Contracts" (**TPWCs**). It is unnecessary to lengthen this part of the judgment by referring to these provisions since they are not directly material to the principal issues which I have to decide[4].

81. It is sufficient to note that clauses 47.8 and 47.10 envisaged that FCCB might enter into long term contracts with other local authorities for handling and processing MSW and, recognising BC's legitimate interest in such proposed arrangements, required FCCB to use reasonable endeavours to ensure that any such contracts contained certain clauses and imposed a consultation obligation on FCCB before it entered into any such contract. Thus, clause 47.10 stated: "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 …".

Invoicing and payment

[4] They are relevant to the proper construction of Off Take Contracts, in the context of the Fortis contract, where I refer to these provisions in more detail.

82. Clause 71 contained provisions for invoicing and payment. There is no need to refer to these terms in detail. In short, provision was made for payment of the monthly unitary charge following on from FCCB's submission of a monthly report and invoice, which might show a balance due from BC to FCCB or vice versa. There was provision for what would happen in case of disputed amounts in relation to the monthly unitary charge. At the end of the year the annual unitary charge was to be calculated as the sum of the monthly unitary charges. Clause 7 provided for disputes, including disputes arising in relation to payment, to be dealt with under the Dispute Resolution Procedure in Sched. 22. Again, it is unnecessary to refer to its terms in detail. In summary, it involved a three stage process of commercial negotiation, mediation and, finally, litigation or arbitration. Clause 71.12 provided for payment or repayment to be made as necessary following the determination of any such dispute.

83. I have dealt with these provisions relatively briefly. In submissions and in cross-examination Ms Fiona Parkin KC (leading Mr George McDonald and Mr Samar Abbas Kazmi) placed considerable emphasis on the chronology of events from 2015 onwards as demonstrating that – on FCC's case - BC had elected not to take further its expressed concerns as to contracts entered into by FCC with other local authorities as regards their terms and, in particular, had failed to follow the procedure in clause 71 and Sch. 22 in relation to challenging the monthly or annual reports or the amounts to be paid thereunder. However, as she had to accept – in the face of protest from Mr Mort – FCC had not pleaded any positive case to the effect that BC's failure to raise a challenge at the time operated as a substantive defence to the current claims. That was not surprising, because there was no conclusive effect contractual provision in the PA nor, in my view, was there anything in BC's conduct at the time which could have led to an argument that it had positively elected to accept the reports or payments as binding or conclusive, or to waive its right to contend – as it did successfully as reflected in the O'Farrell judgment – that FCCB was obliged to account to BC for excess TPI in relation to income other than gate fee income.

84. It is also worth recording that the reason why I have passed over the detailed provisions of clause 47 relatively briefly is for similar reasons. Thus, in submissions and in cross-examination Mr Mort placed considerable emphasis on what he contended was FCC's failure to come clean about the true terms of the agreements entered into between FCC group companies and other local authorities in order – he submitted – to conceal the true extent of the profit which FCC was expecting to make under these contracts and to avoid having to share excess TPI with BC. However, in the same way as Ms Parkin, he also had to accept that BC had not pleaded any positive case for damages for breach of these contractual provisions. Whilst he did suggest that this was only because of the late provision of disclosure of the relevant documents which first alerted BC to this state of affairs, that cannot afford a justification for allowing a party to run an un-pleaded case. I can fully understand why BC would not have wished to seek to amend to plead such a case if that would have jeopardised the trial proceeding in April 2024.

The paymech and the definition of TPI

85. I now turn to the key contractual provisions in relation to the payment of TPI. Clause 77 provided that the provisions of paragraphs 3 and 11 of Schedule 15 - the paymech - should apply in that respect.

86. The paymech is itself a 32 page document with its own definitions section, although clause 2.1.8 provides that it is to be read in conjunction with the PA and the specification.

87. Paragraph 3 of Schedule 15 deals with the unitary charge, both the monthly unitary charge (**MUC**) and the annual unitary charge (**AUC**). Paragraph 3.2 set out how the MUC was to be calculated. As relevant to this case, it was the monthly base payment calculated under paragraph 3.4 less the third party income share (**TPI share**), the latter to be calculated in accordance with paragraph 11. The MUC was to be adjusted in

the final month of the contract year to produce the AUC. Paragraph 3.4 contained a detailed provision for the calculation of the monthly base payment which, in summary, was dependent on the contract waste provided by BC in each month.

88. In his evidence Mr Dickson explained that the unitary charge was calculated using the formula in the Base Case, by applying the internal rate of return (**IRR**) figure, which: (a) was defined in the PA as being 10.62%; and (b) which also appeared as a specified percentage figure in the summary sheet at F27. It represented the rate of return which FCCB expected to receive under the PA on the basis of the assumptions in the Base Case. As he explained it, the Base Case contained the total costs which it was agreed FCCB would incur, and the guaranteed TPI which it had agreed to achieve. The unitary charge was calculated using the formula in the Base Case in order for FCCB to cover its costs and achieve the IRR after taking into account the costs and the guaranteed TPI. The unitary charge was payable in three price bands, with a higher price payable on contract waste treated in excess of the forecast tonnages (because that decreased the amount of TPW which FCC could treat and, hence, its ability to meet its guaranteed TPW tonnage). Achieving the guaranteed TPI represented the commercial risk undertaken by FCCB. Also, however, since any TPI achieved above and beyond the guaranteed TPI represented a surplus, the PA provided for it to be distributed between the parties in accordance with the agreed profit share division of excess TPI.

89. Paragraph 11 of Schedule 15 set out the formula for calculation of the TPI share. This was the total of four separate excess TPI shares, namely: (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.

90. Recyclates Output was defined as: "all products of the treatment process at the Main Facility that are sent for reprocessing into new products."

91. Electricity Output was defined as: "All electricity generated by the Contractor at the Main Facility and delivered to the National Grid."

92. Third Party Waste was defined as: "all waste received at the Facility(ies) other than Contract Waste and Substitute Waste". In short, anything which was not contract waste (or substitute waste) was TPW.

93. Paragraph 11.4 provided for BC to receive 75% of the “Excess Third Party Waste Third Party Income derived from gate fee revenue over and above the Guaranteed Third Party Waste Third Party Income …”. This was defined in the paymech definitions section as meaning “the nominal Third Party Income in relation to gate fee revenue in respect of Third Party Waste, as set out row 41 of the "Financials" sheet in the Base Case in the relevant Contract Year”.

94. Provision was then made for further additions or deductions which are immaterial for the purposes of this case. The key point is that it was the difference between actual TPI and guaranteed TPI which formed the TPW excess share which was then fed into the calculation of total TPI which was to be shared 75:25 between BC and FCCB.

95. Pausing there, in the O’Farrell judgment the judge had to address a submission by then leading counsel for FCCB that the reference to gate fee revenue supported the argument that BC’s entitlement was limited to the specified share of excess gate fee income received by FCCB for the treatment of waste from third parties at the Facilities. She rejected this submission, observing at [87] that “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”.

96. The definition of TPI in Appendix A is, thus, a key definition in this case. It read as follows:

"Third Party Income: 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."

97. A number of points may be made about this definition.

98. First, the Project is widely defined as "the provision of waste management services to the Authority by the Contractor as contemplated by this Contract including … the provision of the Services".

99. Second, it is a definition of TPI not a definition of excess TPI. In other words, the end result of following the process in this clause is to arrive at the figure for third party income, from which the figure for guaranteed TPI is to be deducted to arrive at the figure for excess TPI. Thus, the references in the clause to "such income" and to "Third Party Income" are not references to income over and above the guaranteed income, but to all income.

100. Third, as O'Farrell J noted in her judgment, the words "income from third parties … associated with the project" are wide ones. They are not necessarily even limited to the three income streams already identified, namely TPW, electricity output and recyclates output.

101. Fourth, the costs must be directly incurred in generating the TPI. I will address the true meaning of this requirement later in this judgment. The question of the burden of proof arises in relation to this overall requirement as well as to the three provisos. In my judgment this is a sterile argument. At the most basic level it is trite law that BC as claimant bears the burden of proving that it is entitled to the monetary and other relief which it seeks. Under the terms of the PA, it is apparent that as between BC and FCCB it is the latter which has sole knowledge as to: (i) what TPI has been generated; (ii) what costs have been incurred; (c) whether those costs have been directly incurred and fall within each of the three provisos. It would be a rare outcome, after a trial where the parties have been able to adduce documentary evidence, call and cross-examine witnesses and make full submissions, to make a decision on the basis of a failure by one party to satisfy a burden of proof. That does not arise in this case. It is only necessary to say that it is obvious from the clear wording that the burden is on FCCB to demonstrate (prove) that each of the three provisos is met in relation to any individual cost item.

102. Thus, FCCB must be able to demonstrate that such costs fall within each of the three provisos, i.e. that they are: (i) specifically and solely related to the generation of TPI additional to that modelled in the Base Case; (ii) incremental costs incurred over and above those costs which were either (ii)(a) envisaged in the Base Case or (ii)(b) have been or will be otherwise recovered through the paymech; and (iii) not the costs of handling or processing the TPW by FCCB or an affiliate.

103. I will address the true meaning of each of these three provisos later in this judgment.

104. It is common ground that the operating contractor was a reference to FCCR, who was the operating contractor under the operating and maintenance contract ("**O&M contract**") which FCCB entered into for the provision of the service.

The Base Case

105. The Base Case was defined by reference to the definition in appendix 1 of schedule 19 to the PA. It further stated that at the commencement date it should be in an agreed form as identified in Part 1 of schedule 20. A copy of the Base Case in Excel spreadsheet format was included as schedule 20 to the PA.

106. The Base Case has been the subject of close scrutiny, given its importance to the issue of deductible costs. Mr Dickson was involved as a financial modeller in the preparation of the Base Case and his evidence - especially as someone who is no longer employed by FCC and was plainly entirely genuine and non-partisan - was extremely helpful to me in understanding the detail of what is a fairly complex set of spreadsheets.

107. He explained in his witness statement that tenderers were required to produce a financial model as part of their tender. The Base Case was the financial model produced by FCC, which went through a number of iterations before the final version became a schedule to the PA. The invitation to tender included a list of requirements and evaluation rules for the model, one of which was that it should not include any TPI which was not guaranteed. It is common ground that one reason for this and, indeed, for the fact that it was agreed that BC should receive 75% of any excess TPI, was to avoid any suggestion that allowing FCC (or any other successful tenderer) to have the opportunity of making a substantial profit from processing TPW might be argued to offend the prohibition on state aid.

108. The Base Case has a summary sheet, provided for reference rather than as a working tool, which contains a summary of the important information within the supporting sheets.

109. The financials sheet at row 41 contained a figure of £609,525,000 as being "commercial revenue". Row 41 is referred to in relation to paragraph 11.4 of the paymech; see paragraph 93 and the reference to row 41 in the definition of Guaranteed Third Party Waste Third Party Income as "nominal Third Party Income in relation to gate fee revenue in respect of Third Party Waste, as set out row 41 …"). This is the total of the commercial revenue figures for each month of the operational period. It is arrived at by multiplying the figure for commercial waste in tonnes figure in row 34 of the O&M sheet by the commercial waste £/t figure in row 40. This is also the guaranteed income figure from TPW under the PA. The commercial waste £/t figure of £66.50/t is also the band 3 gate fee for TPW.

110. It is, thus, apparent from the Base Case itself that the TPW TPI modelled in the Base Case was based on the forecast and guaranteed commercial tonnage multiplied by the commercial waste £/t which was also the band 3 gate fee for TPW.

111. Mr Dickson confirmed that the assumptions which were used to produce these figures do not appear in the Base Case itself and were provided by others within FCC who had the commercial knowledge to

provide them. He explained that internally FCC created its own separate and more detailed model, known as the O&M model, from which all of the figures necessary to create the Base Case were inserted into the "import per" sheet of the Base Case. As he explained, this was because during the tender process FCC had to create a number of data schedules, covering subjects such as tonnage, haulage, distances, staff numbers, maintenance plans and the like, which included commercially sensitive information which FCC did not wish to share with BC. This included, as Mr Mort was keen to emphasise, that – as Mr Dickson confirmed in his witness statement – FCC had added a 15% margin (i.e. profit) to all operating costs save for haulage provided by third party contractors, for which only a 7.5% margin was added. The O&M Model was only recently provided during the course of the disclosure process. However, the import per sheet did contain relevant information, such as the annual tonnage of waste to be processed through the Facilities, divided as between contract waste and TPW.

112. It follows, it seems to me, that all that can be said from the Base Case itself is that what was "modelled" was the stated commercial income, which was calculated by multiplying the forecast commercial tonnage by the commercial £/t. If, however, one can and should have regard to the wider terms of the contract, then what appears from the definition section and from paragraph 11.4 of the paymech is that this was also the nominal TPI in relation to gate fee revenue in respect of TPW.

113. The same can be said in relation to the various costs items which are included in the Base Case. In the import per sheet all of these costs related to the costs incurred under the overall sub-headings of the various Facilities[5], including the costs for variable haulage. Insofar as there was any doubt about this item, to which Mr Dickson was referred in cross-examination, the variable haulage cost item total at C30 of the import per sheet of £58,686,000 was arrived at by adding all of the monthly figures for haulage costs for the operational period in that sheet.

114. It is fair to say that BC would have had no means of understanding from the Base Case itself which particular haulage costs had been included within these figures or how they had been arrived at. In other words, BC would not have known from the Base Case itself the detail of the assumptions or calculations behind this figure. Nonetheless, it was apparent from the transport plan method statement at Sch. 7(9) to the PA, which identified the proposed transport flows in terms of the contract waste and TPW direct into Greatmoor and into Greatmoor from the WTS (i.e. Amersham and High Heavens), that the only waste haulage activity required under the PA was the haulage of waste, both contract waste and TPW, from the WTSs to Greatmoor. Thus, it would have been possible for BC to correlate the two and, by doing so, to understand that the variable haulage costs referred to were the TPW haulage costs from the WTSs to Greatmoor.

115. For completeness, I should record that the information in the method statement was also input into the O&M Model (the TLS assumptions sheet), and the resultant £/t obtained (by Mr Dickson or others working alongside him) so as to arrive at the total for variable haulage costs in the base sheet. However, none of this information appears directly in the Base Case itself, and not only was the O&M Model not shared with BC but also there is no pleaded case or hard evidence as to when or in what circumstances any particular schedules may or may not have been shared with BC (or, more particularly, with Ernst & Young (**EY**) as its financial advisers).

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[5] As Mr Dickson explained, because at the time of entry into the PA it was still unknown whether or not Amersham WTS would proceed, the import per sheet had to include different permutations dependent on whether or not it would do so, but this makes it even clearer in my view that all such costs were envisaged as being incurred at the Facilities, whichever ones might in the end be proceeded with.

Other clauses

116. Moving on in the PA, I shall refer to clauses 99 and 111, dealing with FCC's obligations in relation to information and documentation, later in this judgment when I address the dispute arising in relation to these clauses.

117. Clause 132, entitled "Third Party Income", provided as follows:

"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."

118. As I have said, it is common ground that it was important to ensure that the PA did not offend against the prohibition against state aid in relation to public procurement projects, and this is one reason why the TPI provisions were included, and why BC was to receive 75% of the TPI compared to FCCB's 25%, and why clause 132 contained these provisions obliging FCCB to maximise TPI and not to act so as to have the effect of undervaluing the TPI which would otherwise be received.

119. 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…"

120. The PA also referred to a number of associated contracts, entered into on the same day, of which the most relevant is the one entitled the waste supply agreement (although referred to throughout as the waste finder agreement – **WFA**) entered into between FCCB and FCCR, to which I shall make reference below.

Pre-contract phase

121. I have included a summary of the pre-contract phase primarily because FCC places considerable reliance on the procurement of the PA as relevant to the factual matrix for the purposes of the proper construction of the PA.

122. It is common ground that the procurement was undertaken under the EU public procurement regime pursuant to the Public Contracts Regulations 2006 (SI 2006/5) (as amended), using the competitive dialogue procedure, with the award being made on the most economically advantageous tender (**MEAT**) basis. FCC emphasises that under such a procurement process the opportunity for negotiation or revision of a tender, once a tenderer is selected as preferred bidder, is limited and, hence, it follows that it is important to have regard to the relevant factual matrix leading up to that point.

123. FCC also emphasises that at the outset of the procurement process BC informed bidders that the contract terms and risk allocation would be in line with Treasury standard PFI contracts and DEFRA standard waste management PFI contracts guidance on SOPC which, as replaced and supplemented during the course of the procurement process, were to be found in Treasury standard document SoPC4 and DEFRA WIDP guidance (the latter including payment mechanism drafting and standard residual waste treatment contract). I shall refer to these documents when considering the proper legal approach to the contract construction process.

124. FCC also notes that from the earliest stages the outline business case produced by BC and provided to all prospective tenderers indicated that: (a) there would be spare capacity in the EfW facility, at least in its early years; and (b) potential options for filling that spare capacity included procuring commercial waste arising in the Buckinghamshire area as well as MSW from neighbouring waste authorities. FCC also notes that from an early stage BC made it clear that bidders would be required to put forward proposals for the sharing of income generated from utilising any spare treatment capacity at any facility proposed by bidders. By the end of 2008: (a) FCC had already tendered on the basis that the gate fee would be reduced by guaranteeing to source TPW at a predetermined gate fee of £65/t; (b) BC had already proposed a definition of TPI which varied from that contained in the WIDP standard form (see above) and included the three provisos forming part of the final definition.

125. FCC was unsuccessful at this stage, with preferred bidder status being awarded to a competitor, however – and for reasons unconnected with this case – that decision was withdrawn and the competitive dialogue process was re-opened with FCC and that competitor. FCC submitted its final tender in September 2010. As part of its tender FCC stated that C&I waste would be sourced predominantly from within Buckinghamshire but that it would also be able to receive waste by rail or road from outside Buckinghamshire. This was supported by a waste review study which concluded that the estimated quantities of suitable C&I waste available in Buckinghamshire (estimated at 75,000 to 157,000t p.a. in 2015) and that the neighbouring local authority areas (estimated at 193,000 to 203,000t p.a. in 2015) could satisfy the required capacity of the EfW facility in at least the early years of operation. It should be noted however that for planning policy related reasons there was good reason to emphasise the estimated volume of C&I waste arising from within Buckinghamshire and to under-emphasise the estimated volume arising from outside the county.

126. FCC also obtained and supplied various expression of interest letters from potential sources of TPW, including some from commercial waste management companies as well as one from Luton indicating that

it already had a contract with FCC dating from 2004 and running until 2016 and it would be interested in utilising any spare capacity at any treatment facility in Buckinghamshire.

127. On 29 November 2010 FCCE was awarded preferred bidder status which, after an internal BC call-in challenge, was reconfirmed the following year.

128. FCC notes that when EY was evaluating FCC's tender in November 2010 it included a comment to the effect that "bidders may earn additional returns through the SPV or on the margins applied to subcontract costs". It says this is relevant to and largely undermines BC's complaint that the costs which FCCB now seeks to deduct include margin added by FCC subcontract companies such as FCCW and FCCR as well as overhead added by those companies. This may well be true but, in any event, the complaint as made by BC is irrelevant to the issues I have to decide.

129. In advance of the meeting of BC's cabinet to be held in July 2012 a detailed final business case was prepared by BC which went through various iterations. It was shared in draft with FCC and, hence, is a potentially relevant document for factual matrix purposes.

130. It confirmed that the draft contract documents had been "developed broadly in line with the standard principles and drafting in the Treasury's guidance known as … SoPC4" and that "much of the drafting in fact replicates the Waste Infrastructure Delivery Programme's model contract for Waste PFI".

131. It also explained that the contracting party would be FCCB as the SPV which, by being a separate company, would "shelter" the project from risk of the failure of the group for reasons unconnected with this project. It explained that FCCB would in turn enter into 3 separate subcontracts, one for the construction of the Facilities, another to operate and maintain the Facilities (the O&M contract) and, most relevant for present purposes, the third to source TPW – the WFA. The O&M contract and the WFA were to be entered into by FCCB with FCCR, which would give BC collateral warranties for FCCB's performance of its obligations under the PA. The FCC parent company would also provide a very substantial guarantee against FCCB's performance of its guarantee of TPI to BC. Thus, as FCC emphasises, BC was fully aware that FCCB would not procure TPW itself, and would enter into a contract for that purpose with a connected company, and that BC would benefit from this proposed contractual structure.

132. It also conveniently recorded FCC's proposed solution as a 292,500t p.a. EfW facility of which c.109,000t p.a. was expected to come from BC's own waste and the balance comprising TPW from other sources, namely contract waste (commercial waste collected by local authorities under contract) and C&I waste (commercial and industrial waste, collected by private companies), primarily from within the BC area but some from outside the area. It recorded that Amersham could manage c.85,000t p.a. of waste and High Heavens c.130,000t p.a.

133. It also noted that "the current railhead at Calvert provides a future option for the transport of waste to the facility by rail. In addition to sourcing C&I waste, FCCE is actively bidding for long term municipal waste disposal contracts from neighbouring disposal authorities" (p.51).

134. It also contained a useful summary of the financial proposals as included in FCC's tender and as came to be included in the PA itself. FCC makes the point that nowhere in the final business case nor in the preceding tender documents was there any indication of a shared expectation that FCC would generate significant excess TPI over and above the guaranteed TPI limit or, thus, that BC would receive significant amounts pursuant to its agreed 75% share in that excess TPI. Nor was there any reference to any discrete costs which FCC might incur in procuring any such excess TPI or how such costs would be treated in

relation to the ascertainment of any excess TPI. It is undoubtedly the case that this absence of reference to excess TPI was for two principal reasons: (a) first, because there is no evidence that it was the shared expectation of the parties; and (b) second, because there was – as I have already mentioned – a common interest in not emphasising the possibility of FCC receiving any substantial additional income which might appear to amount to unlawful state aid. This does not mean, however, that the parties had a positive shared expectation that little or no excess TPI would be generated over the lifetime of the project nor as to what, if any, costs were to be taken into account in ascertaining excess TPI.

135. It appears that although the BC Cabinet approved the proposal to award the contract to FCC there was another call-in and that process, resulting in the Cabinet confirming its decision, together with the need for detailed drafting, largely explains the delay until April 2013 in entering into the PA.

136. As already indicated, three sub-contracts were entered into by FCCB at the same time as its entry into the PA and that which is of most relevance for present purposes is the WFA.

The waste finder agreement (WFA)

137. It is common ground that the WFA, being an agreement referred to within the PA and executed as part of the wider contractual structure of contracts for the project, is a relevant agreement for the purposes of construing the PA in its proper factual matrix. As FCC submits, it is clear that it was a contract in which BC had an interest, not least because of the guarantee which FCCR gave as to FCCB's achievement of the guaranteed minimum TPI and also because of BC's right to step into the WFA in place of FCCB in various defined events. However, it must nonetheless be borne in mind that it was still a separate contract entered into by FCCB and not by BC, who was not a party to the WFA.

138. The recitals to the WFA are sufficient to explain its intended purpose:

"A. FCCB has agreed to build and operate an energy from waste facility for [BC]. The Facility will have a capacity to burn approximately 300,000 tonnes of waste a year, of which approximately 100,000 tonnes a year will be supplied by BC. The remaining (approximately 200,000 tonnes) of waste is to be secured from commercial and industrial sources ("C&I Waste") by FCCB."

"B. The economic viability of the project is dependent upon FCCB achieving the guaranteed minimum incomes set out in the Base Case which is in turn dependent on a combination of the volume, quality and price of C&I Waste that FCCB can secure."

"C. FCCB requires an organisation capable of securing the supply of C&I Waste for the Facility and [FCCR] is willing and able to supply those services all in accordance with the terms and conditions set out below."

139. There are then two relevant definitions. First, "Base Case" is defined by reference to the meaning given to such term in the PA, i.e. the excel spreadsheet to which I have referred at some length above. Second, the "Base Costs" are defined as "the cost in the Base Case allocated to generate the Third Party Income being £60,000 per year (base 2010) and indexed by RPIx". This second reference is something of a puzzle, since it has not been suggested by FCC that the Base Case in the PA does indeed contain any express reference to such a cost item. It is difficult to see how this definition in this third party contract can be binding upon BC as regards the proper construction of the PA, notwithstanding the connection between the two agreements and BC's role and interest in the WFA.

140. In its written opening submissions FCC refers extensively to internal FCC correspondence leading up to the finalisation of the WFA. On conventional principles, and also on the basis that such correspondence has not been pleaded as relevant parts of any factual matrix relevant to its proper interpretation, it seems to me that reference to such material is legally irrelevant.

141. FCC also refers to correspondence involving both BC and the project funders and/or their responsive solicitors during the drafting of the WFA. In particular, it seeks to rely upon one shared email which explains that the "base cost" of £60,000 in that agreement represented the estimated cost of one person for sourcing the supply of waste to the facility. It does not seem to me that such an email is strictly speaking admissible to seek to explain that this is what the £60,000 base cost was intended to cover. However, it is probably sufficient to note that, regardless of whether this is right or wrong, it is apparent that the allowance of £60,000 cannot have been thought by anyone as being a reference to the costs of handling and treatment of TPW which may be secured and supplied by FCCR pursuant to the WFA.

142. By clause 7 FCCR was obliged to supply waste to the Facilities in accordance with the terms of the delivery plan (to be agreed under clause 5) and so that the supply was no less than the minimum tonnage, where "supply" is defined as the supply of waste to the Facilities (defined as Greatmoor and the WTSs) pursuant to the WFA by or on behalf of FCCR and where minimum tonnage is (as relevant) defined as the lowest tonnage required to ensure the achievement of the applicable guaranteed incomes.

143. By clause 9, FCCR undertook to pay FCCB the guaranteed TPW income and BC's share of any excess TPW income, and in turn FCCB agreed that FCCR should be allowed to: (a) retain the base cost and to receive the Net Costs (defined as the "reasonable, proper and evidenced costs (if any) incurred by Recycling solely in providing the supply and complying with the terms of this Agreement in so far as any such costs exceed the Base Costs"); and (b) receive FCCB's share of any excess TPW income.

From construction phase up to the first proceedings

144. I need say nothing about the construction process itself. As indicated, the construction phase was completed and the project went into operational phase with effect from 22 June 2016.

145. However, alongside the construction phase the parties were looking ahead to the operational phase. In particular, FCC was obviously keen to have in place arrangements for the supply of TPW. The relevant events and documents begin with the first meeting of the Greatmoor operational management board (**GOMB**), constituted by Sch. 30 PA, held on 16 December 2014. This is only relevant because under the heading "Notification of Municipal Waste Contracts", Mr Belfield of FCC reported, with evident satisfaction, that it had managed to secure three contracts with local authorities to treat municipal waste, one placed and two finalised, with NLW, Herts and Luton respectively and was, therefore, close to securing full capacity for the TPW requirement. Mr Dickman of BC said that BC expected to see copies of the contracts to undertake due diligence and to be involved in price discussions. Mr Belfield responded that: (a) "the contracts reflected commercial reality in order to secure the contracts for the plant in accordance with the Project requirements"; and (b) "project profitability was in the optimal operation of the plant and not in any one given contract". It was agreed that FCC would provide copies of the municipal contracts. This early exchange reflects the tension between FCC's desire to maximise TPW income to avoid any failure to achieve the guaranteed capacity and BC's concern to ensure that FCC did not negotiate any contracts with other local authorities which might prejudice its own interests, including its interest in sharing any excess TPI.

146. At the next GOMB meeting, held on 18 March 2015, Mr Belfield tabled a presentation explaining the background and circumstances leading up to the placement of the three third party waste contracts and provided copies of the three contracts. BC's response was that it would study the contracts and revert but that for the future it wanted to be involved in the contract placement process and that being presented with a fait accompli was not acceptable. Given the terms of clause 47 of the PA, BC was clearly justified in my view in making that point.

147. The presentation itself has been the subject of some close consideration, particularly from Mr Mort in cross-examination of FCC's witnesses. It is not necessary for me to address the specific issues arising in relation to the individual local authority contracts at this stage. It suffices to make the following observations.

148. First, as regards Luton, it was explained that this was a variation of an existing contract dated 31 March 2004 to allow waste to be treated at Greatmoor for 3 years from 1 April 2016. The waste was to be delivered by trailer from a separate WTS, either Kingsway or another one and would not, therefore, pass through either of the (then envisaged) two contract WTSs of Amersham or High Heavens. The financial information showed that the price to be paid by Luton was £75.97/t, which was passed on in full by FCCR (as the FCC entity contracting with Luton) to FCCB and which, as it transpired (which was the phrase used by Ms Parkin KC in cross-examination of Mr Seed for this ostensibly remarkable coincidence), was also the current guaranteed price per tonne (**ppt**) under the PA, so that there would be no excess TPW income to share. The information also explained, somewhat cryptically, that there were no relevant costs, group corporate overhead or margin (FCC's term for profit) to take into account because these were all "captured in the wider contract".

149. As regards NLW, it was explained that this was a new 3 year contract from 16 December 2014, with waste for treatment at Greatmoor to be transferred by train from Hendon WTS to the Calvert rail siding[6]. In this case the contract with NLW was entered into by FCCW which had, in turn, contracted with FCCR, who had in turn contracted with FCCB. The financial information showed that NLW was to pay £90/t plus £13.81 for carriage by train, and that the £90/t was all absorbed by FCCW's costs, including the same £75.97/t to be paid to FCCR, again also the guaranteed ppt under the PA, so that again there was no TPW income to share.

150. As regards Herts, this was a 4 year contract from 1 April 2014, with delivery by road direct to Greatmoor for treatment. Again both FCCW and FCCR were contracting parties in the chain and again the £89/t payable by Herts was absorbed by costs and margin. However, in this case the amount payable by FCCW to FCCR was £1.72/t higher than the guaranteed ppt under the PA, so that BC was to receive 75% of this, £1.29/t.

151. In cross-examination Mr Seed explained that BC was "somewhat surprised" that the price paid by Luton matched exactly the guaranteed ppt. It was put to him that it was clearly necessary for FCC to balance the desire to maximise TPI with the need to win the contract, a proposition with which Mr Seed agreed.

152. In further cross-examination of Mr Seed in relation to this presentation Ms Parkin also asked him whether or not, if he had been shown the costs incurred by FCC in relation to the NLW contract before it was entered into he would have challenged them. His answer, in summary, was that he would have wanted to know more about the costs and whether their deduction could be justified. That is indeed what BC did

6 Adjacent to Greatmoor – see fn. 2 above.

ask in its letter dated 13 May 2015. The answer from FCC, by letter dated 29 May 2015, was that these were "the real costs incurred in operating the supply contracts into Greatmoor". BC's reply, which did not come until 17 July 2015, was that it remained concerned about the evidence and justification for these costs, and that BC would insist on enforcing its right to review the costs through the clause 99 open book accounting procedure. BC's reply did, however, also seek to strike a constructive tone, referring to a proposal to develop a protocol for how the requirements for BC's involvement in relation to proposed TPWCs should operate in practice, in order to avoid the difficulties which could arise, and agreeing that these issues should be covered through dialogue rather than necessarily through a more formal process.

153. Ms Parkin spent some time in cross-examination of Mr Seed in taking him through the subsequent correspondence with a view to showing that BC had limited its interest to certain specific points. The correspondence at that time, ending with an email of 13 November 2015 from FCC to BC, showed that no specific agreement was reached, but also with FCC saying that: "… we do feel that to date we have provided you with all the information we can and that the open book accounting, under Clause 99 of the Project Agreement, should offer you the visibility you require to audit the third party waste contracts and identify any sharing elements which are due". BC did not take any further steps at time to invoke clause 99 if it wanted to obtain more information.

154. It is not however pleaded, and nor in my view is there any compelling evidence, that any agreement was reached in relation to costs at this stage, even though there was no further correspondence on the subject until 2018.

155. As Mr Seed agreed in cross-examination, once the Facilities became operational, and the paymech procedure began to be applied, FCCB began to submit the monthly reports required under clause 71 which included a section in relation to TPW income. These were submitted using the format prepared by EY, on BC's instructions, as part of a guide to the operation of the paymech. It is common ground that, although some requests for further information were submitted, BC did not exercise its right under clause 99 to require information or its right under clause 71.8 to dispute any relevant report or invoice submitted by FCC as regards the MUC or the composite AUC in relation to the matters in dispute in this case. Mr Seed said that BC was perfectly happy with this process and accepted that the parties worked well together to operate the agreed procedure. It is also apparent that at this stage there was no debate between the parties as to whether TPI extended to any income above and beyond the gate fee income received for TPW delivered to Greatmoor for treatment. However, again it is not pleaded, and again in my view there is no compelling evidence or argument, that in some way BC is contractually (or otherwise) barred from raising its case in this respect, as it did in the previous claim (without objection) and has it has done now in relation to Luton.

156. As already indicated, BC returned to the theme of TPW income in late 2018. The immediate trigger was FCC's notification on 28 November 2018 of its intention to tender for an interim contract to be procured by Herts commencing April 2021 following the expiry of the existing contract. FCC did bid for and was awarded the Herts contract.

157. There was some debate at trial as to whether or not BC's approach in relation to this question coincided with its appointment of external financial advisers, a firm known as New Networks, and the involvement of two particular individuals, Mr Frank Smith on the commercial side and Mr Steve Hazelton on the financial side, to provide general advice which extended into specific advice about whether or not the PA was being correctly operated in relation to TPW income. Whether it did or did not is irrelevant to the matters I have to decide.

158. However it was not until August 2019 that BC submitted a position paper in advance of the forthcoming GOMB meeting which identified potential disputes regarding TPW income as regards the "incorrect deduction of costs".

159. This was a document in which BC's external lawyers and the advisers referred to in paragraph 157 above were involved in drafting. It made clear that it was putting forward BC's position for discussion and resolution and not, at that point, so as to engage the contractual dispute resolution procedure. It set out in summary the position which BC has adopted in the instant proceedings. It requested FCC to provide a written demonstration for each cost deducted and it sought payment of some £8 million based on the assumption that no such costs could be deducted.

160. It is not surprising that this position paper was not well received by FCC, as evidenced by minutes of a meeting held to discuss matters. Matters rumbled on without a resolution. On 7 January 2020 BC submitted a dispute notice in relation to BC's case about the alleged incorrect deduction of costs. That was the subject of a mediation in May 2020, which did not resolve matters.

161. In May 2020 FCC also notified BC that it was interested in bidding for a contract offered by Norfolk County Council, which was the subject of detailed information requests in relation to income, not limited to gate fee income. FCC refused to provide such information, explaining that it was required to submit a single ppt for all elements of the services, although also assigning a component ppt for the gate fee for treatment at Greatmoor. It also asked BC to confirm that it would not assert any claim to TPI share on any other element of the bid. BC declined to do so and, in the end, FCC did not put in a bid for the Norfolk contract.

162. On 23 June 2020 BC made a formal and wide-ranging clause 99 request for information and documents in relation to income "associated with the project" prior to deductions for costs. FCC's response of 17 July 2020 was to refuse to provide the information and this was the catalyst for the issue of the proceedings in the previous case, to which I now turn.

The proceedings before and the judgment of O'Farrell J

163. In proceedings issued in the London TCC on 5 October 2020, claim number HT-2020-000363, heard by O'Farrell J over 2 days in March 2021, BC sought: (1) declaratory relief as to what income constituted TPI; and (2) an order requiring the production of certain information by FCCB. (Other relief was also sought by both parties in relation to two other points of dispute, but it is not necessary to refer to these issues.)

164. At paragraph 151(ii) of her judgment given on 26 October 2021 O'Farrell J decided that "income received by FCCB, or by any Affiliate … 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".

165. By paragraph 6 of her order made on the same date FCCB was directed to provide "full details of all income 'associated with the Project' received from third parties to date". In her judgment she explained which categories of information and documentation she required FCCB to provide and which she did not. She: (a) observed that the clause 99 open book accounting was expressed to apply only in relation to FCCB's costs, rather than its income (paragraph 110); (b) made disclosure orders under clause 111 in

relation to income, although not an extensive as those sought by BC (paragraph 114); (c) refused to make disclosure orders in relation to haulage costs, being the only documentation sought by BC in relation to costs in the first action (paragraph 115).

166. It is fair to say that the outcome of the judgment as regards the definition of TPI came as a surprise to FCC, and an unpleasant one at that. It had always believed that its only obligation was to share TPI on gate fee income received from TPW sent to Greatmoor for treatment and it had entered into various agreements with three local authorities which are the subject of claims in these proceedings on that basis. It was now faced with the prospect of having to provide information on other income relating to such agreements and, save to the extent it could set off costs incurred which it could establish were deductible from such TPI, pay 75% of such TPI to BC. O'Farrell J had not been asked to, and did not, make any findings as to what was were, and what were not, deductible costs.

Information and payment by FCCB pursuant to the O'Farrell judgment

167. FCCB provided information in accordance with the O'Farrell order setting out its calculations of TPI for the periods 2016/17 to 2020/21, together with supporting information. It has subsequently provided further information as well as its calculations of TPI for the year 2021/22 and the year 2022/23. It has also paid BC its share of TPI in accordance with its calculations for the period / years 2016/17 to 2021/22 in the principal sum of £4,088,351 (although FCCB contends in its defence that if BC is correct in relation to certain aspects of its case then there has been some element of overpayment). FCCB has also paid the principal sum of £495,074 in relation to its calculation for the year 2022/23 for TPI from TPW at Greatmoor and also, more recently, the sum of £422,417 for TPI from TPW haulage and from WTS.

168. Being dissatisfied with the calculations provided by FCCB and the amounts paid BC commenced the present proceedings.

169. The cases as advanced by the parties are contained in their detailed respective pleaded cases, which I shall address as necessary below, and are as summarised in the above issues for determination.

170. BC now has the benefit of the disclosure provided by FCCB as well as the information provided pursuant to the O'Farrell order.

The relevant principles of contract construction

171. The relevant principles were concisely summarised by O'Farrell J in her judgment at paragraph 80, where she stated that the court's approach to contractual interpretation is now well-established. She said that: "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 [to mean]. 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".

172. As authority for that summary she referred to three of the relevant leading cases at House of Lords and Supreme Court level, being: Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38 per Lord

Hoffmann at paras. 14 - 15 and 20 - 25; Rainy Sky SA v Kookmin Bank [2011] UKSC 50 per Lord Clarke at paras. 21 - 30; and Arnold v Britton [2015] UKSC 36 per Lord Neuberger at paras. 15 - 23.

173. Unsurprisingly, both parties have emphasised particular aspects of this process which they believe suits their respective cases and referred me to authorities where those particular aspects have been found to carry greater weight than others on the particular facts of those cases. I will, however, resist the temptation to be drawn into citation of such authority.

174. It is worthwhile observing that in subsequent decisions the Supreme Court has firmly resisted any attempt to identify any tension between the above decisions and the separate judgments given in each.

175. Thus, I refer to what Lord Hodge said in Wood v Capita Insurance Service Limited [2017] UKSC 24 at paragraphs 10 - 12, in which he dispelled any suggestion that there was any difference between what was said in Rainy Sky and in Arnold.

176. I also refer to the succinct summary of Lord Hamblen in Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd [2023] UKSC 2 at paragraph 29 where, passing over sub-paragraph (1) as in substantially the same terms as O'Farrell J's summary in her judgment in the previous case, he said:

"(2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning.

(3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated."

177. I also record the following points emphasised by counsel as being of particular relevance to this case.

178. BC emphasises that whilst business or commercial common sense may be an important factor in construing a contractual agreement: (a) it cannot be used to re-write the parties' bargain; and (b) caution should always be exercised in seeking to rely upon it.

179. FCC emphasises that the court should have regard not only to the definition of TPI itself, nor only to the text of the PA in isolation, but also to the wider context in which the PA was entered into, including: (a) the suite of documents which were entered into at the same time and referred to in the PA; (b) that it was the result of a formal detailed tender procedure, conducted by BC in its capacity as a waste development authority as a public procurement exercise to which the 2006 Public Contracts Regulations applied; and (c) that it was based on the structure of a PFI contract generally and, specifically, on the standard SoPC4 and WIDP terms and guidance.

180. FCC submits that the complexity of the arrangements and the contractual structure means that textual analysis alone is insufficient to resolve the disputes as to the proper construction of various of the contractual provisions, so that the court should have proper regard to context and should conduct the iterative process necessary to ascertain the objective meaning of the disputed provisions.

181. As to BC's point (a), the authorities do indeed confirm that there is a limit to how much reliance can be placed on commercial commonsense[7] – although where the limit is drawn will depend very much on the particular circumstances of the case.

[7] See for example the observations of Christopher Clarke LJ in Wood v Capita [2015] EWCA Civ 839 at [29] to [31].

182. As to FCC's submission, a clause should always be construed in its proper context, including the admissible legal and factual matrix, although again the weight to be attached to individual factors will also depend very much on the particular circumstances.

183. I also fully accept that, where there are points which indicate differing constructions, the court should undertake an iterative process, although the extent to which this is necessary will vary in an individual case.

184. As to BC's point (b), there was a dispute in submissions as to whether or not the decision in City Alliance v Oxford Forecasting Services Ltd [2001] All ER, upon which BC relied for its proposition, is inconsistent with or has been overtaken by Rainy Sky, as suggested by Carr J in Seakom Limited v Knowledgepool Group Limited [2013] EWHC 4007 (Ch) at [87]. In their closing submissions Mr Mort and Mr Coulson referred me to the most recent (2024) edition of The Interpretation of Contracts at paragraph 2.80, footnote 252, where Sir Kim Lewison doubted that this was the case, referring to the fact that in Amlin Corporate Member Ltd v Oriental Assurance Corp [2014] EWCA Civ 1135 the Court of Appeal cited City Alliance with evident approval. However, since – as Carr J also said – the approach in Rainy Sky is more fluid, but still rigorous, it is not necessary for me to investigate or determine this dispute to decide this case.

185. As to reliance on the factual matrix, BC makes the points that: (a) FCC is limited to reliance on what it has been allowed to and has pleaded; (b) the presence – as here – of an entire agreement clause may justify placing less weight on the factual matrix than might otherwise have been placed, because it supports the inference that the parties did not wish their final written agreement to be construed by reference to what had gone before: Giedo Van Der Garde BV v Force India Formula One Team Ltd [2010] EWHC 2373, per Stadlen J at [167]; (c) pre-contract negotiations and declarations of subjective intent are inadmissible.

186. In reply opening submissions FCC suggested that the passage from the Giedo case relied upon by BC was both obiter and made in very different factual circumstances. In their closing submissions Mr Mort and Mr Coulson again referred me to The Interpretation of Contracts, this time at paragraph 3.140, where Sir Kim: (a) noted that "a conventional 'entire contract' clause does not affect the question whether some matter of fact (whether or not in documentary form) is admissible as an aid to the process of construing a contractual document"; but also (b) said, at fn. 488, citing Giedo, that: "It may, however, entitle the court to treat such matters with caution". I respectfully agree with and adopt that analysis.

187. As to pre-contractual negotiations, FCC submits that the court is entitled to look at things said and done in pre-contractual negotiations where they explain the genesis and objective aim of the transaction or identifies the meaning of a descriptive term or establishes relevant facts known to the parties at the time. This is not in dispute: see the principles set out by Leggatt LJ in Merthyr (South Wales) Limited v Merthyr Tydfil County Borough Council [2019] EWCA Civ 526 at [51] to [55].

188. As to the standard SoPC4 and WIDP terms and guidance, I accept that these documents may in principle be relevant, in the same way as it is relevant to know that a construction contract is concluded on standard form terms subject to bespoke amendments, and it may also be relevant to have regard to any previous decisions as to the proper construction of such a clause. However, what is most important in my judgment is to look at the actual words used in the standard terms and to compare them with the contract as concluded, so as to understand the extent to which the contracts and their wording is the same and to what extent it is different, and to see whether the similarities or divergences cast any light on the particular disputed questions of construction which arise.

189. Thus, in its opening submissions , FCC argued that because clause 1.1 of SoPC4 stated that the purpose of the contract structure was to promote a "commercially balanced contract", a construction which would have the effect of "structurally unbalancing the contract by, for instance, materially reducing the IRR set out in the Base Case or causing the contractor and its affiliates to incur wide losses is one that goes against the policy of SoPC4". FCC argued that "a mechanism for sharing excess third party income should not, by the back door, create the imbalance against which the guidance warns. It is for this reason that the WIDP guidance expressly provides that: 'Any income not included in the Base Case financial model that is subject to sharing should be shared after netting off additional marginal costs (i.e. those not shown in the model) incurred by the Contractor in developing the additional income'".

190. I am prepared to accept that, all other things being equal, a construction which plainly led to such a result should not be preferred to a construction which did not. However, insofar as it is argued, I cannot accept that this should dictate the outcome, especially when it is not suggested that the definition of TPI in the PA is materially identical to the standard terms referred to. As BC submitted in its responsive opening submissions, the WIDP guidance itself stated that: "Third Party Income sharing arrangements are often complex and need to be tailored to the specific circumstances of each project. Therefore Authorities should allow sufficient time and resource to develop this part of the Payment Mechanism at each stage of the procurement process".

191. Finally, as regards the proper approach to the argument of surplusage, arguments based on redundancy of provisions will usually have limited relevance: see again Merthyr (South Wales) Limited v Merthyr Tydfil County Borough Council [2019] EWCA Civ 526 at [39].

Deductible costs

192. The issue between the parties in relation to deductible costs is of substantial value, since in this litigation FCC seeks to deduct a further £20,471,963 of cost which it contends that it has incurred in generating TPI.

193. It is worth beginning by emphasising a number of points about the definition of TPI in the PA.

194. First, as mentioned above when referring to the definition, it is a definition of TPI as a whole. It is not a definition of TPI from TPW alone, still less a definition of excess TPI from TPW. It is also plainly intended to apply to a wide range of income sources. That is because it covers, as it says, income received by FCCB as the Contractor, but also by FCCR as the Operating Contractor and by any Affiliates, such as FCCW, from any third party, where such income is "associated with the project", including – but not limited to – the three specific mentioned categories of income derived from TPW, electricity output and recyclates output.

195. Second, it follows that the deductible costs to which the definition is intended to extend must, on any objective analysis, have been intended to apply to the same wide range of income sources. Whilst it is tempting to focus on its interpretation through the prism of the current dispute, i.e. the particular costs which are in issue here, there is a danger that in so doing the court is led into error.

196. Third, as stated, applicable costs may be deducted from such income by FCCB and/or by any Affiliate. Although there is no similar express reference to FCCR as the Operating Contractor, since it is common ground that FCCR is also an Affiliate it cannot be suggested that it is not included in this regard.

197. In order to undertake the process as required by the authorities I must undertake a unitary analysis as is required by the authorities of this clause. It would be wrong to construe the meaning of "directly

incurred" in isolation and then to construe each of the three provisos in isolation, all without reference to each other or considering how they would work together in the context of the definition as a whole and of the wider contract and context. This is what I have done.

Directly incurred.

198. Neither side has referred me to anything else within the PA or the ancillary documents or the relevant factual matrix which directly assists in interpreting this term. The words "directly" and "incurred" are, of course, normal English words with no established specific meaning in specific contexts. Hence, the starting point is that they should be given their normal meaning.

199. In that regard, in their opening submissions Mr Mort and Mr Coulson drew attention to the Shorter Oxford English Dictionary, which says that the word "directly" means "without an intermediary; by a direct process; straightforwardly; plainly". They contrast this with the definition of the word "indirectly" which means: "by indirect action, means or connection; through an intervening person or thing". They submitted in oral closing submissions that this imposes a requirement that there must be some immediate relationship between the winning of the income and the outlay. That, I think, is plainly right.

200. Neither side referred me to legal authority on the meaning of this phrase. That is not surprising; my own search of the index of legal terms in Westlaw, which includes the three standard legal dictionaries (Jowitt, Stroud and Osborn) reveals no result.

201. However, a search of the phrase "direct costs" turned up *The Street Works (Recovery of Costs) (England) Regulations 2002*, which makes provision for the costs of a chargeable job recoverable under the *New Roads and Street Works Act 1991*. This statutory instrument, whilst of no direct relevance or application to the clause in issue in this case, is helpful in my view since it provides some support for the general understanding and approach which most lawyers, accountants and business people would share, in my view, if they were asked to think about what direct costs are, in comparison to such things as indirect costs, fixed costs or overheads in the context of costs incurred by a medium or large sized business such as the FCC group, which operates through a number of companies and at a number of locations, in generating income through a number of different activities or ways. Thus, it:

(1) divides costs "relevant to a particular chargeable job" into two categories, namely direct costs and overheads;

(2) defines direct costs as including: (a) direct employed staff costs; (b) costs payable to a contractor; (c) materials costs; (d) costs of hire of equipment, plant and vehicles; and (e) other relevant costs specifically attributable to a chargeable job;

(3) provides for overheads to be added as an ascertained percentage of direct costs, where the percentage is ascertained by adding together the following three percentages: (a) first, the overall cost of support services provided within the cost centre responsible for the chargeable job as a percentage of the total direct costs charged to the cost centre; (b) second, the cost of support services provided to that costs centre by other cost centres within the claimant's organisation, again as a percentage of the total direct costs charged to the cost centre; and (c) third, the cost of capital and depreciation of assets used in connection with the direct costs incurred by that cost centre and cost centres providing support services, again as a percentage of the total direct costs charged to those cost centres.

202. In summary, and applying that approach to this case, one would take the specific category of income in question, identify the direct costs of obtaining that income in the same way as under (2) above, and then

separately identify the indirect or fixed costs or overheads by reference to the cost of the support services incurred at the individual facility, the support services provided by head office to the individual facility, and any relevant capital and depreciation costs.

203. In short, in my view this illustrates that: (i) there is an obvious distinction between direct costs on the one hand and what may be described either as indirect or fixed costs or as overheads on the other hand; and (ii) the dividing line lies between those costs which are incurred specifically in relation to the particular income generating activity in question and those costs which are not specifically incurred in relation to that activity but are the general costs incurred by the organisation as part and parcel of undertaking its activities as a whole.

204. I would accept that in an individual case there may be room for debate as to whether costs incurred at a particular facility are direct or indirect costs. The approach adopted in the Regulations appears to assume that the organisation will be able to allocate the time spent by specific individuals and plant and specific materials to a particular job, which may well be possible in the context of individual road repair jobs. That is unlikely to be the case here. Instead it may well be, to take an example relevant to this case, that a particular WTS employs a specific number of operational staff or maintains a specific number of operational vehicles where: (a) no identifiable staff members or vehicles are used to undertake only the income generating activity in question and there is no reliable way of allocating the time spent by each to such activity; but (b) there is a minimum number of operational staff and vehicles needed to operate the facility; and (c) the total number of operational staff or vehicles will vary according to the throughput of the facility and the nature of the income generating activities generated there at the time. I can see there may be scope for argument as to whether all such costs should be treated as an overhead, or whether it would be possible to identify as direct costs some percentage of total costs of the operational staff and vehicles employed at the facility. That is not, however, an argument which can be resolved in the abstract and would need to be tested against the particular facts of the particular case.

205. I have also referred to Keating on Construction Contracts (11th edition), which refers (at paragraph 9-017) to a decision of the Scottish Inner House on appeal from the Court of Session: Robertson Group v Amey-Miller 2006 S.C.L.R. 772. In that case it was held (in relation to a claim under a letter of intent) that an entitlement to recover "direct costs and directly incurred losses" permitted a claim for overhead and profit to be recovered. However, it appears from the judgment that this was on the basis that such claims fell within the category of directly incurred losses, rather than the category of direct costs, in the context of an analogy with contractual claims for recovery of "direct loss and expense", so that in my view this decision does not really assist me either way.

206. Turning from the general to the particular, one should ask why the parties might have decided to limit deductible costs to those directly incurred. In this case that requires one to consider the reasons why the definition of TPI should include reference to the categories of costs which are deductible. As I have said, it is not a clause whose purpose is to specify the categories of costs in respect of which FCCB can receive payment from BC. Nor does it affect the value of guaranteed TPI because – as explained above – guaranteed TPI is a specified figure (subject to indexation) which applies regardless of the actual TPI received or the actual costs incurred in generating that TPI. Thus, both the guaranteed TPI income and the costs incurred to generate it are matters solely for FCCB under the PA, in that: (a) if FCCB does not generate TPI up to the guaranteed amount it has to make up the difference; and (b) it is solely entitled to the benefit of any surplus between the TPI earned up to the guaranteed limit and the costs incurred in earning that TPI. Its only purpose, therefore, is to control which costs can be deducted from TPI before the excess TPI available for profit share is arrived at.

207. FCC emphasises very strongly that it would offend commercial commonsense for this provision to be interpreted so that the overhead or other indirect costs which it incurs cannot be deducted from TPI. It submits that this is especially so if those costs might be so high that not only would its 25% profit share be wiped out, but it would also make an overall loss, and potentially a very substantial one.

208. However, as BC submits, there is an important and obvious difference between direct and indirect costs. The former are costs incurred directly in order to generate the income in question, whereas the latter are costs incurred by the business as a whole and are, by definition, incurred whether or not any particular or specific income is generated. Thus, the extent to which FCC would suffer a true loss in such circumstances, as opposed to the loss of an opportunity to make a contribution to indirect costs, would depend on a number of factors which might vary considerably at any particular time. Also, unless FCC had actually scaled up its costs of operating a particular facility or service in order to deal with the TPW in question, it would not have incurred any actual excess expenditure on these fixed costs. If it was unable to recover a proportion of these fixed costs from BC then it would, of course, have to recover them from existing income. However, that is not the same as saying that it would make a loss. In a case such as the present, that would also depend on whether, and if so to what extent, FCC had already recovered some or all of its fixed costs through the guaranteed income.

209. FCC has not, so far as I can see, been able to suggest what meaning should be ascribed to the phrase "directly incurred costs". Mr Mort asked FCC's expert accountant witness Ms Perks, whether she felt able to offer an opinion as an experienced accountant. She was unable to do so.

210. In summary, in my view BC's suggested interpretation is more compelling than is any interpretation advanced by FCC. As Mr Mort submitted, limiting deductible costs to direct costs means that there is less room for argument about whether any, and if so which, indirect costs should be attributed to TPI, on the basis that all indirect costs are instead simply treated as for FCC's account. Putting it at its lowest, such an interpretation does not in my view offend against commercial commonsense. It is a bargain which two commercial parties, properly advised, could quite properly have made. It is not inconsistent with the structure and intent of the PA, whether read in isolation or by reference to the wider factual matrix insofar as relevant. The fact that FCC may now regret having agreed to such a clause and having agreed to sharing excess TPI 75/25 in BC's favour is nowhere near sufficient justification for – effectively – putting a line through the word "directly".

Proviso (a) – specifically and solely related to the generation of additional TPI.

211. BC has submitted, correctly in my view, that by reference to the words used what this proviso is directed at is costs which are specifically and solely related to the generation of TPI additional to that modelled in the Base Case. In other words, the focus in this proviso is on what TPI was modelled in the Base Case, as opposed to what costs were modelled in the Base Case.

212. On a simple level the answer appears from the financials sheet which, under "revenues" shows £609,525,000 as commercial revenue and £353,042,000 as power revenue and nil for recyclables net income.

213. Thus, BC contends that it is only costs specifically and solely related to the generation of TPI additional to those figures for commercial income (which, plainly, refers only to third party waste income) and power income (i.e. electricity output) which is properly deductible on a proper interpretation of this proviso. On this basis, it contends that FCC has to establish this stringent causal requirement, i.e. that in

relation to TPI from TPW the costs have to be specifically and solely related to generating income above and beyond what is guaranteed income from that source.

214. In contrast, FCC contends that the only TPI income modelled in the Base Case so far as TPW is concerned is the guaranteed figure for commercial revenue and, although not appearing explicitly in the Base Case, that is plainly only "gate fee revenue" as stated expressly in the definition of guaranteed TPW TPI in the definitions section of the paymech. It follows, FCC submits, that income from TPW additional to gate fee revenue falls within this proviso and, hence, so do costs specifically and solely related to the generation of other sources of TPI.

215. FCC has to accept that there is no express reference to gate fee income in the Base Case itself. However, it submits that it is both permissible and right to look at the Base Case in the context of the PA as a whole, especially given the close connection between the Base Case and the paymech.

216. It also submits that the parties cannot be taken to have intended the interpretation for which BC contends, since it would be effectively impossible for FCC to surmount this stringent causal requirement, even where it has incurred direct costs in generating additional income from TPW in excess of the guaranteed amount, regardless of the source of that income.

217. In my view, the phrase "modelled in the Base Case" does not compel the conclusion that the only place in which the parties can look to see what is modelled in the Base Case is the Base Case itself. As long as it is clear from the PA as a whole that the TPI modelled in the Base Case relates to a specific source, then that would be sufficient in my view.

218. In my judgment, FCC's interpretation is more compelling than BC's interpretation on this point. On BC's interpretation, if all that "modelled" means is that an amount is included in the Base Case for TPI from TPW, without any identification of the source of that income, then if the actual TPI from TPW exceeded the guaranteed amount it would be very difficult, if not impossible, to identify which costs were specifically and solely related to the generation of the additional income. Thus, this proviso would have the practical effect that no costs related to the generation of TPI from TPW could ever be deducted against TPI for the purposes of ascertaining excess TPI. That is not what the proviso says and there is no obvious reason to read it as such. In contrast, looking at the PA as a whole to see what TPI is modelled is perfectly legitimate and, indeed sensible.

219. Thus, as I said in paragraph 112 above, having regard to the wider terms of the contract, then what appears from the definition section and from paragraph 11.4 of the paymech is that what was modelled in the Base Case was only the nominal TPI in relation to gate fee revenue in respect of TPW. It follows, I am satisfied, that costs specifically and solely related to the generation of TPI from sources other than this nominal gate fee revenue are in principle properly deductible from such TPI.

Proviso (b) – incremental costs above those envisaged in the Base Case.

220. As with proviso (a), this requires the court to look at what was "envisaged" in the Base Case in terms of costs[8].

221. Again, reference to the financials sheet shows reference to various operating costs including O&M costs as well as insurance costs. As I have observed above, when referring to the detailed terms of the PA, the import per sheet contained a detailed breakdown of costs. What is apparent is that all of these costs

[8] This proviso also prohibits the deduction of costs which have been or will be otherwise recovered through the paymech, but neither party has suggested that this is relevant.

are related to the Facilities themselves, with the possible exception of variable haulage, which – as I have also observed above – in addition to being included within the sub-heading of the Facilities can also be identified from the transport plan as being limited to haulage costs from the WTSs to Greatmoor.

222. It follows, in my judgment, that this proviso, in referring to the costs which were envisaged in the Base Case, is referring to the costs of operating the Facilities (including the variable haulage as identified above) and not to costs incurred remote from the Facilities.

223. BC submits that this interpretation fails to address the fact that costs of a similar nature could be incurred by FCC in undertaking the same activities at other locations, such as other WTSs. It submits that it is irrelevant that the costs happen to be listed under the general reference to the Facilities. It submits that it would produce a surprising result if FCC could choose to undertake the same activities at other locations and deduct the costs thus incurred from TPI, whilst also retaining the benefit of the costs of operating at the Facilities, for which the parties envisaged it would be compensated through receipt of TPI under the guaranteed TPI provisions of the PA. However, there are two answers, each compelling in my view, to that submission.

224. First, as Ms Parkin said in oral closing submissions, the services which FCCB was obliged to provide under the PA included obligations to accept contract waste at the WTSs during the specified opening hours and to transfer such waste to Greatmoor for treatment. Thus, FCCB could not – even if wanted to – manipulate the contract by mothballing one or both of the intended TFSs and undertaking the same services at some other location and then seek to load its costs into that. There is no evidence that any, or any significant, costs would be saved at the WTSs, given that they would have to be kept open for contract waste, even if TPW was diverted elsewhere for handling.

225. Second, all of this assumes that FCC would have some commercial incentive to act in this way. One might ask rhetorically why would it chose to incur costs at remote facilities rather than use the WTSs provided by BC under the PA unless there was some good commercial reason to do so? Its most compelling incentive was to secure the guaranteed amount of TPW to achieve its guaranteed TPI. Incurring costs in relation to other WTSs to be able to set those costs off against excess TPW income, when it would still have to share that excess profit 75/25 with BC, makes no obvious sense. Although Mr Mort submits that the risk of this happening is illustrated by what has happened since the O'Farrell judgment, this is not an answer in circumstances where FCC's behaviour since that time has been affected not just by the realisation of the impact of that judgment but also the feared consequential impact if BC was to succeed in this litigation as regards the extent of the costs which FCCB is entitled to deduct from TPI.

226. Finally, and for completeness, I should address FCC's alternative argument that the costs "envisaged in the Base Case" only comprised the £60,000 figure referred to in the WFA. I am not at all convinced by that argument. The reference to Base Case in proviso (b) is clearly intended as a reference to the Base Case in the PA itself, not a reference to the Base Costs in the WFA as an ancillary document (which itself defines Base Case as having the meaning given to it in the PA). If that were otherwise, then the reference to Base Case in proviso (b) would be a reference to a completely different thing, viz. Base Costs as defined in the WFA, to that referred to in proviso (a), which would make no sense at all. Further, there is no reference to this £60,000 figure in the PA Base Case. Also, since – as stated above - the PA Base Case included a substantial number of other costs, it is difficult to see how FCC's alternative case could work alongside the PA Base Case. The WFA had a completely different structure so far as its treatment of costs was concerned and there is no sensible basis for seeking to introduce one part of this separate ancillary

contract between separate parties into the PA as the actual contract made between these two contracting parties.

Proviso (c) - handling or processing TPW costs by FCCB or an affiliate

227. BC's case is that handling TPW includes the activities undertaken at any WTS or similar place and also the activities of transporting waste to any such WTS or similar place and from there to Greatmoor. Accordingly, BC submits, if FCC chooses to handle TPW other than at one of the WTSs and to transport it other than from one of those facilities to Greatmoor, then the costs thereby incurred are caught by proviso (c) and not deductible.

228. FCC's case is that handling TPW only falls under proviso (c) if it is handled at one of the Facilities, because it is only such costs which are included within the Base Case as recoverable under the guaranteed TPW income provision. FCC notes that, although the terms "handling" and "processing" are not defined terms in the PA, by contrast, the term TPW is defined as all waste received at the Facilities other than contract waste and substitute waste.

229. FCC submits that this restricted meaning is consistent with the fact that, as I have noted, the costs envisaged in the Base Case are all costs undertaken at the Facilities themselves, or costs of transferring TPW from the WTSs to Greatmoor.

230. Whilst in principle the same competing arguments would apply in relation to processing costs, since there is no suggestion of FCC incurring processing costs anywhere else than at Greatmoor that point has not figured in submissions. It is, nonetheless, relevant in principle to the interpretation exercise. However, since in my view it is vanishingly impossible that the parties could ever have contemplated at the time of entry into the PA any circumstances in which FCC would not use the facility at Greatmoor to process TPW, given that it was effectively to be provided free of charge by BC, that seems to me to be a tangential point at best.

231. BC's most prominent argument against FCC's case is that it involves reading the words "at the Facilities" into proviso (c), when there is no compelling basis or justification for so doing. It also submits that if – as I have indicated above - proviso (b) is read as contended for by FCC, then this renders proviso (c) as little more than a duplication of proviso (b). It also submits that the reference in the definition of TPW to waste received at the Facilities is simply a convenient way of identifying the waste which is the subject of this definition, rather than an intention to limit the places where TPW may be handled before it ends up at Greatmoor (or one of the WTSs).

232. BC also submits that its case is consistent with O'Farrell J's analysis of the definition of TPW in her judgment at [85], where she said this:

"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 NLW Waste contracts falls within the definition of Third Party Waste if it is received at the Facilities."

233. In my judgment, this last point cuts both ways. BC rightly observes that the same reasoning applies to proviso (c), i.e. that it could have been expressly worded to limit non-deductible costs to those incurred in handling or processing TPW at the Facilities. However, it may also be said that if TPI is to have this wide meaning under this definition, so that income generated other than at the Facilities is included, then it is not immediately obvious why costs directly incurred other than at the Facilities in generating that income should not be deducted. The effect would be that BC takes the benefit but not the burden. Whilst parties to a contract may indeed agree that this is what happen, it would appear to be a surprising outcome in the absence of some obvious reason for the parties intending such an outcome.

234. Indeed, it appears that O'Farrell J may have recognised the force of this point in her judgment at [93] where she said this:

"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 NLW Waste."

235. Of course, it is apparent from this paragraph that O'Farrell J was careful to emphasise that: (a) commercial arguments should not override the allocation of costs and risks in the PA; and (b) she had not been asked to undertake the exercise with which I am concerned, so that her observation at the end of this paragraph was not intended to be anything other than a general observation not in any way binding on the parties or any judge in subsequent litigation.

236. Nonetheless, in my judgment BC has been unable to articulate any convincing reason why the parties, considered objectively, should have intended the result for which it contends. Mr Mort repeated his argument in relation to proviso (b), namely that FCC's interpretation would allow it to deduct the costs incurred away from the Facilities whilst retaining the benefit of the costs of operating the Facilities which the parties envisaged it would be compensated under the guaranteed TPI provision of the PA, but I have already rejected that argument when addressing proviso (b).

237. As to the wider terms of the PA, I have already observed that clauses 47.8 and 47.10 envisaged in terms that FCC might enter into long term contracts with other local authorities for handling and processing MSW. The transport plan identified substantial TPW being delivered to Greatmoor, both directly and via the WTSs which, therefore, must have envisaged that at least some of that TPW might comprise MSW from other local authorities. It is inherently improbable that the parties, with the knowledge they both had as to how MSW is collected and handled by local authorities, would not have known that: (a) any such MSW would very likely already have been handled at local WTSs before being transported either directly to Greatmoor or to the WTSs for onward transfer there; and (b) thus, that handling costs would be incurred by FCC before the MSW arrived at the Facilities.

238. This is all reinforced by the relevant factual matrix which includes, as I have said, that: (a) BC's outline business case identified from the outset that potential options for filling that spare capacity included procuring MSW from neighbouring waste authorities; (b) it was clear from the documents supplied by

FCC as part of its tender that it envisaged procuring MSW from neighbouring waste authorities; (c) BC's detailed final business case expressly mentioned that FCC was actively bidding for long term municipal waste disposal contracts from neighbouring disposal authorities.

239. As I have said, it appears that until the O'Farrell judgment FCC assumed that only gate fee income was included within TPI. It also appears from the chronology that it was not until 2018 at the earliest that BC came to have a different view. However, for the purposes of interpretation I must assume that both parties are, objectively, assumed to know that the wider categories of TPI as found by O'Farrell J were included within TPI. Thus, the question arises whether, in the light of that assumed common understanding, the parties could also, objectively, have intended that all handling and processing costs, regardless of where such costs were incurred, were not allowable deductible costs. In my judgment they could not. Apart from the points already made, one must consider the impact of BC's construction if - in the context of income from TPW - one adopts the cumulative construction of: (a) only allowing direct, as opposed to indirect, costs to be deducted; (b) only allowing costs to be deducted if they are limited to the generation of non-gate fee income; and (c) only allowing costs to be deducted if they are not already envisaged in the Base Case as being incurred at – or in transport between – the Facilities. If there was then a further limitation that any handling or processing costs incurred in generating the relevant income, regardless of where it was incurred, were also not deductible, that would appear to have the effect of disallowing virtually all costs in the event of FCC entering into one of the very contracts with local authorities which was so plainly envisaged as at least possible, if not indeed as likely, by the parties from the very outset.

240. In my judgment, anyone reading the definition of TPI, knowing all of this, could not possibly conclude that it was the common objective intention of the parties that this additional TPI would be brought into the equation but that the directly incurred costs of generating the very same additional TPI would not be deducted from the income. They would, therefore, be entitled to conclude that the common objective intention of the parties was that the definition of TPW in proviso (c) was the contractual definition of TPW (i.e. waste received at the Facilities), because there was no compelling basis, as O'Farrell J found there was in relation to the meaning of "income derived from TPW" in the main body of the definition of TPI, for disregarding that part of the definition.

241. Whilst that produces an anomaly, in the sense that it may be argued[9] that TPW has a different meaning in different parts of the same clause, it is not in my judgment such a significant anomaly as to justify the objection that the court is re-writing the contract so as to correct what now, in the light of subsequent events, appears unfair.

242. Further, whilst it may be argued that this means that provisos (b) and (c) cover similar ground, they are similar rather than identical in their effect, so that this does not seem to me to be a sufficient basis in itself for giving proviso (c) the narrower meaning as contended for by BC and, as Mr Mort rightly recognised in oral closing submissions, the argument against redundancy carries relatively little weight if there are other substantial pointers the other way.

243. Whilst I have found this a difficult exercise, in the end I am satisfied that this is the proper construction of proviso (c).

[9] In fact, as I have explained, it is not the definition of TPW which is different, but merely that the definition of "income derived from TPW" has a different meaning from "TPW".

The application of the principle to the individual cost items

244. I can now address the individual cost items relatively shortly.

(1) Haulage and contractors

245. This includes haulage of waste by external transport companies and costs for use of any other sub-contractors.

246. Given my findings as to the proper interpretation of the definition of TPI, the haulage and other sub-contractor costs which FCC has sought to deduct in relation to the income the subject of this case are in my judgment properly deductible. They plainly fall within the definition of directly incurred costs; they are specifically and solely related to the generation of income other than gate fee income, they are not the costs of operating or haulage between the Facilities envisaged in the Base Case and nor are they costs of handling or processing waste at the Facilities.

(2) Manpower

247. As summarised by Mr McKenzie in his witness statement at paragraph 8.8.1, this includes "wages/salaries, national insurance, pension costs, travel expenses, training costs, medical costs, etc".

248. As explained by Mr McKenzie, FCC has taken the approach of identifying the overall manpower costs incurred by the individual facility (also referred to as a cost centre) and then apportioning that overall figure to the PA by reference to the percentage of waste sent by that facility to Greatmoor relative to the overall waste handled at that facility. In his witness statement, he explained (at paragraph 8.9) that in relation to manpower, "these costs relate to individuals working at the relevant sites, and could include vehicle drivers, mobile plant operators, MRF pickers, HWRC operatives, traffic management, EfW Day operators, EfW Electrical specialist, EfW mechanical specialists, Site Supervisors and Team Leaders".

249. The difficulty with that approach is that it is simply not possible to identify specific manpower costs which might individually fall within the definition of directly incurred costs. It is possible that some of them might, whereas in the absence of concrete evidence to the contrary, it is difficult to see how the cost of employing site supervisors and team leaders, for example, could ever be described as directly incurred costs. As Mr McKenzie explained in cross-examination, this approach was taken on the basis that "the [O'Farrell] judgment wasn't prescriptive about how we would approach this, so we approached it in what we thought was the simplest and most logical way of allocation of cost".

250. It does not appear that in producing the costs in this way FCC gave any thought to the potential consequences of the limitation on deductible costs to those directly incurred in generating the income.

251. This not so much a point about apportionment as about the distinction between direct and indirect costs. As to the former, as Mr McKenzie said in his witness statement at paragraph 8.15, explaining the decision to apportion costs by reference to the percentage of waste handled at a particular WTS which was sent to Greatmoor, "it is not possible to identify specific amounts of costs incurred in relation to operation of the transfer station which relate to that volume of waste because the waste that ends up at Greatmoor is not segregated from waste that ends up elsewhere". As to the latter, this is more a point about identifying, if possible, which – if any – manpower costs can properly be said to be directly incurred in generating the income from those which cannot. As I have already said, I can well appreciate that it would probably be difficult, if not impossible, to identify individual employees who worked on waste destined for Greatmoor and nothing else. Equally, however, I can also see how it might be possible to identify and separate out

the non-operational from the operational staff, or the core staff required regardless of workload from those whose number is dependent on workload and to make a case, based on evidence, that the latter category of costs might – and I emphasise might – be capable of inclusion as direct costs and then as apportionment to Greatmoor based on the volumes of waste sent to Greatmoor from that facility as opposed to other waste treatment destinations.

252. However, in the circumstances of the case and the light of the evidence advanced by FCC, it is not possible to find in its favour on its pleaded and evidenced case. That means in my judgment that nothing can be deducted by way of costs in relation to the years the subject of this case. I appreciate that this may seem an injustice, however that seems to me to be a consequence of FCC's decision to adopt an all-or-nothing approach and to include every possible category of manpower related cost into this cost item. I do not consider that it would be proper for me to allow FCC the opportunity to now, in the light of this judgment, seek to recalculate a claim for direct manpower costs on a completely different basis.

a. In its post-draft judgment submissions FCC invited me to reconsider this finding, on the basis that the exercise I identified as possible in paragraph 251 above had in fact been undertaken as part of the disclosure sampling protocol process as agreed between the parties and approved by the court in the directions order made by Ms Buehrlen KC referred to at paragraph 22 above. It submitted that the documents it had provided in relation to manpower costs, including job descriptions for each staff grade describing the work done, were the subject of specific questions raised by BC, none of which raised any specific query as to whether these were directly incurred costs.

b. However, it is apparent that the sampling process was only intended to enable the parties to identify and for FCC to provide a sufficient number of documents to enable the parties to litigate the issues in dispute. It was not intended to operate as a substitute for FCC to identify and prove its case as to whether all, or if not all some identified part, of the claimed manpower costs were directly incurred costs and thus deductible.

c. FCC also relied on the fact that although BC had, in its opening submissions, identified certain categories of costs as either indirect costs or appearing to be a combination of direct and indirect costs, which had not bene separated out, it did not include manpower in either category.

d. However, at no time had BC ever conceded that manpower costs were direct costs and, moreover, it made clear in its opening submissions that FCC had chosen to organise its costs into these categories, that BC was not in a position to unravel them to try and work out which might fall into which category and, in the circumstances, the burden was on FCC to "demonstrate that all of the various component parts of the heads of cost into which it has grouped things are costs that were 'directly incurred' in generating income from third parties". It made no concession in relation to manpower costs in its closing submissions, written or oral.

e. In the circumstances in my judgment it was or should have been plain to FCC that it was advancing an all or (whether it liked it or not) nothing case in relation to manpower costs. If it had wanted to take up BC's challenge and to identify an intermediate position, by reference to the documentary and witness evidence it had submitted, it was obliged to do so in clear terms before the trial concluded. It did not do so and, as BC submitted in its response on this point, it could not have expected the court to embark on this process of its own volition in the course of production of its judgment, whether prior to circulation of the judgment in draft or on receipt of the draft. Indeed, as BC also submitted, even in its request for reconsideration FCC did not

identify which, if any, manpower costs were directly incurred and which were not, or make submissions as to on what basis it could be said that the costs of employing, for example, a contracts supervisor or contract manager or chargehand fell within the category of direct costs.

f. In reality, what FCC is inviting me to do, having considered my judgment in draft, is to reconsider my conclusion in paragraph 252 that it would not be proper to allow FCC to have the opportunity to advance this intermediate case as a new case. Indeed, in its responsive submissions on this point it submitted that the fairest course would be to determine the question as to whether manpower costs are deductible until the trial of the Luton costs issue.

g. I accept that it is always open to a judge to reconsider a decision at this stage, if it is necessary to do so to deal with the case justly. I am satisfied that it is not appropriate to do so in this case, for the following reasons.

h. FCC, a well-resourced and well-advised organisation, took the decision to plead and to argue its case on this all-or-nothing approach. Although it submits that it did so in reliance on what was said by O'Farrell J in paragraph 93 of her judgment, it cannot – for reasons already identified – have regarded that as having been intended to be anything other than the most provisional of observations. It knew that BC's case was that it would have to justify all costs as meeting the definition of deductible costs, including that they be directly incurred.

i. Although there is, as I have said, no direct authority on this point, I am unable to accept that those experienced in the commercial and construction fields, whether legal, financial or business people, would not have had a pretty clear appreciation of the difference between direct and indirect costs. It would have been extremely straightforward for it to plead and argue, strictly as an alternative, that even if the costs of one category of staff arguably fell outside this definition nonetheless the remainder did not, and to provide a breakdown of the costs by reference to each staff category.

j. Finally, the consequence of its failure to do so only impacts on its success or failure in relation to the manpower costs the subject of the historic years dealt with in this claim, excluding the Luton costs which are the subject of further consideration. It does not prevent FCC from adopting an approach which is consistent with this judgment in future years.

253. Further (and now picking up the point identified in (j) above), since I have not been asked to make a declaration as to the proper interpretation of the PA which might assist the parties going forwards, it seems most sensible for me to say nothing further about what the position might be in relation to successive years.

254. Finally, there is a separate issue in relation to manpower where there is a dispute between the parties as to the proper assessment of the amount. Given my above conclusions, I do not need to address it. In case of any appeal, I will nonetheless do so, but briefly and for completeness. In short, having regard to the evidence of Ms Boosey and Mr McKenzie on this point, as summarised in FCC's written closing submissions, I am satisfied that FCC would have satisfied the burden of proof in relation to this item.

(3) Site costs

255. This includes the costs associated with a site e.g. utilities, maintenance, telephone, IT costs and insurance recharges.

256. I reach the same conclusion in respect of this item as I do in respect of the manpower claim and for the same reasons. Indeed, if anything, the case against these being direct costs is far stronger than it is in

relation to manpower, since the cost items referred to are far less likely to be volume dependent, so that any argument to the effect that some at least could be direct costs would be correspondingly far weaker.

257. Again, there is also a separate issue of assessment of the proper amount in relation to insurance. Again, given my primary conclusion, I do not strictly need to address this point but again I will do so briefly in case of an appeal. In short, having regard to the evidence of Ms Harlock and Mr McKenzie on this point, as summarised in FCC's written closing submissions, I am satisfied that FCC would have satisfied the burden of proof in relation to this item.

(4) SHE costs

258. This includes costs for health and safety, pest control, environmental monitoring, etc.

259. The same conclusions for the same reasons apply in relation to this item as apply in relation to site costs as above.

(5) Hire costs

260. This is the cost of all hired items e.g. mobile plant, generators, odour treatment equipment etc.

261. The same conclusions for the same reasons apply in relation to this item as apply in relation to manpower costs.

262. In its opening submissions FCC argued that hire costs were direct costs, positing the example of a hire of an item of mobile equipment for a particular site so as to be able to perform a particular task arising out of a particular income-generating contract. It is argued that: "if the contract in question is a TPW contract, then the task is being carried out in furtherance of earning revenue under that TPW contract; it is therefore a paradigm example of a direct cost flowing from generating income from a TPW contract".

263. It follows from what I have already said that I would be prepared to accept that if a case had been made out on that basis then it would have succeeded. However, again and unfortunately for FCC that is not what it has sought to do. Nor has it sought to separate out the hire items which are waste treatment volume dependent from those which are required regardless of volume (odour treatment equipment would appear to fall clearly into that category) and to apportion the former as between treatment destinations based on volume. In the circumstances it is simply not possible for me to make any determination as to what, if any, hire costs might have been deductible.

(6) Fuel

264. This includes the costs for petrol and diesel.

265. The same conclusions for the same reasons apply in relation to this item as apply in relation to manpower costs.

(7) Plant repair and maintenance

266. This includes all costs for repairs of vehicles, mobile plant and any other equipment used on site.

267. The same conclusions for the same reasons apply in relation to this item as apply in relation to manpower costs.

(8) Fixed rent, rates and licensing

268. This includes costs of site rent, business rates, royalties, and any other licensing and permitting costs.

269. The same conclusions for the same reasons apply in relation to this item as apply in relation to site costs. Indeed, these appear to be paradigm examples of fixed overhead costs.

(9) Site overheads

270. It is said by Mr McKenzie in his witness statement that "this may include management costs, but typically an operational site will not have any costs of this nature. This category is used primarily for corporate overhead costs".

271. It is wholly unclear from this explanation what is included in this item. However, judging from the explanation given, it is plainly a category of overhead and, as such, is not and cannot be a direct cost.

272. A separate issue was raised as to whether FCC had satisfied the burden of proof in relation to the allocation of general group overheads to specific sites. This includes site overheads (whatever that includes) as well as divisional and corporate overheads (see items 11 and 12 below). The key point here is that by reference to the evidence adduced by FCC and the answers given by Mr McKenzie in cross-examination, these "allocations" are only notional inter-company allocations and no money changes hands nor are inter-company credits shown in company accounts. This was consistent with his evidence in his witness statement at paragraphs 8.48 to 8.50 and contradicted a suggestion in an earlier document that there would be an apportionment via a management charge. On that simple basis in my judgment it cannot be said that such allocations could be included as "costs directly incurred [by the Contractor or any Affiliate] in generating the income". In the circumstances, even if these overhead costs otherwise fell within the definition of deductible costs, FCC would not on the evidence before me be entitled to deduct what are essentially notional inter-company allocations rather than actual costs incurred by the relevant companies within the FCC group.

(10) Depreciation

273. This is depreciation costs for all assets deployed to a site.

274. The same conclusions for the same reasons apply in relation to this item as apply in relation to site overheads.

(11) Divisional Overhead

275. These are management costs in an operating division that are not specific to an individual operating site or contract.

276. The same conclusions for the same reasons apply in relation to this item as apply in relation to site overheads.

(12) Corporate Overheads

277. This includes all the management and support costs associated with support functions e.g. Finance, IT, HR, Procurement, Directors.

278. The same conclusions for the same reasons apply in relation to this item as apply in relation to site overheads.

(13) Operational support charge

279. This includes the support costs to the operational sites of Fleet and Plant, SHEQ and Engineering.

280. The same conclusions for the same reasons apply in relation to this item as apply in relation to site overheads.

281. Finally, and for completeness, in relation to costs, it does not appear that BC is advancing a positive case that the deed of variation in relation to Amersham has the effect that any specific categories of costs should not be allowed by reference to the terms of that deed and the individual costs claims made. Although the deed of variation was referred to in the opening written submissions, no specific costs were identified as being irrecoverable by reason of this deed, and no mention of it was made in the course of the trial or in BC's closing submissions. Given that there is no evidence to which I have been referred to the effect that any of the costs the subject of this case have been incurred due to the non-availability of Amersham, I can understand why BC does not appear to advance a specific case in this regard.

The Luton unitary charge

282. As I have already indicated, this is the second most substantial claim - at least as pleaded and subject to the issue of determination of properly deductible costs, which is not for this trial - which I must address. BC's case is that as a result of FCC's failure to include this income as TPI it has under-declared such income by £13,109,296. This figure is based on FCC's own pleaded case as to the unitary charge element of waste disposed of at Greatmoor, excluding the diversion fee (see below).

283. As I have also already indicated, as long ago as 2004 FCCR entered into a contract with Luton for waste management services in the Luton borough for a term of 12 years, with Luton having an option to extend for up to a further 6 years. This was a substantial and complex contract providing for a full range of waste disposal services, including the updating and operation of the Kingsway WTS, the updating and provision and operation of two HWRCs, and the operation of a materials recycling facility (**MRF**)[10] (each of which is leased to FCCR by Luton). Payment was to be made by way of a unitary charge which, of course, in 2004 did not include any provision for waste disposal at Greatmoor.

284. By deed of variation dated 20 March 2015 the Luton contract was extended until 31 March 2019, making provision for the first time for payment of a separate "diversion fee" for disposal of waste at Greatmoor, set at the same level as the current guaranteed gate fee for TPW under the PA, and a renegotiated (and reduced) unitary charge, subject to adjustment in specified circumstances.

285. In May 2017 Luton subsequently extended that contract for a further year to 31 March 2020.

286. FCC has disclosed the diversion fee income to BC pursuant to the O'Farrell judgment. However, because the diversion fee has been set at the same level as the guaranteed gate fee for TPW under the PA, there is - BC says conveniently for FCC, although FCC emphasises that this was not challenged by BC in 2015 when the details were disclosed - no excess TPW income in respect of which BC has any entitlement to a profit share in relation to that diversion fee income.

287. The unitary charge, although covering a wide range of services, now includes for: (a) the operation of the WTS at Kingsway (as described by Mr Beresford-Green of FCC in his witness evidence) where MSW destined for Greatmoor and elsewhere - as well as other waste, including MDR and bulky waste - is received, segregated, held and bulked up for delivery by FCCR; (b) haulage of such MSW to Greatmoor. However, by no means all of Luton's MSW, let alone all of Luton's waste, is sent to Kingsway for handling or sent to Greatmoor for treatment. There is no evidence or suggestion that the unitary charge was

[10] Also at Kingsway, although apparently burned down in October 2022 and no longer operational.

renegotiated in 2015 or subsequently specifically so as to include any additional costs in relation to handling and transporting waste destined for Greatmoor or any margin upon any such additional costs.

288. Mr Beresford-Green explains that 16 persons are directly employed to perform the contract operations for Luton and that FCC also provides off-site support for these contract operations. He explains that Luton is invoiced monthly by reference to the type and quantity of waste dealt with in that month and that, whilst different rates apply to different waste types, for present purposes all municipal waste falls into one of two unitary charge rates, regardless of its precise type, treatment or disposal, although there is a separate EfW charge to cover the gate fee charged by EfW facilities such as Greatmoor and a separate payment (described by him as a notional financial incentive payment) for waste disposed of at such EfW Facilities. He explains that there are various other charges and rebates applied each month. He also explains that there is a contract reconciliation exercise at each contract year end which may involve further charges or rebates.

289. He also explains how the management accounts for Luton are prepared using FCC's finance system, with Kingsway being a separate cost centre and bulk haulage (hauling waste from Kingsway either to Greatmoor or to landfill) being another.

290. He addresses whether it is possible to allocate part of the Luton municipal waste unitary charge to the handling, hauling and disposal of municipal waste that is sent to Greatmoor. His evidence is that it is not, because the unitary charge is an average of the total cost (plus overhead and margin) incurred by FCCR of providing all of its services to Luton divided by the total tonnage of municipal waste to be managed under the contract. Different services cost different amounts, e.g. managing recycled waste is much higher than managing black bag waste.

291. Nonetheless, BC's case is that the unitary charge falls within the definition of TPI because it is income associated with the project derived from TPW. It submits that there is no difference of any substance between the services provided by FCC to Luton under the Luton contract and the services provided by FCC to Herts so far as the waste sent to Greatmoor for treatment is concerned. The only difference, so far as the handling and treatment of MSW at Greatmoor is concerned, is that at Luton the Kingsway WTS was used, whereas for Herts the Waterdale and Hitchin WTSs were used.

292. BC also submits that even if all of the unitary charge does not fall within the definition of TPI, nonetheless to the extent that the unitary charge includes income derived from the handling and treatment of waste which is ultimately sent to and treated at Greatmoor, then it is income associated with the project and thus is TPI. It submits that FCC cannot be permitted to argue that simply because that income is subsumed within a unitary charge for the provision of an overall service, which is not broken down into different rates for different elements of the overall service, it is not included. That would be to elevate the form of the contract payment terms over the substance of the service provided for which income is received.

293. BC accepts that the unitary charge income should be apportioned, so that it is only the apportioned value of the waste which is sent to Greatmoor[11] which is to be treated as TPW income for the purposes of the PA. BC thus submits that it is irrelevant that, for example, under the Luton contract FCC was also handling and treating MDR at the Kingsway MRF.

[11] Which can be identified from the weighbridge records created and maintained at Kingsway.

294. BC also submits that it is relevant that the Luton contract was a particularly profitable contract for FCC. For my part I do not think that this is a relevant factor, although I do note that FCC does not contend that: (a) the contract overall was not a profitable one; or (b) this part of the overall service was consciously tendered or negotiated as a "loss leader", either in its internal build-up for the Luton contract as varied when it came to include the EfW treatment option or in its negotiations with Luton for the variation. I also note that FCC does not contend that the diversion rate charged separately to Luton, and set at the same rate as the guaranteed gate fee rate under the PA, was built up or negotiated so as to include an allowance for the cost of handling at Kingsway or haulage from Kingsway to Greatmoor. To the contrary, as BC submits, if FCC had proposed to Luton a disposal fee that was £1 above or £5 above the guaranteed gate fee rate, with a corresponding deduction in the amount of the unitary charge rates, there could be no dispute that the amounts received in excess of the guaranteed rate would fall to be shared on the 75:25 basis agreed in the PA.

295. FCC's case is that none of the income generated by the payment by Luton of the unitary charge is TPW income, for a number of different reasons. The first two are the most substantial and are closely related.

296. The first is that the unitary charge is paid for services provided under the Luton contract that were not "associated with the Project" in the definition of TPI. In particular, it notes that: (a) the vast majority of the services were not provided for the purpose of (or the primary purpose of) treatment of TPW at Greatmoor; and (b) the same unitary charge is payable regardless of whether any, and if so how much, waste is treated at Greatmoor.

297. The second is that even if the services were in part associated with the project, and that this is sufficient to bring the unitary charge within the definition of TPI in principle nonetheless in practice, because the unitary charge is an indivisible sum paid for the wide-range of services provided under the Luton contract, it would not be possible or practicable to identify and isolate the income received relating to the services associated with the project from the income which did not. It submits that in the absence of any contractual mechanism under either the PA or the Luton contract for doing so, it follows that no relevant TPI can be identified.

298. In my judgment BC is correct to argue that the unitary charge does include income from third parties associated with the project as derived from TPW. Both parties have made reference to the reasoning of O'Farrell J in the previous case to support their respective cases (although she was not dealing with the Luton contract in that case). I will not indulge in extensive citation, but the following observations are pertinent.

Paragraph 84: "… 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."

Paragraph 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 NLW Waste contracts falls within the definition of Third Party Waste if it is received at the Facilities."

299. In my judgment this reasoning, which with respect I would endorse as plainly correct, applies just as much to the unitary charge in this case as to the income received from Herts and NLW in the case before O'Farrell J. In short, post the 2015 variation, and as FCC knew full well, it was using Kingsway and using haulage to handle and transfer waste destined for treatment at Greatmoor. It knew that it was receiving payment of the unitary charge for a wide range of waste services which included these services. It fully appreciated that due to the Luton contract as varied being structured in this way part of the unitary charge included for the provision of these services. It did not seek to agree an apportionment with Luton, or to seek to agree an apportionment with BC, so that it could separate out all income relating to waste intended for disposal at Greatmoor from other income. It plainly knew that in structuring the contract as varied in this way there were two different income streams relating to waste intended for treatment at Greatmoor, one of which was the separate and overt diversion fee and the other of which was bundled into the unitary charge. But the latter still included income derived from TPW.

300. I should emphasise that I am not finding that any of this was done in an underhand way or with the deliberate intention of avoiding payment to BC. It may very well be that this was how Luton wanted to structure the payment terms post-variation. But that does not matter; I am concerned with substance and not form.

301. Perhaps recognising this difficulty, FCC seeks to place reliance on paragraph 90 of the O'Farrell judgment where, in the course of rejecting an argument by FCC that paragraph 11.4 of the paymech, referring to income derived from gate fee revenue, limits BC's entitlement to such gate fee revenue, she observed in paragraph 90 that the purpose of the contracts under which payments were made by Herts and NLW was the treatment of waste at the Facilities. FCC argues that an application of this "purpose" test to the present case should lead to the conclusion that the purpose (or primary purpose) of the agreement with Luton was not the treatment of waste at the Facilities. However, in my judgment this argument fails for the following reasons:

(i) O'Farrell J was not suggesting in her judgment that the satisfaction of some "purpose" test was an essential prerequisite for income to come within the definition of TPI. It was simply a way of explaining why FCC's reliance on paragraph 11.4 of the paymech was misconceived. As O'Farrell J said at paragraph 92: "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".

(ii) In any event, it is clear that the treatment of waste at Greatmoor was one of the purposes of the Luton contract as varied. It is not an essential prerequisite for income to fall within the definition of TPI that treatment of waste at Greatmoor is the only purpose of the contract under which the income is received.

302. As to the second ("indivisible sum") argument, BC submits that this this is misconceived. If FCC chooses to enter into a contract where the income received is paid by way of a flat rate unitary charge p/t, regardless of the particular waste type and the way in which the waste is handled and treated, that is a matter for FCC, but it does not mean that FCC does not in fact receive that flat rate unitary charge p/t on waste treated at Greatmoor. It also submits that if the unitary charge really is an indivisible sum, then the consequence is that all of the unitary charge income is TPI, rather than the consequence being that none of it is. It makes the point that there is nothing unfair in this, given that it is only making a claim for the apportioned element of the overall tonnage which was sent to Greatmoor.

303. BC also submits that in reality the unitary charge income is not indivisible as alleged. It relies upon the evidence of Mr Beresford-Green who, under cross-examination, accepted that it would be possible to calculate what FCC had actually spent on its operations which generated income derived from TPW treated at Greatmoor, and that this could "theoretically form a unitary rate", whilst adding that this "would not be the same as saying, this is what Luton .. expect the apportionment of that unitary rate to be" because it would be "trying to simulate what would be in a new bid as opposed to being what we've actually got agreed with Luton". He stated that such an exercise would be "quite simple" as regards haulage from Kingsway to Greatmoor, because it was based on a fixed rate p/t from a third party haulage company. As regards the operation at Kingsway it would be simply be a rate p/t arrived at by taking the total costs for operating Kingsway divided by the total tonnage which has gone through it. (Although it may be said that the latter exercise would not fully reflect any difference between handling the waste sent to Greatmoor and other waste handled at Kingsway, which may either be easier and thus cheaper to handle or more complex and thus more expensive to handle, as BC observes this is also true of the exercise which FCC has undertaken in relation to its other income calculations.)

304. However, there is a potential complication about undertaking such an exercise, to which both parties referred in closing submissions. Mr Beresford-Green was asked only about handling at Kingsway and haulage from there to Greatmoor. However, in both its original and its amended pleaded case BC contended that the services undertaken by FCC for Luton which it contends generate TPI also include: (a) haulage to Kingsway; (b) haulage from HWRCs; and (c) haulage of rejected waste from the MRF. This, as I understand it, is because waste which ends up at Greatmoor may originate, in part, from other locations before being hauled to Kingsway. By its amended case BC has further added to these relevant services the operation of the HWRCs and the MRF. BC's fallback case, as I understand the pleaded case at paragraph 59D of Sch. 2, is to contend that "income received in respect of (1) haulage of such waste and (2) handling and/or managing such waste at Kingsway WTS and/or the [HWRCs] and/or MRF sites, is Third Party Income", where "such waste" is referring back to the waste eventually received and treated at Greatmoor.

305. Whilst, based on Mr Beresford-Green's evidence, it might be possible to undertake the above exercise in relation to the operation of Kingsway and the haulage from Kingsway to Greatmoor, it seems to me that it would be far more difficult – if not impossible – to undertake the same exercise in relation to the operation of the other facilities and the other haulage routes. This is because there is, so far as I am aware, no way of ascertaining what proportion of waste which eventually went to Greatmoor started off at, or passed through, the various other facilities identified or, thus, was hauled from such facilities to Kingsway.

306. In written closing submissions BC submitted that because FCC had argued that no part of the unitary charge income amounted to TPI it was not open to it to argue, should it wish to do so, that some, but not all, of the unitary charge income should be regarded as TPI. It submitted that, in such circumstances, the court should conclude that all of the income from the unitary charge is TPI.

307. In oral closing submissions FCC contended that it would be quite wrong to divide the unitary charge simply by reference to the proportion of waste treated at Greatmoor as compared to the overall quantity of waste treated, since – as already noted – the unitary charge included for works of construction and improvement for specific facilities as well as for waste treatment itself.

308. I must now state my conclusions. First, I have no doubt that FCC cannot properly deploy the indivisible sum argument as a full defence to the claim, essentially for the reasons advanced by BC as recorded above. On any view the simple solution adopted by BC provides a sufficient answer to that

objection. It may be a rough and ready solution, but it is not manifestly unfair on FCC for two principal reasons. First, because there is no evidence that the services provided in relation to waste sent to Greatmoor are more extensive or expensive that the average (and, indeed, it appears that they are considerably less than, for example, the recycling services provided). Second, because even though the unitary charge includes for services which are not directly waste treatment related, for example the construction and improvement of certain facilities, again there is no evidence that these facilities are wholly unconnected to the waste not sent to Greatmoor. Moreover, since FCC was happy to roll up the cost and its margin for providing all of these services into a composite unitary charge recoverable over a lengthy period, it is not obviously unfair to FCC to adopt the same basis when dividing up income, in the absence of any more obviously appropriate solution.

309. In that respect, I have considered whether there is a more appropriate solution that that suggested by BC which is more consistent with the relevant terms of the PA and which is also permissible on the respective pleaded cases, having regard in particular to the evidence of Mr Beresford-Green on this subject. I conclude that there is not for, essentially, two reasons already identified above, being that: (a) the exercise suggested by Mr Beresford-Green in cross-examination could only be a hypothetical retrospective exercise which would not identify the income actually generated from Luton derived from TPW, because that cannot be ascertained from the unitary charge - at least on the basis of the evidence provided by FCC; (b) there would appear to be insurmountable difficulties in doing so in relation to the facilities other than Kingsway and the transport other than from Kingsway to Greatmoor.

310. Finally, although the issue of deductible costs is not for this trial or for this judgment, I must bear in mind that it would be wrong to undertake this exercise which is, at least in part, one of interpretation of the definition of TPI, without some regard as to whether this conclusion is consistent with the conclusions I have already reached in relation to costs. It is not a criticism of the O'Farrell judgment, because she was asked by BC without objection from FCC to deal with the issue of income separately from the issue of costs, to observe that there is plainly a risk of construing the definition of TPI without considering the question of deductible costs. It suffices to make the following observations.

311. First, having regard to my conclusions as to what are directly incurred costs, it seems to me to be strongly arguable that, if the income from Luton should be taken to be an apportioned element of the overall unitary charge income, then on the same approach the costs incurred by FCC in generating the overall unitary charge income are directly incurred for that purpose and, subject to apportionment on the same basis of income, are properly deductible. I will however leave the final determination of that argument for the trial to deal with the Luton costs if necessary.

a. In submissions produced after circulation of this judgment in draft BC submitted that this provisional conclusion was inconsistent with the conclusions reached above regarding the deductible costs in relation to the Herts and NLW contracts, where I had considered similar categories of cost to those pleaded by FCC in relation to the Luton contract and, principally, disallowed the majority of such costs. It submitted that it would be wrong to allow FCC to attempt to relitigate the same arguments in relation to the Luton deductible costs.

b. In responsive submissions FCC: (a) emphasised there could be no question of re-litigation, given that in my order made 4 March 2024 I had ordered in terms that "any issue concerning the costs (if any) that the Defendant is entitled to deduct if the Claimant's case in paragraph 59D of Amended Schedule 2 to the Amended Particulars of Claim succeeds shall be deferred until after the trial in April 2024"; (b) noted that it was apparent from the draft judgment that

the income derived from the Luton unitary contract was of a different nature and type to that derived from the Herts and NLW contracts, so that there is no necessary inconsistency between the findings in relation to the latter and the above provisional observation in relation to the former; (c) submitted that the determination of what costs are deductible in relation to the income from Luton needs to be made on the basis of the evidence adduced in relation to the Luton costs, especially in circumstances where – as is clear from this judgment – a number of the conclusions reached in relation to the different categories of cost were made (at least in part) on the basis of the evidence (or, more specifically, the lack of it) adduced by FCC in relation to the Herts and NLW contracts.

c. Having considered these submissions, I am satisfied that I should not alter what is in paragraph 311 above, for essentially the reasons advanced by FCC, save to provide the following clarification. I can see that, if the words "the costs incurred by FCC in generating the overall unitary charge income are directly incurred for that purpose" are read as meaning "all of the categories of costs incurred by FCC in generating the overall unitary charge income as pleaded in appendix C to amended Schedule D2 are directly incurred for that purpose", that might indicate that I had undertaken an item by item consideration of each cost category and reached the provisional conclusion that all such categories are to be regarded as direct costs. That was not my intention and I should clarify that what I envisage is that the question is to be determined, as FCC submits, by applying my conclusions on the proper interpretation of what are deductible costs to the evidence as adduced at the trial of the Luton costs issue.

d. BC also raised its concerns that FCC should not be permitted: (i) to re-run its submissions on the proper construction of the definition of TPI as regards what costs are properly deductible; and (ii) to "re-arrange or change" the costs properly to be deducted from Luton unitary income (as currently pleaded in App. C to Sch. 2) on sight of this judgment. In response, FCC has made clear that it does not seek to re-open point (i) - as indeed it could not, in my judgment, seek to do - but has also submitted that it should be entitled to make out its case on the basis of the evidence to be adduced at the trial of the Luton costs issue. This second point is really a case management point to be addressed when directions come to be given in relation to the trial of the Luton costs issue and I will address any dispute in that regard at that point.

312. Second, having regard to the provisos, clearly this income is additional to that modelled in the Base Case, the costs are not envisaged in the Base Case and nor are they the costs of handling or processing the TPW at the PA Facilities.

313. Finally, FCC has also raised various other arguments which I can dispose of relatively shortly.

314. The first is that the price agreed for the unitary charge had nothing to do with Greatmoor, since it was agreed in 2004, long before Greatmoor was conceived. That point does not assist FCC, since by the time of the 2015 variation the unitary charge plainly did include provision for treatment of waste at Greatmoor and the court has to consider the position as it stands at the time of the years the subject of these claims.

315. The second is another variant on FCC's "commercial commonsense" argument, this time on the basis that under the - complex - arrangements made under the varied Luton contract, then if BC was right FCC would have no incentive to dispose of waste at Greatmoor, because it would be unprofitable for it to do so, and that this would conflict with a stated purpose of entering into the PA, namely of reducing the amount of municipal waste sent to landfill. I have no doubt that this argument, based solely on this rather tenuous appeal to one of the many purposes behind the entry into the PA, as well as an assumption about

profitability taking BC's case at its most extreme, cannot prevail over the reasons I have already given for rejecting FCC's case.

316. In conclusion, I am satisfied that BC has made out its case as regards the Luton unitary charge and that the income should be calculated on the proportionate tonnage basis adopted by BC.

Luton residual contamination

317. The status of this issue is not entirely clear from the closing written submissions and it was not, so far as I can tell, addressed in oral closing submissions.

318. In short, BC's position is that the argument advanced by FCC in relation to residual contamination in its Amended Defence, which was to seek to correct an over-statement of its calculation of TPI from Luton, came too late to be determined at this trial, especially in circumstances where BC had made plain in its Amended Reply that it objected to such amendment and where FCC had failed to provide the promised figure to be corrected or the calculation behind it. It submits that the inclusion of evidence by Mr Beresford-Green in his witness statement in this respect is too little and too late.

319. In contrast, in its supplemental opening submissions FCC suggested that the matter should be dealt with by a declaration as to the principle of entitlement to correct and for any quantification either to be agreed or dealt with at the hearing to address Luton costs. In its written closing submissions FCC then performed what appeared to be a volte face, saying that because BC had not challenged Mr Beresford-Green's evidence it should be entitled to an order for the calculation to be adjusted.

320. In my view the appropriate course is for this matter to be determined at the same time as the Luton costs are dealt with, if and to the extent that there is still a dispute about this so as to make it necessary to do so.

The blended waste issue

321. This is one of the few areas where the court needed to hear oral evidence. Although it has been taken up enthusiastically by the parties as an issue, the values involved are relatively modest in comparison with the deductible costs and the Luton income issues and, hence, I do not propose to over-lengthen this already long judgment by delving into too much detail.

322. In relation to the Herts contract, waste from WTSs at Hitchin and Waterdale was handled and transported to Greatmoor for treatment. The same is true – as stated above – in relation to the Luton contract at Kingsway. This waste comprised MSW from Herts and Luton respectively as well as C&I waste from third parties. The former attracts a lower price than does the latter. In order to calculate a "blended" price BC has assumed - in the absence of any documentary evidence to the contrary - that the proportion of each waste type sent to Greatmoor is in the same proportion as the proportion of each waste type which comes into each WTS. FCC, on the other hand, says that its approach has always been to send all MSW to Greatmoor, for good waste management reasons[12], and then, and only where necessary, to send C&I waste there as well. Thus its blended price assumes that all of the MSW arriving at the WTSs is sent to Greatmoor and only the remaining C&I waste is then added to make up the difference. This

[12] MSW has a lower calorific value than trade waste which, for reasons which are unnecessary to explain, is better for the operation of the EfW facility at Greatmoor.

explains the difference between the blended rate adopted by BC and that adopted by FCC and why the former is higher than the latter.

323. FCC's case is that in relation to Waterdale and Kingsway the MSW and C&I waste is held in separate bays and in relation to Hitchin is held in separate piles, which explains how it can in practical terms prioritise the former over the latter and, hence, the description of this issue as the "bays and piles" issue.

324. BC sent representatives to the three sites to seek to confirm or otherwise this account. Their evidence in their witness statements was to the following effect.

325. During his visit to Waterdale WTS on 13 February 2024, BC's Mr Curran was told by James Holt of Herts that the municipal and trade waste was not separated.

326. During his visit to Waterdale on 26 February 2024, BC's Mr Ferguson could not see that municipal and trade waste was kept separately. Rather, the waste was split into two piles, one for black bag waste and one for bulky waste (furniture etc).

327. During their visit to Kingsway WTS on 23 February 2024, BC's Ms Fitt and Mr Ferguson observed that there was no separation of municipal and trade waste and were told as much by Mr Askins, Luton's service manager.

328. One possible source of confusion in this debate is that, as already explained, MSW can include not only waste from domestic premises but also waste from business premises collected by the local authority or its contractors as part of the service it offers. That is all included as municipal waste because it all attracts the same payment from the local authority. It is, thus, different from C&I waste in economic terms and, also, in terms of who is delivering it to the WTS, but not necessarily in physical appearance or actual composition. Both MSW and trade waste will often principally comprise waste stored in typical black plastic bags (hence referred to as black bag waste), whereas both may also include bulky waste, such as mattresses.

329. There is also a separate point, which is that if BC is right about the proper blend of waste to take, then FCC says that this has a knock-on (but reverse) effect in relation to haulage income from the same source (in relation to Herts), which should also be taken into account. This is accepted by BC, as is the quantification of that amount.

330. In closing submissions BC advanced three main reasons for disputing FCC's case.

331. The first was that it was Herts, not FCC, which decided which waste was sent where for disposal. The evidence in support of this argument comprises an admission to this effect made by Mr Hale in cross-examination, consistent with an email from Herts to FCC setting the tonnage allocations from each WTS to each WTF (including Greatmoor). I accept that this evidence does indeed indicate that FCC did not have full decision making capacity in this respect. The difficulty lies in assessing just what a difference it made in practice. In that respect I accept Mr Hale's evidence that it was rare that FCC did not have MSW to send to Greatmoor. There is also no evidence that Luton operated a similar decision making process. Accordingly, I do not accept that this made a significant difference in practice.

332. The second was that it would have been, and was, impossible for FCC to have arranged for this to be done on an annual basis, because decisions had to be made on a day to day basis by those operating the individual WTS and juggling incoming waste against outgoing waste. Again the evidence of Mr Hale in cross-examination supports this argument. However, again, whilst I accept that there must have been times when operational compromises had to be made, again the difficulty lies in assessing just what a difference

it made in practice. FCC reminded me of Mr Hale's evidence to the effect that the C&I waste typically accepted is skip waste and really only suitable for landfill, hence why it goes into the bulky waste pile which will go to landfill, unless it could be seen that it included suitable black bag waste which was needed at that time for Greatmoor, in which case it would be taken for that purpose. Again, I accept this and do not accept that this made a significant difference in practice.

333. The third was that C&I waste suitable for treatment at Greatmoor was not in fact kept separately from MSW. BC contended that the evidence showed, as one might expect, that FCC would separate out black bag waste from bulky waste at the WTSs, but not that FCC separated out municipal black bag waste from C&I black bag waste.

334. As to the evidence, BC submits that: (i) both Mr Davies and Mr Stass had limited knowledge of what happened at the WTSs over the whole period in question; (ii) none of the evidence supported FCC's argument that when BC's witnesses had been told about the trade waste not being separated that was a reference to municipal trade waste rather than C&I waste, especially since everyone involved would have been fully aware of the fact that different vehicles brought in the MSW and the C&I waste; (iii) Mr Davies was wrong in saying that no C&I waste had been accepted at Waterdale since 2021; (iv) Mr Hale's evidence that all C&I waste was deposited into the bulky waste pile was inherently implausible.

335. In contrast, FCC submitted that the court should prefer the direct evidence given by its witnesses, Mr Stass, Mr Hale and Mr Davies, over the hearsay evidence given by BC's witnesses as to what they say they were told by the employees of Herts and Luton. It submitted that: (a) as regards Hitchin, the evidence of Mr Stass and Mr Hale was clear that C&I waste was deposited in the bulky waste pile and MSW prioritised for delivery to Greatmoor, and Mr Ferguson's evidence in fact corroborated this; (b) as regards Kingsway, Mr Hale gave the same evidence as with Hitchin, and as regards the evidence which Mr Askins – who is not involved with daily site operations – gave, he was probably referring to municipal trade waste rather than C&I waste when he said that municipal and trade waste were not separated; (c) as regards Waterdale, the evidence about what Mr Holt said is probably best explained by the same confusion about terminology as Mr Askins.

336. On balance I prefer FCC's case. I am satisfied that its witnesses had a far better knowledge of the detail, being involved in day-to-day operations, than either BC's witnesses – whose evidence was largely confined to what they were told anyway – or the local authority representatives whose accounts they were given. Specifically, I am satisfied that their evidence, which was that C&I waste would be deposited in the bulky bays or piles because it was almost always only suitable for landfill, is credible, as is their evidence that it was only on rare occasions where they would use C&I black bag waste to bulk up a delivery to Greatmoor. The evidence given by the local authority representatives is probably, I accept, a reference to municipal trade waste rather than C&I trade waste, not least because they would have had no particular interest in C&I waste anyway. I am satisfied that there is no proper evidential basis for me to be able to conclude that any proportion of C&I black bag waste that was included in bulking up deliveries to Greatmoor had such a significant effect as to make a change to the approach which FCC has taken, or in any event a change which I can properly assess on the evidence.

337. Thus, I am satisfied that no adjustments are required in relation to this item.

The management fees allocation issue

338. By the end of the trial it appeared that this issue was largely resolved. In its opening and closing submissions FCC explained that: (i) FCCR receives a management fee from Herts for managing the

transfer stations at Hitchin and Waterdale which it accepted (subject to an important reservation to which I refer below) fell within the definition of TPI; (ii) because waste received at these WTSs is disposed of at Greatmoor and elsewhere, it was necessary to apportion the management fee as between waste treated as Greatmoor and waste treated elsewhere; (iii) initially, it had done this by reference to its initial projected tonnages, however, consequent upon this being challenged by BC on the basis that actual tonnages should be used, it had undertaken a recalculation which showed that the actual tonnage was less than the projected tonnage so that a recalculation was required; (iv) this was not disputed by BC in principle, however BC did not admit the figures; (v) evidence as to the figures was addressed by Mr McKenzie in his witness statement and he was not challenged on those figures; (vi) no point was taken by BC in its opening or closing submissions on this point; and (vii) thus FCC was entitled to a reduction of £221,145.

339. The reservation is that in its statement of case FCC contended that if such management fees were to be included in TPI, then "similar or equivalent costs (such as management or site costs) should be deducted" and, if that was not the case, as BC contended, then "it follows that the management and similar fees should also be omitted from Third Party Income and FCCB should be entitled to and will reduce the Third Party Income accordingly" on the basis (per paragraph 318 of FCC's opening) that they are not "associated with the project".

340. Given that I have found to a significant extent in BC's favour in relation to deductible costs, it appears to follow that I must address this argument as well.

341. I can do so relatively quickly because, for the reasons given when determining the Luton unitary charge issue, it seems to me to be apparent that a management fee charged for running these WTSs for Herts, for the purpose of handling Herts' waste and then transporting it to various facilities, including Greatmoor, for treatment, falls within the definition of income from third parties associated with the project derived from TPW.

342. However, it also follows that I should consider the question of the applicable deductible costs on the basis of the source of this income. I touched on this, but did not need to decide it, in dealing with the Luton unitary charge above. On the same basis, since the management fee is received for operating the WTSs in question then, in principle, costs directly incurred in operating the WTSs should be deductible. The question arises, as I indicated it would in relation to Luton, as to where the line should be drawn. The difficulty here is that costs in relation to Herts is a matter for this trial, unlike the costs in relation to the Luton unitary charge. Nonetheless, it does not appear that this particular issue has been the subject of separate specific treatment or submission.

343. It thus appears that there are two options. The first is that I undertake an assessment by reference to the categories of cost identified above, which would then have to be translated into figures. The second, which in my view is far more satisfactory and fairer to both parties, is that the income from this source is identified separately but not made the subject of a money judgment, on the basis that the determination of the proper deductible costs is left over for determination at the same time as the Luton costs. If this course cannot be agreed then I will invite submissions from the parties on this particular topic once judgment is handed down and in advance of the consequential order being made.

    a. As with the Luton contract (as to which see above) it became clear from submissions received by the parties on receipt of the draft judgment that: (a) there is both concern from BC as to what I have said in paragraph 242 as to the position in principle and as to the course of conduct proposed by me in paragraph 343; whereas (b) FCC is content for it to be addressed after judgment is handed down.

b. On the basis that, as in relation to the Luton contract, I make it clear that my "in principle" view was intended and should be read as a provisional in principle view, and leave over the final determination as to the way forward after judgment is handed down, as I have already indicated, then that disposes of this point, at least for present purposes.

The IBA tonnage issue

344. There is no issue about whether or not income from processing IBA to extract residual metals is metals income. It is accepted that it is.

345. There is, therefore, a modest value and straightforward issue as to whether or not FCC has under-reported the tonnage in question by £106,588.

346. FCC's position is that Mr McKenzie explained in his witness statement that BC had used the wrong data and, since he was not cross-examined on the point, his evidence should be accepted.

347. BC's position is that the IBA tonnage figures reported by FCC to DEFRA should be preferred and Mr McKenzie gave second-hand evidence unsupported by documents which should not be preferred to FCC's own documentation. It contends that it was not reasonably required to cross-examine Mr McKenzie simply to put this proposition to him.

348. In my judgment Mr McKenzie provided a perfectly rational and sensible explanation for the difference between the figures and it does not seem to me to be unreasonable for him, as the chief financial officer, to collate the information which has been provided to him and to provide the explanation, based on that information, as to why FCC has used the correct figure (based upon the volume actually processed).

349. Accordingly, whilst I accept that BC was entitled (especially given the very tight timetable for trial) not to cross-examine him and to take its stand on the evidence as produced, on the facts I prefer FCC's case on this issue.

Bletchley material recycling facility

350. The issue here is similar to the IBA tonnage issue, in that BC have raised a query by reference to apparent discrepancies between the TPI calculations provided by FCC and the documents in support, which Mr McKenzie explained in his witness statement. Again, BC contends that the explanation was second-hand and not supported by documentary evidence and it was not required to cross-examine him on the point, whereas FCC contends that since he was not cross-examined on the point, his evidence should be accepted.

351. Again, in my judgment Mr McKenzie has produced a sensible explanation, based on information provided to him by people who might be expected to know, which he has sense-checked by reference to the selling prices achieved in previous years, and I therefore accept his evidence on this issue and find in FCC's favour accordingly.

Metals income

352. The remaining issue here is one of principle.

353. It is common ground that an issue before O'Farrell J was whether or not income from metals derived from the IBA falls within the definition of TPI under the PA: see paragraph 95 of the O'Farrell judgment. BC argued that it did, FCC argued that it did not.

354. O'Farrell J succinctly summarised the factual position at [97] as follows:

"FCCB … pays [FCCR] to dispose of the IBA. FCCR transports the IBA from [Greatmoor] to an area within the landfill site where there is a plant run by a Fortis entity. FCCR 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."

355. I should say that this, whilst an accurate summary of the position on the evidence as it was before her, was not always the position, although nothing turns so far as this issue is concerned on the difference. The position as it obtained from 2016 to 2018 was that the company in question, Fortis IBA Ltd (**Fortis**), was not involved and FCCR undertook this process itself, whereas from 2018 onwards it entered into a contract with Fortis to undertake part of this role and, since March 2020, all of this role. Under this contract FCCR receives income from Fortis in respect of the processing of IBA in accordance with the terms of the Fortis Contract, calculated as a rate per tonne of IBA, initially £7.00 (but subject to indexation).

356. O'Farrell J recorded, analysed, and rejected, FCC's case that in such circumstances neither FCCB, FCCR nor any other affiliate derived income from recycling metals, holding at [104] and [106] that it did.

357. However, at [105], she also said this:

"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 [Greatmoor]. 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."

358. Following the O'Farrell judgment FCC disclosed additional income from metals of £1,434,147 (calculated by reference to income of £2,618,463 less a deduction of £1,184,315 for costs). There was a dispute as to whether or not it was entitled, as it claimed, to deduct costs of at least £1,184,315. FCC's case is that (i) either the metals income should be excluded from TPI, which would lead to a reduction of £1,434,147; or (ii) all the costs should be deducted. FCC's argument in its opening submissions may be summarised as follows.

359. The arrangement between FCCB and FCCR recorded in the O'Farrell judgment is contained in an agreement referred to as the IBA Offtake Agreement, which is an ancillary agreement to the PA (and, therefore, a relevant document so far as the factual matrix is concerned).

360. Under this agreement FCCB would pay FCCR £12/t (indexed) for IBA which it removed from the conveyor belt at Greatmoor. In return FCCR became the owner of the IBA upon transfer, pursuant to Clause 5.4 of the IBA Offtake Agreement. The effect of this, albeit only implied as a necessary consequence of the unconditional transfer, is that FCCR enjoyed all the rights of the true owner including, therefore, the right to retain any revenue that it derived from any metals recovered from the IBA.

361. It is not contentious that the Base Case includes as a cost the sum of £12/t paid to FCCR under that agreement. FCC's case is that as a matter of fact this £12/t was fixed as between FCCB and FCCR on the

basis that any income earned by the latter from metals extraction would be for FCCR's benefit alone, pursuant to the IBA offtake agreement.

362. Factually, Mr Dickson's evidence to this effect was not challenged by BC although, as BC observed, there was nothing in the Base Case or in the PA as a whole from which it could be said to have been apparent to BC that this was the case. Nonetheless, as BC would have to accept, it is – as I have said – implicit from the IBA offtake agreement that FCCR was entitled, as between it and FCCB, to retain any such income. It follows that if BC had given the issue any thought it would not have had any reason to believe that FCCB would obtain any income from such metals extraction.

363. BC does, however, dispute the conclusion which FCC urges the court to draw from the above, which is that "if the £12 per tonne is the "net cost", then the income would already have been accounted for in full within the Base Case and should not be double-counted in the TPI". FCC's fallback case is that "if, instead, the £12 per tonne is merely the disposal costs, then any income from the IBA should be included in the TPI but the costs of generating that income should be deducted".

364. FCC's difficulty with its primary case is that there is no evidence whatsoever that at the time of the contract there was any agreement, express or implicit, whether as a matter of construction or otherwise, to the effect that BC accepted that any income earned by FCCR from metals extraction should not be treated as TPI. For the reasons so clearly articulated by O'Farrell J, it plainly does fall to be treated as TPI in my judgment.

365. The most that FCC can do in this respect is to point to a letter from FCC to BC dated 29 May 2015 (i.e. after the date of the PA) where, in answer to a question about what it believed was the position of income from the metal content of IBA, the answer was given: "Our project proposal and financial model assumed a net cost of IBA treatment to the facility, as such any income from the recovery of metals from the IBA is for the account of the IBA off take FCC Recycling Limited, the cost and risk of treatment of IBA is thus reflected in the gate fee to BC".

366. It is self-evident that this later communication cannot affect the proper interpretation or effect of the PA and, indeed, the explanation does not actually say that FCCB is under no obligation to account to BC for income received by FCCR if it is otherwise within the definition of TPI.

367. FCC's complaint appears to be that the consequence of this would be unfair. It complains that: " if the income received from extracting metals in the IBA was included in the TPI, FCCB would be paying BC twice in respect of the same income. The income has already been included in the Base Case (thereby depressing the gate fees paid by BC), and BC would then recover a further 75% of the same income as TPI".

368. However, the difficulty for FCC is that this appeal to unfairness is an argument founded on sand, in the absence of anything in the PA or wider surrounding factual matrix which shows that the PA could or should be construed so as to exclude this income from TPI when, under the definition of TPI, it plainly is included, since the definition includes income received by FCCR (as an Affiliate) from third parties associated with the project. Thus, income received by FCCR is included. Nothing relied upon by FCC can overcome that fundamental point.

369. Furthermore, there is an obvious alternative remedy in the PA itself to remedy any such unfairness. If it is TPI then it follows that properly deductible costs can be deducted.

370. In its opening submissions FCC contends that FCCB has only sought to deduct the additional costs incurred by FCCR in addition to its disposal costs and due to its arrangements with Fortis. It contends that these costs meet the requirements of being deductible costs, as the costs are specifically and solely related to the generation of TPI additional to that modelled in the Base Case (on the basis that neither the costs nor the income were modelled in the Base Case). Since this has not been the subject of specific submission from either party, and since my determination as to what are and what are not properly deductible costs is not something which fully reflects either party's case as argued before me, my provisional view is that this is also something which can and should be done at the same time as the costs determination in relation to Luton unitary income, assuming that it cannot be agreed following my determination.

The Fortis contract

371. A separate issue has been raised as to the status of the contract between FCCR and Fortis (**the Fortis contract**). BC has contended that it is an Off Take Contract as that phrase is defined in the PA, i.e. a contract relating to the off take of derived residues in relation to the Project, and seeks a declaration to that effect. This is in the context of its pleaded case that it was a contract which fell within the scope of clause 47.4 and, hence, it was subject to the FCCB's obligation under clause 47.7.1 to afford BC a reasonable opportunity to conduct due diligence before entering into it. However, as FCC observes, in paragraph 76 of its Particulars of Claim BC simply "reserves the right to make a further claim in respect of any losses suffered by BC as a result of breach on the part of FCCB of clause 132.4[13] in relation to the contract with Fortis and/or breach of clause 47 of the PA".

372. In its opening submissions FCC contended that this is a pointless exercise because, although BC has contended that FCC has breached its obligations under clause 47.7 of the PA in relation to the entry into the PA, no substantive relief is sought in this respect, so that no point would be served in the court deciding it. However, FCC has also gone on to make detailed submissions as to the substance of the argument, which was also covered in the closing submissions of both parties. In the circumstances, and since it appears that this is a contentious issue as between the parties as to which further issues may yet arise, it appears convenient to decide this question of construction of the PA at the same time as the other issues of construction are determined.

373. "Off Take Contracts" are defined in the PA to mean "any contract entered into by the Contractor relating to the off take of energy or derived residues solely in relation to the Project". The issue is as to whether or not this reference to Contractor is such as to exclude a contract entered into by FCCR as an Affiliate. It will be recalled that under the PA it is FCCB which is defined as the Contractor and that there is no general extension of that term to include Affiliates. Instead, Affiliates were 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".

374. It follows, as is common ground, that this definition includes FCCR, which is itself referred to in the definitions section as the "operating contractor". It follows that, in general, a reference to the Contractor in the PA cannot be read as if it included FCCR as an Affiliate.

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[13] Since there is no clause 132.4, this must be either a reference to the obligation on FCCB under clause 132.2 to maximise TPI or the obligation on FCCB under clause 132.3 not to agree a price at an undervalue, which refer back to the clause 47.4 obligation.

375. Nor can it be said that wherever reference is made in the PA to Off Take Contracts the context is always such as it must be read as a reference to Off Take Contracts entered into by Affiliates as well as by FCCB as the contractor.

376. Clause 47 contains a complex series of sub-clauses in respect of which it cannot possibly be said, in my judgment, that in relation to each and every sub-clause the reference to Contractor must always be read as including Affiliates. Thus, clauses 47.1, 47.2 and 47.3 all refer only to the Contractor, and there is no basis for reading them all as necessarily including reference to FCCR as an Affiliate.

377. Turning to what in my view are the key clauses for the purposes of this debate, namely clauses 47.4, 47.5, 47.6 and 47.7, they are clearly intended to be read and to operate as connected and interlocking clauses. Clauses 47.4 and 47.5 appear below the sub-heading "Amendments to and conditions relating to Third Party Waste and Off Take Contracts", clause 47.6 appears below the sub-heading "Affiliates", and clause 47.7 appears below the sub-heading "Due diligence over Third Party Waste and Off Take Contracts".

378. Clause 47.4 stated that: "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)".

379. Clause 47.5 stated that: "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."

380. Clause 47.6 stated that: "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."

381. Clause 47.7 stated: "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."

382. What is immediately obvious is that clause 47.4 makes no express reference to Affiliates, whereas clause 47.5 does. In contrast, clause 47.5 provides for an extended definition of Off Take Contracts for the purposes of that clause, because it expressly provides that this clause applies where the Contractor or an Affiliate enters into an Off Take Contract. Nonetheless, the obligation to comply with the specific clause 47.5 requirements is imposed on the Contractor and not on the Affiliate as well, i.e. FCCB is required to procure that the Off Take Contract as entered into by the Affiliate complies with these requirements. However, clause 47.5 does not include any express confirmation requirement, in contrast to clause 47.4, and clause 47.6 expressly restricts the Contractor from entering into or amending a TPWC or an Off Take Contract unless BC has confirmed in writing its satisfaction that clauses 47.4 and 47.5 have been complied with.

383. The end result, it seems to me, is that the obligation under clauses 47.6 to obtain confirmation only applies to TPWCs and Off Take Contracts entered into between the Contractor and an Affiliate. There is no equivalent confirmation obligation in relation to a TPWC or an Off Take Contract entered into between an Affiliate and a third party. Instead, that is subject only to the Contractor's obligation to ensure or procure that it complies with the separate clause 47.5 obligations.

384. In the same way, clause 47.4 has effect 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)". Again, there is no reason to read this as extending to contracts entered into with third parties by Affiliates.

385. Clause 47.7 imposes an entirely separate and freestanding obligation on the Contractor to afford BC a due diligence opportunity before the Contractor enters into a TPWC or an Off Take Contract. Again, there is no basis for reading this as plainly intended to extend to contracts entered into by Affiliates with third parties.

386. The conclusion I reach is that this represents a carefully designed structure, where some – but not all – of the obligations imposed are designed to extend to contracts entered into by Affiliates with third parties, whereas others are designed to apply only to contracts entered into between the Contractor and an Affiliate, and others still are designed to apply only to contracts entered into by the Contractor, whether with Affiliates or third parties.

387. Nonetheless, BC contends that it is clear that the parties intended all of these obligations to apply to all contracts "relating to the off take of…derived residues solely in relation to the Project" entered into by Affiliates. This submission, in my judgment, ignores the carefully designed structure and, instead, involves treating all reference to Affiliates as applying to all of the clauses and, in that way, treating every obligation as extending to any contract entered into by an Affiliate with a third party. That seems to me to be an impermissible construction.

388. BC contends that if these clauses are not construed in this manner FCCB could avoid its obligations under the PA by using Affiliates and channelling all TPI income generated through those Affiliates. Again, however, in my judgment this ignores the fact that obligations are imposed on FCCB in relation to contracts involving Affiliates, but only in the specified circumstances identified. It is not contrary to the mutual intention of the parties, as revealed from the PA and the relevant factual matrix, that the contract should draw a distinction between the obligations owed by FCCB in relation to certain categories of, but not all, contracts involving Affiliates.

389. Further, as FCC submits, this distinction is not unique to Off Take Contracts. Thus, TPWCs are defined as "contracts entered into by the Contractor and/or the Sub-Contractor in respect of Third Party Waste excluding Off Take Contracts". The definition of "Sub-Contractor" ("each of the counterparties of the Contractor to the Ancillary Documents …" includes FCCR. The fact that Off Take Contracts are not similarly defined to include FCCR cannot be ignored or treated as an obvious mistake.

390. In the circumstances, it seems to me that the most which BC would be entitled to is a declaration that the Fortis contract is an Off Take Contract for the purposes of clause 47.5, in that it is an Off Take Contract entered into by FCCR as an affiliate with Fortis, but it is not further or otherwise an Off Take Contract.

The clause 99 and 111 obligations

391. The final issue for my determination is whether BC is entitled to a declaration as to the extent of FCCB's obligations to provide information and documents under clauses 99 and/or 111 of the PA and, if so, in what terms.

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

393. Clause 99.1 states that: "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."

394. Clause 99.2 states that: "Compliance with Clause 99.1 (Contractor's Accounts and Open Book Accounting) shall require the Contractor to keep (and where appropriate to, procure that each Sub-Contractor shall keep) books of account in accordance with best accountancy practices with respect to this Contract showing in detail:

99.2.1 administrative overheads;

99.2.2 payments to Sub-Contractors and by Sub-Contractors to sub-contractors;

99.2.3 capital and revenue expenditure; and

99.2.4 Third Party Income

99.2.5 such other items as the Authority may reasonably require from time to time to conduct costs audits for verification of cost expenditure or estimated expenditure, for the purpose of this Contract, and the Contractor shall have (and procure that the Sub-Contractors shall have) the books of account evidencing

the items listed in Clauses 99.1 to 99.2 (Contractor's Accounts and Open Book Accounting) inclusive, available for inspection by the Authority (and any expert) upon reasonable notice, and shall promptly present a report of these to the Authority as and when requested".

395. Clause 111.1 provided for the audit access and co-operation and stated that: "… 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."

396. This part of the claim was originally included because, at the time the proceedings were issued BC, considered that FCCB was in breach of the above obligations in relation to the provision of documents requested by BC evidencing the values shown in FCCB's TPI review spreadsheets. As a result of the orders for disclosure made in the proceedings BC no longer seeks disclosure of the documents requested in relation to TPI the subject of its claims in these proceedings. However, it identifies what it says is an important dispute between the parties as to the nature and extent of FCCB's contractual obligations to provide or provide access to documents evidencing income from third parties and costs which FCCB seeks to deduct, which it seeks to have determined by way of declaratory relief in this trial.

397. It seeks a declaration that "pursuant to its obligations under clause 99 and/or 111 of the PA, FCCB is obliged to maintain and (upon reasonable notice) make available to BC: (i) records of all TPI, including records of costs said by FCCB to have been incurred in the generation of TPI; (ii) documents in support of such records, such as copies of invoices evidencing expenditure such as would permit BC to conduct cost audits for verification of cost expenditure; further or alternatively: documents of the type requested by BC in its letter dated 13 April 2022 and the accompanying appendix".

398. It submits that this ought not to be controversial, given the terms of clauses 99 and 111, and given that the accountancy experts were able to reach substantial agreement as regards accounting practice and the sort of information which they would expect to be available. It also submits that it would assist the parties going forwards to know where they stood as regards the provision of information on a year by year basis, especially given the time taken in agreeing the sampling protocol which was used in this case. In the alternative to its primary case BC submits that the agreed sampling protocol should be ordered to be adopted – either as is stands or suitably modified - for future years.

399. FCC raised a number of objections to this part of the claim. I shall consider the objections and BC's submissions in response and state my conclusions on each in turn.

400. FCC's first objection is that BC attempted, but failed in significant respects, to obtain a declaration that it was entitled to similar information and documentation in the previous proceedings, so that it should not be permitted to relitigate this same point. However, as BC submits in response, this request was different to the current request and was made in the context of a different claim, where what was being sought was information and documentation solely or substantially in relation to income rather than in relation to costs. It was also made before FCC was ordered to provide details of TPI following the O'Farrell judgment and before the facts and matters giving rise to the current case came about and have bene litigated, so that I do not regard this as an impermissible attempt at re-litigation or, thus, a fatal bar to obtaining a declaration if that was otherwise appropriate.

401. FCC's second objection is that the declarations sought go beyond the express wording of clauses 99 and 111, which themselves represent the agreement of the parties as to what is required, so that the court ought to exercise judicial restraint and not go beyond what is already stated in those clauses in the absence of any cogent evidence that specific disputes have arisen in relation to the specific extent or effect of the relevant obligations, which justifies judicial determination at this stage.

402. In particular, FCC submits that clause 99 is carefully and clearly worded as to what is required, and needs no clarification. Specifically, and summarising, it requires FCC to: (a) maintain a full record of particulars of costs, including books of account in accordance with best accountancy practices, showing five specified categories of costs in detail, which are available for inspection by BC and by any expert on reasonable notice; (b) present a report as to these costs when requested to do so; (c) provide such written summary of costs as is reasonably required; (d) provide such examination facilities as are reasonably required; and (e) provide copies of its annual report and accounts.

403. In my view BC has been unable to present any convincing argument as to how, if at all, the declarations sought are consistent with these specific obligations and how they would assist the parties going forwards. I agree with FCC that in the absence of clear evidence that there is any specific dispute about the scope and effect of clause 99 which properly requires determination by the court and the grant of declaratory relief I should decline to do so.

404. FCC similarly submits that: (a) clause 111 is also carefully and clearly worded, and relates only to reasonable requests made by an internal or external auditor of BC for documents and/or for explanations; and (b) any declaration in relation to such clause would be unworkable, save and unless some specific dispute had already arisen in relation to some particular requests, since any dispute could only be answered by reference to the particular facts of the dispute, because it would be necessary to consider the individual request which had been made by an auditor, whether it was reasonably made and, potentially, whether any document contained commercially sensitive information. FCC submits that BC has made no attempt to engage with these points in its draft declaration. Again, in my view BC has no real answer to this point and, again, I agree that in the circumstances there is no proper basis for interfering by making a declaration such as sought.

405. FCC also makes the point that the fundamental difficulty with the declarations sought is that they are far too widely expressed and would, in effect, require FCC to give the equivalent of full disclosure on every item of income and costs in every year for the remaining duration of the contract. FCC submits that what is necessary in any year to comply with the clause 99 and 111 obligations will depend on what income has been received and costs been incurred in that year and cannot sensibly or usefully be provided for in advance by some all-encompassing declaration. FCC notes that the expert accountants had agreed that in relation to an audit under an open book accounting contract there would be no requirement for all available information to be provided and, instead, the nature and extent of the audit required would depend on the value, volume and complexity of the transactions in issue and would typically involve a suitable sampling exercise. This is exactly what happened under the sampling protocol. Again, in my view BC has no real answer to this point, which is a further reason not to make the declaration as sought.

406. Finally, FCC submits that the wording of the declaration is insufficiently imprecise, using words "such as copies of invoices" and "such as would permit BC to conduct cost audits" and "documents of the type requested by BC". Again, I agree. To be useful, the declaration would have to be far more precise but, as FCC says, that cannot be achieved in the abstract.

407. Turning to the sampling protocol, that was agreed between the parties on the basis of the need to provide for disclosure as part of the litigation process and in recognition that it would be unnecessary, unreasonable and disproportionate to provide disclosure in relation to each and every item of income and cost. Although the sampling process plainly saved substantial time and cost compared to a traditional disclosure exercise, as FCC submits it is apparent from the evidence that even this sampling process was a very intensive and time-consuming process and did not resolve all matters in dispute[14].

408. FCC does however acknowledge that the size and complexity of the task is in part explained because the exercise spanned 6 years of income and costs. It is also reasonable to observe that, having undertaken the process once, it ought to be much easier for the parties to undertake the same process far more efficiently and with far less scope for disagreement and dispute for future years. Nonetheless, FCC still submits that there is no proper basis for making a declaration that this is something which it is contractually obliged to provide for each remaining year of the contract, when that is not what the contract requires it to do. It also submits that it made a perfectly reasonable counter-proposal in a letter dated 28 February 2024 to which BC did not respond.

409. In my view it would be wrong in principle to make a declaration that the parties are contractually obliged to follow a sampling protocol which was only agreed in the context of the disclosure obligations required in this litigation. Whilst I would have no hesitation in encouraging the parties to agree a sensible way forward for the future, so as to avoid the huge waste of time and effort in starting from scratch every time, it seems to me that this is not a sufficient basis for declaring that the parties are bound to do so as a matter of substantive legal obligation.

410. Finally, as to BC's fallback position, I am satisfied that the information requested in the letter dated 13 April 2022 could not provide a principled basis for a declaration as to the parties' substantive rights and obligations as regards clauses 99 and 111. I do not consider it at all appropriate to make any order by reference to a detailed letter sent over 2 years ago in a very different context.

411. In the circumstances BC's claim to a declaration fails.

Glossary

Amersham: one of the two planned WTS under the PA which ultimately was not proceeded with

AUC: annual unitary charge

C&I waste: commercial and industrial waste (also referred to as external or trade waste). To be contrasted with municipal waste (i.e. waste collected by local authorities). Municipal waste may include: household residual waste (i.e. non-recyclable "black bag" waste); mixed dry recycling ("MDR"), typically cardboard, plastic bottles, food and drinks cans and paper; waste delivered to HWRCs by the public; green waste, hazardous waste, clinical waste, bulky waste, street cleaning waste and ad hoc requests such as gas bottles.

EfW: energy from waste

Excess TPI: excess third party income

EY: Ernst Young – BC's financial advisers during the procurement process

Greatmoor: the EfW waste treatment facility operated by FCC under the PA

GOMB: Greatmoor operational management board, see Sch.30 PA.

High Heavens: the other planned WTS under the PA which, unlike Amersham, was proceed with.

[14] It notes that it was only in the context of its desire to avoid the trial being lost due to insufficient time being available to litigate every disputed item that BC took the pragmatic decision to abandon the vast majority of the individual disputes.

HWRCs: household waste disposal / recycling centres (also sometimes referred to as household recycling centres (HRCs) or civil amenity sites (CAs)).

Kingsway: a WTS operated by Luton

Luton: Luton Borough Council

IBA: incinerator bottom ash

IBAA: IBA aggregate – the reside once ferrous and nonferrous metals are removed from the IBA

IRR: internal rate of return

MDR: mixed dry recyclables

MRFs: materials recycling facilities

MSW: municipal solid waste

MUC: monthly unitary charge

NLW: North London Waste Limited

O&M Contract: the operating and maintenance contract entered into between FCCB and FCCR

PA: project agreement

Paymech: the payment mechanism provided for by Sched. 15 of the PA.

ppt: price per tonne

TPI: third party income

TPI share: third party income share

TPW: third party waste

TPWCs: third party waste contracts

TPW income: third party waste income. (Note also TPW excess income - third party waste excess income – i.e. the excess income from TPW over and above the guaranteed TPW income)

TPW income share: third party waste income share

WTF: waste transfer facility

WTS: waste transfer station

end