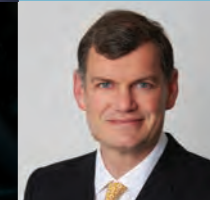


CASE REPORT: ESSEX V UBB WASTE



Marcus Taverner QC,
Piers Stansfield QC and
Paul Buckingham acted for the
successful Claimant.

On 18 June 2020, Pepperall J handed down judgment in *Essex County Council v UBB Waste (Essex) Ltd*¹ following a six week trial in the TCC. He awarded Essex County Council (Essex CC) damages in excess of £9 million as a result of the defective construction of a waste treatment facility under a PFI contract and held that Essex CC was entitled to terminate the contract.

Although many of the issues turn on the specific facts of the case, the judge was highly critical of the Defendant (UBB) and its main expert witness for their failure to recognise and raise obvious and serious conflicts of interest. Whilst accepting that there was a term of good faith to be implied into the 25 year PFI contract, he rejected the notion of a general principle which required contractual termination rights to be exercised within a reasonable time and held that no such term was to be implied into this contract.

Background

Essex CC entered into a 25-year contract with UBB on 21 May 2012 for the design, construction, financing, commissioning, operation and maintenance of a mechanical biological waste treatment plant in Basildon to process the county's waste. After completion of the facility, the contract provided for a commissioning period followed by Acceptance Tests that were intended to confirm that the facility could meet the performance requirements in the contract. These tests should have been completed by the Planned Services Commencement Date of 12 July 2015 but, if not ultimately passed by an Acceptance Longstop Date of 12 January 2017, Essex CC was entitled to terminate the contract.

Essex CC's position was that UBB had failed to design and construct the facility properly so that it was incapable of passing the Acceptance Tests. It said that UBB's failure either to pass the Acceptance Tests or to attempt to do so by the Acceptance Longstop Date was an event of Contractor Default which, pursuant to Clause 67 of the contract, entitled it to terminate. Essex CC sought a declaration to this effect, as well as substantial damages.

UBB's primary position was that, on a proper construction of the contract, the facility was capable of passing the Acceptance Tests and it sought a declaration of deemed acceptance. Further, it contended that any delays in passing the Acceptance Tests were due to failures on the part of Essex CC to supply contractually compliant feedstock to the facility. UBB also argued that these failures breached an implied term of good faith.

Judgment

Pepperall J found that the facility's failure to pass the Acceptance Tests was due to serious design errors by UBB and not because of any actions or omissions by Essex CC. The major error lay in UBB's overestimate of the density of the waste such that the facility was significantly

undersized for the amount of waste that it should have been able to process.

The judge held that UBB's attempts to remedy the defects in the plant were carried out and implemented in a manner which breached the contract. Essex CC was accordingly entitled to damages in excess of £9m due to the additional costs that it had incurred as a result of UBB's unilateral decision to process the waste in a manner that contravened the contract.

A number of particular legal issues arose during the course of the judgment.

Conflicts of interest and the role of expert witnesses

Pepperall J was heavily critical of UBB's use of a technical expert witness, Dr John Weatherby. Essex CC challenged Dr Weatherby's independence, impartiality and objectivity. The judge's attention was drawn to the fact that Fichtner, the company for which Dr Weatherby was managing director, had advised UBB in relation to the earlier design and construction phases of the project. There was also email evidence which showed a link between Dr Weatherby's willingness to act as an expert witness and UBB's position taken in its defence of the claim.

The judge reached three main conclusions in relation to that expert evidence. First, that Dr Weatherby should have recognised that the substantial role played by his company amounted to a conflict of interest. Secondly, that he had failed to distinguish between the different roles of the provision of consultancy services to a client and that of acting as an expert witness. Thirdly, he should have recognised that, even though

there was no direct claim in relation to his company's consultancy work, a conflict of interest still arose.

If the full extent of the conflict had been identified at the case management conference, he said that it was doubtful that permission to rely on the expert evidence would have been granted. However, the judge declined to exclude Dr Weatherby's evidence due to the late stage of the proceedings at which the issues arose, but said that he would treat that evidence with caution. Ultimately, he preferred the evidence of the employer's experts.

Contractual interpretation of a "rolling annual average" provision

There was a dispute as to the proper interpretation of a 'rolling annual average' provision in the contract and whether a single composition test result was sufficient to trigger a defined contractual mechanism called an "Options Review".

The judge concluded that an earlier adjudicator had been wrong and that the results of each composition test result should be determined on a rolling annual average basis rather than a single result because UBB had accepted the risk that waste composition might fluctuate not just from day to day but from quarter to quarter. That erroneous adjudication decision had led to the parties having been compelled to engage in an Options Review process which was now a 'parallel universe' into which he no longer needed to travel.

Implied term of Good Faith

The judge considered the question of whether there should be a term of good faith implied into the contract. He identified a number of factors which pointed to the agreement being a relational contract, including the long-term nature of the contract, the high level of communication and co-operation it required between the parties, and other features which pointed to the parties' intention that their roles be performed with integrity and with trust and confidence in each other.

He decided that a term requiring each party to act in good faith could be implied as it was a relational contract. He then considered the scope and content of the implied term of good faith, concluding that:

- i) Whether a party has not acted in good faith is an objective test;
- ii) The key question is whether the conduct would be regarded as 'commercially unacceptable' by reasonable and honest people; and
- iii) What will be required in individual cases depends upon the contractual and factual context.

Applying those principles, the judge dismissed all UBB's allegations of breach of the term of good faith. He commented that it was somewhat ironic that UBB had relied so heavily on that term when it was arguable that UBB itself had not acted in good faith in relation to its original concealment of the density problem, its attempt to replace the BMC test with a different test, and its piecemeal presentation of the QSRF line modifications to Essex CC.

Implied Term as to the timing of the exercise of a contractual right of termination

Pepperall J's judgment contains a further discussion as to whether a term should be implied into the contract requiring a contractual termination option to be exercised within a reasonable time.

The judge reviewed the authorities and rejected the argument that there was an immutable rule of law that all rights of termination must be exercised within a reasonable time after such right first arises. He said that the proposed term should be tested against the usual principles for finding an implied term and rejected the implication of a term as to promptness on the basis that it was neither necessary to ensure that the contract had commercial or practical coherence nor was it obvious.

He also rejected a narrower formulation of the term on the basis that it was neither necessary nor obvious since delay in the exercise of the right of termination beyond the point when the facility passes the Acceptance Test was best dealt with by the doctrine of waiver by election.