

Jessica Stephens QC examines the recent TCC judgment in Essex County Council v UBB Waste (Essex) Limited 2020] EWHC 1581 (TCC)

Judgment was issued yesterday in Essex County Council v UBB Waste (Essex) Limited 2020] EWHC 1581 (TCC) following a six week trial heard last year before Mr Justice Pepperall in the TCC. [Daniel Churcher](#) of 4 Pump Court appeared as junior counsel for Essex, instructed by Slaughter and May alongside Marcus Taverner QC, Piers Stansfield QC and Paul Buckingham.

The case arose out of a 25-year £800m Private Finance Initiative contract for the treatment of Essex’s “black bag” household waste (more than 300,000 tonnes per year). UBB was required to design and build a facility capable of extracting recyclable materials before shredding and composting the remaining waste in “biohalls”, to reduce both its mass and its biodegradable content. After construction of the facility, the contract anticipated a commissioning period followed by “Acceptance Tests” that would demonstrate that the facility could meet the performance requirements set out in the contract. Passing the Acceptance Tests would also trigger significant increases in UBB’s remuneration under the Contract, in the form of a “Unitary Charge”.

Unfortunately, commissioning did not go as planned: the facility was seriously underperforming, and failed to pass the Acceptance Tests by the “Acceptance Longstop Date”. Essex said that as a consequence, it was entitled to terminate the contract for default by UBB. UBB said that the problem with the facility was not its design and construction at all, but rather the mix of waste that Essex was delivering to the facility. UBB also said that the contract was a relational contract (following the approach of Fraser J in *Bates v Post Office*), including an implied term requiring the parties to act in good faith. UBB said that Essex had breached that term in numerous ways, including by failing to agree to changes to the contract and the Acceptance Tests that would have allowed the facility to pass. UBB said that if Essex had acted in accordance with the contract, the facility would have been “deemed” to pass the Acceptance Tests in July 2016, and as a consequence Essex should pay damages reflecting all of the payments under the contract that UBB had lost out on since that date (running to nearly £100m).

Pepperall J agreed with Essex that the true cause of the facility’s failure to pass the Acceptance Tests had nothing to do with any actions or omissions on the part of Essex, and everything to do with “*serious design errors*” (at [452]) made by UBB, not least in overestimating the density of the waste, so that the facility was significantly undersized for the amount of waste it had to process. The Court also found that UBB’s unsuccessful efforts to improve the situation were implemented in breach of contract, such that Essex was entitled to damages in excess of £9m in respect of the additional costs it had incurred as a result of UBB’s failure to process waste as the contract required.

As to the allegations of a lack of good faith, Peperall J agreed with UBB that “*this 25-year PFI contract is a paradigm example of a relational contract in which the law implies a duty of good faith*” (at [113]). However, all of UBB’s allegations of breach of that term were dismissed. Indeed, at paragraph 117, the Judge commented:

“There is some irony in UBB’s promotion of the implied term of good faith since it is certainly arguable that it did not itself act in good faith in its original concealment of the density problem, its attempts to replace the BMC test and its piecemeal presentation of the QSRF Line when it understood full well that it needed to divert

significant waste away from the biohalls if it was to meet the guaranteed Throughput.”

The Judge found that Essex was entitled to terminate the contract for default, and refused UBB’s principal claims for damages and an extension of time to pass the Acceptance Tests.

The full judgment is available on [Bailii](#).