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# Exploiting infelicities: PFI contracts case law update

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Ted Lowery, Fenwick Elliott LLP

Fiona Parkin QC, Atkin Chambers



# Today's Agenda

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- Introduction
- Four recent judgments
  - Serco v Forth Health
  - Essex County Council v UBB
  - Surrey County Council v Suez
  - Buckinghamshire County Council v FCC Buckingham
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- Questions

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# Introduction



# Introduction

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- Typical characteristics of PFI contracts:
  - Relational in nature
  - Long-running: typically 2 years construction and 25 years of services
  - Complex and extensive provisions
  - High value
  - Susceptible to interpretative arguments
- Lord Justice Jackson's insight:

*I do, however, make this comment. Any relational contract of this character is likely to be of massive length, containing many infelicities and oddities. Both parties should adopt a reasonable approach in accordance with what is obviously the long-term purpose of the contract. They should not be latching onto the infelicities and oddities, in order to disrupt the project and maximise their own gain.*

Amey Birmingham Highways Ltd v Birmingham City Council [2018] EWCA Civ 264 (22 February 2018).

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# Four recent judgments



## Serco Limited v Forth Health Limited [2020] CSOH 48

- The Project: a new hospital at Falkirk.
- The main issue: was the undefined term “First Market Test Date” synonymous with the period fixed for market testing i.e. on the seventh anniversary of building completion, meaning that the claim could be dismissed?
- The decision: the claim could not be summarily dismissed and evidence should be presented:

*In determining this case it will be important to consider the factual matrix and the purpose of provisions in PFI contracts. The pleadings disclose material differences between the parties as to important aspects of the factual matrix, such as the Financial Model and the interrelationship between the payment provisions under different contracts within the overall PFI project. In my view this case cannot properly be determined without evidence.*

## Key contract terms in Serco v Forth

- Section B of Schedule 18 to the Facilities Management Agreement:

2.1 *The annual FM Service Payment for any Contract Year shall be calculated in accordance with the following formula:*

$$ASP_n = \left( ASP_o \times \frac{RPI_n}{RPI_o} \right) + \left( ASP_{emp} \times \left( \frac{RPI_n}{RPI_o} + ((1.0125^n) - 1) \right) \right) + \left( ASP_{emp2} \times \left( \frac{RPI_n}{RPI_o} + Z \right) \right) + \left( A_o \times \frac{RPI_n}{RPI_o} \right)$$

2.1.7 **Z** is

- (a) *for the period until the First Market Test Date ((1.0125<sup>n</sup>)-1) where n has the meaning defined in paragraph 2.1.6; and*
- (b) *for the period after the First Market Test Date nil.*

- Part 17 of the Schedule (Definitions):

*Market Testing Date means every seventh anniversary of the Actual Completion Date during the Project Term*

# Essex County Council v UBB Waste (Essex) Limited [2020] EWHC 1581 (TCC)

- The Project: waste treatment facility at Basildon.
- The issue: as part of the central question over whether the Authority was entitled to terminate the contract; was there an implied duty of good faith in order to further the commercial purpose of the contract?
- The decision: the relational aspects of the Project Agreement, including its duration and the high levels of cooperation required, reflected the need for integrity, trust and confidence.

*.... many of the other factors tell in favour of this being a relational contract:*

*112.1 The contract is long term and the parties plainly intended that they should have a long-term relationship.*

*112.2 This long-term PFI contract required a close collaborative working relationship in which, I am satisfied, they must have intended that their respective roles be performed with integrity and with fidelity to their bargain and their shared environmental objectives.*

*112.3 While the relationship was essentially commercial, in my judgment the parties intended that they should each repose trust and confidence in the other.*

*112.4 The contract required a high degree of communication and co-operation.*

*112.5 The contract required a significant investment by both parties.*

*112.6 The contract involved exclusivity between the parties.*

*...I conclude that this 25-year PFI contract is a paradigm example of a relational contract in which the law implies a duty of good faith.*



## Surrey County Council v Suez Recycling and Recovery Surrey Limited [2021] EWHC 2015 (TCC)

- The Project: a waste facilities Eco Park at Sunbury.
- The main issue: did the provisions for court proceedings in a series of deeds of variation supersede the arbitration clause in the original Project Agreement?
- The decision: the Project Agreement was the “master” document and the variation deeds its “servants” so the parties would have intended to retain the dispute resolution procedure fixed by the Project Agreement rather than by the subsidiary deeds.

*I have come to the clear conclusion that the parties in this case intended the dispute resolution provisions of the WDPA [the Waste Disposal Project Agreement] to remain applicable for their substantive disputes arising in respect of the construction of the EcoPark.*

## Key contract terms in *Surrey v Suez*

- Clause 52.1 in the Waste Disposal Project Agreement:

*If a dispute arises out of or in connection with this Agreement during or after the termination of the Project Period, not being a dispute to which Clause 51.1 [Expert procedure] applies, it shall be determined in accordance with this Clause.*

- Clause 63 in the Waste Disposal Project Agreement:

*This Agreement shall be governed by and construed in accordance with the laws of England and the parties hereby submit to the exclusive jurisdiction of the courts of England and Wales.*

- Clause 15.2 in the first deed of variation:

*The Courts of England shall have exclusive jurisdiction in relation to any claim, dispute or difference concerning this Deed and any matter arising therefrom.*

- Clauses 13.2/15.2 in the second and third deeds of variation:

*The Courts of England shall have exclusive jurisdiction in relation to this Deed and any contractual or non-contractual obligations arising from or connected with it together with any claim, dispute or difference concerning this Deed and any matter arising therefrom*

## Buckinghamshire Council v FCC Buckinghamshire Limited [2021] EWHC 2867 (TCC)

- The Project: a waste to energy facility near Aylesbury.
- The main issue: did income generated by FCC's affiliate companies comprise, "Third Party Income" as defined and as such to be shared with the Council?
- The decision: where the definition of "Third Party Income" referred to income from third parties associated with the Project this encompassed money earned by FCC's affiliates for accepting waste from other councils for processing at the facility.

*The natural and ordinary meaning of the words "associated with the Project" indicates that the definition is concerned with a wide range of activities related to the availability of the Facilities.*

# Key contract terms in Buckinghamshire v FCC Buckinghamshire

## Third Party Income (Appendix A – Definitions)

*“the Contractor’s (including for the purposes of this definition the Operating Contractor and/or any Affiliates) income from third parties ... associated with the Project including without limitation that derived from Third Party Waste.”*

## Clause 47.2:

*“The Contractor shall be entitled to handle process treat and deal with Third Party Waste provided that any income derived from such handling shall be dealt with in accordance with Schedule 15.”*

## Schedule 15 – Paymech

By paragraph 3 the mechanism by which the Monthly Unitary Charge was to be calculated which included for a deduction in respect of Third Party Income Share.

By paragraph 11 that Third Party Income Share was to be calculated to include Third Party Waste Excess TPI share in the manner prescribed by paragraph 11.4

By paragraph 11.4 that the Excess Share was to be calculated as 75% of TPW<sub>R</sub> : The Excess Third Party Waste Third Party **Income derived from gate fee revenue** over and above the Guaranteed Third Party Waste Third Party Income assumed in the Base Case for the relevant Contract Year

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# Summary



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- Common themes?
- Principles of wider application to PFI Contracts?
- Dealing with infelicities.
- How to prepare effectively for PFI contracts litigation.

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Thank you!

Questions?

Ted Lowery, Fenwick Elliott LLP

Fiona Parkin QC, Atkin Chambers

