Neutral Citation Number: [2025] EWCA Civ 921

Case Nos: CA-2024-002136
CA-2024-002139

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (KBD)
His Honour Judge Stephen Davies (sitting as a Judge of the High Court)
[2024] EWHC 1552 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2025

Before:

LORD JUSTICE NEWEY
LORD JUSTICE JEREMY BAKER
and
SIR LAUNCELOT HENDERSON

- -

Between:

BUCKINGHAMSHIRE COUNCIL	**Claimant/ Respondent/ Appellant**
- and –	
FCC BUCKINGHAMSHIRE LIMITED	**Defendant/ Appellant/ Respondent**

- -
- -

Fiona Parkin KC, Zulfikar Khayum and Samar Abbas Kazmi (instructed by **Pinsent Masons LLP**) for **FCC Buckinghamshire Limited**
Justin Mort KC, John McMillan and Tom Coulson (instructed by **Sharpe Pritchard LLP**) for **Buckinghamshire Council**

Hearing dates: 17 and 18 June 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 18 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. These appeals are from a judgment given by His Honour Judge Stephen Davies ("the Judge"), sitting as a Judge of the High Court, on 21 June 2024 ([2024] EWHC 1552 (TCC)) ("the Judgment"). The appeals concern a waste management project agreement ("the Project Agreement") which the parties entered into on 17 April 2013.

2. The claimant, Buckinghamshire Council ("the Council"), is a waste disposal authority for the purposes of section 30 of the Environmental Protection Act 1990 and, as such, has responsibility for the disposal of household waste from Buckinghamshire. The defendant, FCC Buckinghamshire Limited ("FCCB"), is part of the FCC group of companies, which undertakes waste disposal and whose ultimate parent company is Fomento de Construcciones y Contratos, SA, a Spanish company. FCCB is a special purpose vehicle established for the purposes of the project to which the Project Agreement relates ("the Project").

3. In its original form, the Project Agreement provided for the construction and operation by FCCB of an energy from waste plant at Lower Greatmoor Farm, Buckinghamshire ("Greatmoor") and two satellite waste transfer stations elsewhere in Buckinghamshire, at High Heavens and Amersham (respectively, "High Heavens WTS" and "Amersham WTS"), as delivery points for waste. FCCB undertook in the Project Agreement to receive and process waste for which the Council was responsible (termed "Contract Waste"). While, however, Greatmoor was to have the capacity to process some 300,000 tonnes of waste each year, it was expected that "Contract Waste" would amount to only about 100,000 tonnes a year. The Project Agreement allowed FCCB to use Greatmoor and the waste transfer stations to handle waste from other sources ("Third Party Waste").

4. High Heavens WTS and Greatmoor ("the Facilities") were both constructed, and Greatmoor became operational in June 2016. The parties agreed, however, that Amersham WTS was not needed. The Project Agreement was amended to take account of this by a deed of variation dated 7 August 2017.

5. The waste received at Greatmoor comprises Contract Waste, Third Party Waste and "Substitute Waste", which is waste sourced by FCCB in substitution for Contract Waste where that falls below a certain minimum tonnage. The waste is burned, generating hot gas which is used to produce steam and, when passed through a turbine generator, electricity. The electricity is either used on-site or exported to the National Grid.

6. The process leaves bottom ash residue. This contains metals which, after processing, can be extracted and sold. The balance of the ash goes to landfill as quarry backfill.

7. The Council paid 85% of the costs of constructing the Facilities. The FCC group provided the remaining 15%, but the cost of its doing so was factored into the calculation of the "Unitary Charge" which the Council has to pay FCCB. Schedule 15 to the Project Agreement, which deals with payment, provides for a "Monthly Unitary Charge" based in large part on multiplying amounts of Contract Waste by prices per tonne. It also makes provision, in paragraph 11, for adjustments to be made for "Third Party Income Share". In broad terms, paragraph 11 provides for certain income derived from Third Party Waste, "Recyclates Output" (i.e. products of the treatment process at Greatmoor which are sent for reprocessing into new products), "Electricity Output" (i.e.

electricity generated at Greatmoor which is delivered to the National Grid) and other sources to be shared between the Council and FCCB on a 3:1 basis (so that the Council is to be credited with 75% of the relevant income). However, these arrangements are to apply to income from Third Party Waste only if and in so far as it exceeds the "Guaranteed Third Party Waste Third Party Income" assumed in a "Base Case" which detailed anticipated costs of operating the Facilities and revenue to be derived from doing so. "Guaranteed Third Party Waste Third Party Income" is defined in the Project Agreement to refer to "the nominal Third Party Income in relation to gate fee revenue in respect of Third Party Waste, as set out [in] row 41 of the 'Financials' sheet in the Base Case in the relevant Contract Year". The row in question gives monthly figures for the life of the Project Agreement which total £609,525,000.

8. The Unitary Charge was calculated by reference to the modelling in the Base Case. As the Judge noted in paragraph 88 of the Judgment, Mr Gregory Dickson, who formerly worked for the FCC group and was involved in creating the Base Case, explained that the Unitary Charge was designed to enable FCCB to cover its costs and achieve an internal rate of return of 10.62% after taking into account both costs and guaranteed income from third parties. If, however, FCCB managed to achieve the "Guaranteed Third Party Waste Third Party Income" more cheaply than was projected in the Base Case, it was under no obligation to share the saving with the Council.

9. As the parties had envisaged, companies in the FCC group entered into further contracts between themselves. FCCB itself entered into three sub-contracts: one for the construction of the Facilities, another to operate and maintain the Facilities and a third to source Third Party Waste. The last of these was concluded between FCCB and FCC Recycling (UK) Limited ("FCCR") on 17 April 2013. By it, it was agreed that FCCR would supply Third Party Waste to FCCB and pay it the "Guaranteed Third Party Waste Income" (i.e. the "nominal Third Party Income in relation to gate fee revenue in respect of Third Party Waste, as set out in the Base Case in the relevant Contract Year") and FCCB's "share of Third Party Income as provided under the Project Agreement of any Third Party Income in excess of the Guaranteed Third Party Waste Income".

10. The Project Agreement was the product of a lengthy public procurement exercise for which the Council used the competitive dialogue procedure for which regulation 18 of the Public Contracts Regulations 2006 provided. The Project Agreement is a long term contract, expected to run until 2046.

Some of the contractual terms

11. The Project Agreement is very long. The Judge noted in paragraph 69 of the Judgment that the length and complexity of the contract are "not surprising, since it provided both for the construction and the operation over a 30 year period of three separate facilities".

12. Clause 77.1 of the Project Agreement states that the provisions of paragraphs 3 and 11 of schedule 15 are to apply in respect of "Third Party Income".

13. "Third Party Income" is defined in appendix A to the Project Agreement as follows:

> "the Contractor's [i.e. FCCB's] (including for the purposes of this definition the Operating Contractor [i.e. FCCR] and/or any Affiliates') income from third parties (other than the Authority

> [i.e. the Council] 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, [FCCR] or any Affiliate of FCC Environment (UK) Limited."

14. "Affiliate" is defined in appendix A to the Project Agreement in these terms:

> "in relation to any person, any holding company or subsidiary of that person or any subsidiary of such holding company".

15. Paragraph 3 of schedule 15 to the Project Agreement deals with the calculation of the Unitary Charge (including adjustments for Third Party Income Share). Paragraph 11 of schedule 15, headed "Third Party Income Share", explains that the Third Party Income Share in the relevant year is the aggregate of "Recyclate Output Excess TPI Share", "Electricity Output Excess TPI Share", "Third Party Waste Excess TPI Share" and "Other Excess TPI Share". The last two of these featured in argument. Taking them in reverse order, "Other Excess TPI Share" is simply 75% of "Other Third Party Income". As for "Third Party Waste Excess TPI Share", paragraph 11.4 states:

> "The Third Party Waste Excess TPI Share in the relevant Contract Year shall be calculated in accordance with the following formula:
>
> $$\mathbf{W_{TPI} = TPW_R \times 0.75}$$
>
> where:
>
> $\mathbf{TPW_R}$ = The Excess Third Party Waste Third Party Income derived from gate fee revenue over and above the Guaranteed Third Party Waste Third Party Income assumed in the Base Case

> for the relevant Contract Year, calculated in accordance with the following formula:
>
> $$\mathbf{TPW_R = (ATPW_{TPI} - GTPW_{TPI}) + AB3_R + (AB2_R - FB2_R) - ATPW_{SW}}$$
>
> provided that such sum shall be subject to a minimum of zero (0)
>
> where:
>
> **$ATPW_{TPI}$** = the actual Third Party Income received by the Contractor for the treatment of Third Party Waste at the Facilities for the relevant Contract Year. …
>
> **$GTPW_{TPI}$** = the Guaranteed Third Party Waste Third Party Income. …"

16. The Base Case was incorporated in the Project Agreement as schedule 20. It comprised a spreadsheet with, among others, tabs providing a "Summary" and with the titles "Financials", "SPV Paymech", "O&M Paymech", "Assumptions", "ImportPer" and "O&M".

Contracts with third parties

The Luton contract

17. In 2004, FCCR entered into a contract with Luton Borough Council ("Luton BC") under which it undertook to provide waste management services and related construction works in the Borough of Luton. Payment was to be made by way of a unitary charge. By a deed of variation dated 20 March 2015, the 2004 contract was extended to continue until at least 31 March 2019 and also varied to provide for the first time for waste to go to Greatmoor. The unitary charge was renegotiated and reduced. In so far as waste went to Greatmoor, however, a new "Diversion Notional Payment" was to be paid to FCCR. The Diversion Notional Payment was specified as £73.42 per tonne in 2013 prices, subject to indexation from 1 April 2014. The Judge noted in paragraph 284 of the Judgment that the Diversion Notional Payment was "set at the same level as the current guaranteed gate fee for [Third Party Waste] under the [Project Agreement]".

18. The contract was extended several times, ultimately to 1 April 2024. However, no Luton BC waste has been sent to Greatmoor since 31 March 2023.

The Hertfordshire contracts

19. The FCC group had a number of contracts with Hertfordshire County Council ("Hertfordshire CC") under which it agreed to provide services. In essence, these provided for the group to manage waste transfer stations in Hertfordshire (at Waterdale and Hitchin), to dispose of waste at Greatmoor and to transport waste to Greatmoor.

20. The contract of most relevance for present purposes is one which FCC Waste Services (UK) Limited ("FCCWS"), a company in the FCC group, concluded with Hertfordshire CC on 4 April 2014 under which it agreed to provide a "Residual Waste Disposal

Facility" to receive and process waste. A page of this contract showed a price per tonne of £89 for disposal at Greatmoor.

21. On 1 April 2014, FCCWS had entered into a contract with FCCR under which FCCR agreed to accept waste at Greatmoor in return for £77.69 per tonne. The Judge observed in paragraph 30 of the Judgment that "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".

The North London Waste Authority contracts

22. On 9 December 2014, FCCWS entered into a contract with LondonWaste Limited ("LondonWaste"), a company owned by the North London Waste Authority, under which it undertook to transport waste from the Hendon Rail Transfer Station ("the Hendon RTS") in Hendon, London to FCCWS's "nominated Treatment or Disposal Facility site" and to treat and/or dispose of the waste there. The contract explained that FCCWS "should allow for all the costs associated with the transportation and Treatment or Disposal of the Contract Wastes at their nominated facility".

23. In practice, what happened was that FCCWS moved waste by train from Hendon RTS to a railhead near Calvert in Buckinghamshire which was close to both Greatmoor and a landfill site operated by the FCC group. Some of the waste was then disposed of at Greatmoor and some of it went to the landfill site.

24. Where waste went to Greatmoor, FCCWS was paid £7.10 per tonne for transportation and £90 per tonne for disposal. By a contract between FCCWS and FCCR also bearing the date 9 December 2014, FCCR agreed to make Greatmoor available for £75.97 a tonne.

O'Farrell J's judgment

25. In the latter part of 2020, the Council issued proceedings seeking, among other things, declarations as to the meaning and effect of the Project Agreement. One of the issues was whether, for the purpose of the calculation required by schedule 15, Third Party Income included income derived by other companies in the FCC group from contracts with third parties under which they would accept waste which was ultimately treated at Greatmoor. The matter came before O'Farrell J. In a judgment dated 26 October 2021, O'Farrell J concluded that the reference to "the Contractor's … income" in the definition of "Third Party Income" "includes income received by [FCCR] and [FCCWS]" and that the income which FCCWS received from Hertfordshire CC and London Waste was "income from third parties" within the meaning of the definition: see paragraphs 82 and 83. As for the requirement for income to be "associated with the Project", O'Farrell J went on:

> "84. The type of income within scope is '*income from third parties … associated with the Project*'. As [counsel for the Council] submits, that is a broad description. The Project comprises the provision of waste management services to the [Council], including the construction of the Facilities and satisfaction of the requirements in the Specification, but the income referred to as Third Party

> Income is deliberately stated to extend beyond that derived from FCCB's performance of its contractual obligations under the Project Agreement. The natural and ordinary meaning of the words '*associated with the Project*' indicates that the definition is concerned with income from a wide range of activities related to the availability of the Facilities. It is not confined to income payable only from the activities of waste treatment or disposal after waste arrives at the Facilities; no doubt such income is included; but it is capable of extending to income from ancillary activities of collecting waste at a site remote from the Facilities and transporting it to the Facilities for the purpose of treatment and disposal.
>
> 85. The definition of Third Party Income expressly includes income '*derived from Third Party Waste…*' Third Party Waste is defined as: '*all waste received at the Facility(ies) other than Contract Waste and Substitute Waste*'. The definition could have stated that it was limited to income generated from the time at which waste arrived at the Facilities, or income generated directly by the treatment and disposal processes at the Facilities provided by FCCB to the [Council]; 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 [Hertfordshire] CC and London Waste contracts falls within the definition of Third Party Waste if it is received at the Facilities.
>
> 86. It follows that the income received by FCC Waste Services from [Hertfordshire] CC and London Waste, in respect of waste that is delivered to the Facilities for treatment and disposal, falls within the definition of Third Party Income."

26. Addressing an argument advanced on behalf of FCCB to the effect that the formula for calculating Third Party Income Share in paragraph 11 of schedule 15 indicated that the Council'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", O'Farrell J said:

    i) "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" (paragraph 87);

ii) The "ordinary and natural meaning" of "gate fee revenue" is "revenue from charges for waste received for treatment or disposal at the Facilities" and, "[i]n the absence of clear words to the contrary, the mere reference to gate fee revenue would not override the references to the defined terms, 'Third Party Waste' and 'Third Party Income'; in particular, it does not displace the clear and express definition of Third Party Income in Appendix A of the Project Agreement" (paragraph 88);

iii) While $ATPW_{TPI}$ is described as "the actual Third Party Income received by the Contractor", "those words must be read against the defined term, Third Party Income, which explicitly includes income from Affiliates as part of the Contractor's income" (paragraph 89); and

iv) "It is not a requirement of the Third Party Income definition that the third party waste should be treated by the Affiliates or that it should be treated by the Affiliates at the Facilities. It is sufficient that the Affiliates receive income from third parties that is derived from waste received at the Facilities for the purpose of treatment" (paragraph 90).

27. O'Farrell J added in 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".

28. On that basis, O'Farrell J made an order including the following declaration:

> "Income received by [FCCB], or by any Affiliate (including [FCCWS]), in respect of:
>
> a) the treatment of waste from third parties at [Greatmoor];
>
> 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 [Greatmoor];
>
> is (i) income '*associated with the Project*' and (ii) '*Third Party Income*' as defined in the Project Agreement."

29. The contracts between FCCWS and, respectively, Hertfordshire CC and LondonWaste were at issue before O'Farrell J. The contract with Luton BC did not form part of the proceedings.

30. There was no appeal from O'Farrell J's judgment.

The present proceedings

31. The present proceedings were issued in August 2022. By them, the Council sought relief on the basis that it had not been paid its full share of Third Party Income.

32. The issues which fell to be determined when the matter came on for trial by the Judge included, first, whether FCCB was entitled to deduct various costs from Third Party Income before sharing it with the Council and, secondly, whether income which FCCB received from Luton BC was Third Party Income.

33. The Judge concluded that:

    i) Of the costs at issue, the only ones which FCCB was entitled to deduct were those of haulage; and

    ii) The income from Luton BC was Third Party Income.

The appeals

34. FCCB and the Council have both appealed.

35. FCCB's grounds of appeal are to the following effect:

    i) The Judge misconstrued "costs directly incurred" as those words are used in the definition of "Third Party Income";

    ii) The Judge was wrong to conclude that the unitary charge received from Luton BC was "income from third parties associated with the project as derived from [Third Party Waste]" and so to be included in the calculation of "actual Third Party Income received by the Contractor for the treatment of Third Party Waste at the Facilities"; and

    iii) The Judge was wrong to conclude that FCCB bore the burden of establishing certain matters.

36. For its part, the Council challenges the Judge's conclusion as regards the deductibility of haulage costs. It also contends, by way of respondent's notice, that the costs which are the subject of FCCB's appeal are not deductible not only because they were not "directly incurred" (as the Judge held) but because they fall within one or more of provisos (a), (b) and (c) to the definition of "Third Party Income".

37. The issues which arise from the appeals can be conveniently considered under the following headings:

    i) Deductible expenses;

    ii) The Luton unitary charge;

    iii) Haulage costs.

Deductible costs

"directly incurred"

38. To recap, it is apparent from the definition of "Third Party Income" in the Project Agreement that it encompasses "income from third parties … associated with the

Project" but (subject to the provisos) "the costs directly incurred in generating the income" can be deducted.

The Judgment

39. In paragraph 199 of the Judgment, the Judge accepted a submission that the need for costs to be "directly incurred" "imposes a requirement that there must be some immediate relationship between the winning of the income and the outlay". Expanding on that somewhat in paragraph 203, the Judge said 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".

40. The Judge did not accept that such an interpretation offended against common sense: see paragraph 210 of the Judgment. The Judge had explained in paragraph 208:

> "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 [Third Party Waste] 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 [the Council] 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."

41. With regard to the burden of proof, the Judge said in paragraph 101 of the Judgment:

> "The question of the burden of proof arises in relation to this overall requirement [viz. that costs must be 'directly incurred'] 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 [the Council] 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

> [Project Agreement], it is apparent that as between [the Council] and FCCB it is the latter which has sole knowledge as to: (i) what [Third Party Income] 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."

42. Turning to the application of the requirement that costs be "directly incurred", the Judge said in paragraph 246 of the Judgment that "the haulage and other sub-contractor costs which FCC has sought to deduct" "plainly fall within the definition of directly incurred costs". However, the Judge did not accept that any of the other costs which FCCB claimed to deduct had been shown to have been "directly incurred" as he understood those words. He thus held that FCCB was not entitled to make deductions as it had claimed in respect of manpower, site costs, "SHE" (i.e. safety, health and environmental) costs, hire costs, fuel plant repair and maintenance, fixed rent rates and licensing, site overheads, depreciation, divisional overhead, corporate overheads or "operational support charge".

43. With regard to manpower, the Judge observed in paragraph 249 of the Judgment that it was "possible" that some of the manpower costs "might individually fall within the definition of directly incurred costs" but, FCCB having "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 [Project Agreement] by reference to the percentage of waste sent by that facility to Greatmoor relative to the overall waste handled at that facility", it was "simply not possible to identify specific manpower costs which might individually fall within the definition": see paragraphs 248 and 249. "[I]n the circumstances of the case and the light of the evidence advanced by FCC", the Judge said in paragraph 252, "it is not possible to find in its favour on its pleaded and evidenced case", with the result that "nothing can be deducted by way of costs in relation to the years the subject of this case". The Judge went on to say that that was "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".

FCCB's case

44. It is FCCB's case that the words "directly incurred" should have been construed by focusing on the question whether the income which FCCB was required to share could have been generated without the costs which it sought to deduct being incurred. Ms Fiona Parkin KC, who appeared for FCCB with Mr Zulfikar Khayum and Mr Samar Abbas Kazmi, argued that costs are deductible if the relevant income could not otherwise have been achieved. What is required, so Ms Parkin said, is a causal connection.

45. That view, Ms Parkin suggested, is reinforced by the fact that there could never be "scaling up" such as the Judge contemplated in relation to arrangements such as that agreed between FCCWS and Hertfordshire CC, yet the parties would have intended costs to be deductible in such a case. Ms Parkin said that the Judge was in effect reading "costs directly incurred" as "direct costs directly incurred" when the definition does not speak of "direct costs". Further, the Judge, so Ms Parkin contended, failed to have regard either to the "Invitation to Submit Detailed Proposals" ("the Invitation") which had led on to the Project Agreement or to certain documents mentioned in the Invitation.

46. The Invitation itself, which was apparently issued in December 2007, had said in paragraph 21.3.1.3(c):

> "Any income sharing proposals should recognise the Council's risk position, and have regard to state aid implications. Note that it is recognised that whilst the Council would expect to benefit from income generated by the facility on a basis consistent with the risks borne by the Council as funder, clearly the operator also needs to be incentivised and reap the benefits of its efforts."

47. The Invitation had also stated that bidders must include in their proposals "[a]n output specification and payment mechanism following WIDP draft consultation guidance" (paragraph 19.5); that, if funded through "Prudential Borrowing", "the risk profile of the project … should not differ substantially from a PPP/PFI SOPC" (paragraph 21.3.5); and that the draft agreement which a bidder was to supply "should … be SOPC 4 compliant in every respect which is applicable" (paragraph 22.1.1). The Invitation explained that "WIDP" referred to "Waste Implementation Development Programme, DEFRA's Council support programme which supports new waste disposal infrastructure", while "SoPC4" was "HM Treasury's Standardisation of PFI Contracts version 4 (27th March 2007)". SoPC4 stated in relation to projects being financed on a project finance basis that the structuring should be on the basis that "the Unitary Charge is fixed at Financial Close and thereafter changes only for agreed indexation, value testing, Change of Law, Service Change or upon the occurrence of a Compensation Event" and "does not increase for Contractor delay or failure or for Contractor under-estimation of the actual outturn cost of delivery of the Services": see paragraph 35.1.1. In July 2008, the WIDP "Payment Mechanism Principles" were formalised in the publication "Waste Infrastructure Delivery Programme Residual Waste Procurement Pack Module 4 Part I" and "Part II: Payment Mechanism Drafting". The former referred to "the Authority … shar[ing] in net revenues from specific process outputs where the revenue exceeds an agreed pre-defined threshold" (paragraph 2.62.), to the revenue shared being "net of additional marginal costs incurred by the Contractor in generating the additional income" (paragraph 2.6.2) and to "[a]ny income not included in the base case financial model that is subject to sharing" being "shared after netting off additional marginal costs (i.e. those not shown in the model) incurred by the Contractor in developing the additional income" (paragraph 2.6.3). "Part II: Payment Mechanism Drafting" included a proposed definition of "Third Party Income" in these terms:

> "the Contractor's [and/or sub-contractor's] income from third parties (other than the Authority under the Contract) associated with the Project including without limitation that derived from the sale of [ ] [(less the marginal costs of generating such income]".

48. Ms Parkin submitted that both the Invitation and the other documents conveyed the message that the successful bidder needed to derive benefit from finding Third Party Waste, but the Judge's construction of "directly incurred" negated that. It served to discourage FCCB from generating Third Party Income and failed to achieve a commercially balanced result.

Discussion

49. In my view, the Judge was correct that, for costs to be "directly incurred" in generating income, there must be "some immediate relationship between the winning of the income and the outlay" and that "those costs which are incurred specifically in relation to the particular income generating activity in question" fall to be distinguished from "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". As was accepted by Mr Justin Mort KC, who appeared for the Council with Mr John McMillan and Mr Tom Coulson, that does not mean that *everything* that might be described as an "overhead" is necessarily to be disallowed. If, say, a particular facility were used exclusively in the generation of relevant income, costs associated with the facility such as rent or insurance might be "directly incurred" even though they could potentially be termed "overheads". What matters is whether the cost at issue can in its entirety be traced to the particular income.

50. That conclusion appears to me to accord with ordinary usage. It is certainly, I think, consistent with how "direct costs" are understood and, while the Project Agreement instead refers to "directly incurred" costs, I do not regard the distinction as significant. I note in this connection that the Oxford English Dictionary gives as a definition of "direct" "Of or pertaining to the work and expenses actually incurred during production as distinct from subsidiary work and overhead charges, i.e. to prime or initial costs or charges".

51. As I have mentioned, Ms Parkin argued that "directly incurred" should not be interpreted in this way but rather as requiring a causal connection between the costs and the income. On that basis, it would suffice that income could not be produced without, say, a certain facility. The costs of running the facility would be deductible even if it were not used only to produce income, but also (and perhaps mainly) for other purposes.

52. I have not been persuaded. Interpretation of a contract involves, of course, assessment of "the objective meaning of the language which the parties have chosen to express their agreement" (to quote Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, at paragraph 10) or, in the words of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912, "ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". To my mind, such a "reasonable person" would not conclude that a causal connection of the kind espoused by Ms Parkin sufficed, and such a construction is not consistent with the "objective meaning of the language". The imposition of the requirement for costs to be "directly incurred" points to the parties having intended a restriction along the lines of the approach which the Judge adopted. Ms Parkin's interpretation would seem to leave the word "directly" without any real role. Further, were Ms Parkin's submissions well-founded, FCCB could potentially be entitled to

deduct costs out of all proportion to the income in question and even perhaps the costs of the group's headquarters in Spain. I do not think the Project Agreement would convey such a meaning to the hypothetical "reasonable person".

53. Nor, in my view, is FCCB assisted by reference to the Invitation, SoPC4 or WIDP. Passages to the effect that an operator "needs to be incentivised" and income "shared" are too high level to be informative. After all, there is no obvious contradiction between such statements and the Judge's interpretation of "directly incurred". As for WIDP's references to "additional marginal costs" and "the marginal costs of generating such income", it seems to me that these, if anything, favour the Council. The Judge in effect required costs to be "marginal" or, in other words, to represent the *extra* cost occasioned by the income.

54. Of course, the parties did not in the event adopt the definition of "Third Party Income" offered in WIDP. There is no reason to suppose, however, that a looser approach was intended. To the contrary, it seems fair to infer that the more complex definition found in the Project Agreement was designed to be at least as restrictive of the costs that could be deducted.

55. During the hearing, there was discussion as to whether FCCB could properly apportion costs so that, say, costs incurred in generating income from third parties and also for other purposes could in part be deducted in the calculation of Third Party Income. It appears to me, however, that the words "directly incurred" preclude such apportionment. They rather require that the expenditure in question was incurred exclusively in relation to achieving the income from third parties. There are also practical reasons for concluding the parties did not intend such apportionment to be possible. Suppose (as in fact happened) that FCCB claimed to deduct part of its head office costs. The Council would be in no position to assess the propriety of the deduction without knowledge of (a) the total head office costs and (b) what other income the head office was helping to generate. There is no mechanism in the Project Agreement, however, for the Council to obtain such information. Nor are the parties likely to have intended that the Council should undertake such investigations.

56. In the course of the hearing, Ms Parkin referred to certain costs which, she suggested, *must* be regarded as "directly incurred". However, the relevant ground of appeal challenges the *test* which the Judge applied, not his application of it: FCCB's complaint was that the Judge *misconstrued* "directly incurred". Moreover, Mr Mort fairly said that, given the terms of the grounds of appeal, the Council had not come to Court prepared to justify the Judge's conclusions as to how his approach should be applied as regards particular items. Our concern, therefore, is with how the Judge understood the requirement that costs be "directly incurred", not with whether his interpretation could or should have yielded different results on the facts.

Proviso (a)

57. Proviso (a) in the definition of "Third Party Income" requires costs to be "specifically and solely related to the generation of Third Party Income additional to that modelled in the Base Case".

The Judgment

58. Having accepted in paragraph 211 of the Judgment that "the focus in this proviso is on what [Third Party Income] was modelled in the Base Case, as opposed to what costs were modelled in the Base Case", the Judge explained that it was the Council's case that "in relation to [Third Party Income] from [Third Party Waste] the costs have to be specifically and solely related to generating income above and beyond what is guaranteed income from that source" whereas FCCB contended that "income from [Third Party Waste] 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 [Third Party Income]": see paragraphs 213 and 214.

59. The Judge found FCCB's interpretation "more compelling than [the Council's] on this point": paragraph 218 of the Judgment. He had said in paragraph 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 [Project Agreement] as a whole that the [Third Party Income] modelled in the Base Case relates to a specific source, then that would be sufficient in my view."

60. What was modelled in the Base Case was, the Judge said in paragraph 219 of the Judgment, "only the nominal [Third Party Income] in relation to gate fee revenue in respect of [Third Party Waste]". On that basis, the Judge said that he was satisfied that "costs specifically and solely related to the generation of [Third Party Income] from sources other than this nominal gate fee revenue are in principle properly deductible from such [Third Party Income]": paragraph 219.

The parties' positions

61. The Council's case is that the costs which the Judge held not to be deductible as "directly incurred" also failed to satisfy the requirements of proviso (a). Mr Mort argued that the costs in question were not incurred "specifically and solely" in generating additional Third Party Income but were either wholly or in part simply ordinary costs of running the group and/or costs of generating the large quantities of guaranteed Third Party Income. Mr Mort stressed the need for costs to be "*specifically* and *solely*" related to extra Third Party Income and argued that the Judge did not explain how the costs at issue could be said to have met that condition.

62. Mr Mort observed that paragraph 214 of the Judgment, from which I have quoted in paragraph 58 above, has to be read in the light of paragraph 88 of O'Farrell J's judgment of 26 October 2021. O'Farrell J concluded in that paragraph that "gate fee revenue", as used in paragraph 11.4 of schedule 15 to the Project Agreement, refers to "revenue from charges for waste received for treatment or disposal at the Facilities" and that the "mere reference to gate fee revenue" does "not displace the clear and express definition of Third Party Income in Appendix A of the Project Agreement".

63. For her part, Ms Parkin argued that it is important to identify the species of Third Party Income Share which is relevant and, in particular, whether it is "Third Party Waste

Excess TPI Share" or "Other Excess TPI Share". Income will be "Third Party Waste Excess TPI Share", Ms Parkin said, where it arises from the sale of spare capacity at Greatmoor and *gate fees* received by *FCCR*. Where, on the other hand, *FCCWS* receives income as a result of handling Third Party Waste elsewhere than at the Facilities, the income is "Other Excess TPI Share" and the costs incurred in generating it will, by definition, meet proviso (a). They are necessarily, Ms Parkin submitted, costs "specifically and solely related to the generation of Third Party Income additional to that modelled in the Base Case".

Discussion

64. Ms Parkin pointed out that the declaration made by O'Farrell J which I have quoted in paragraph 28 above did not specify whether the income to which it referred represented "Third Party Waste Excess TPI Share", on the one hand, or "Other Excess TPI Share", on the other. We were told by Mr Mort that, when the parties came to the trial before the Judge, they both proceeded on the basis that the relevant income fell within paragraph 11.4 of schedule 15 to the Project Agreement as "Third Party Waste Excess TPI Share". In any event, that appears to me to be clear from what O'Farrell J said in her judgment. It was when discussing paragraph 11.4 of schedule 15 to the Project Agreement that O'Farrell J made the remarks which I have mentioned in paragraph 26(ii)-(iv) above. More specifically, she noted that paragraph 11.4 refers to "the actual Third Party Income" (paragraph 88 of her judgment), that those words "must be read against the defined term, Third Party Income, which explicitly includes income from Affiliates as part of the Contractor's income" (paragraph 89) and that "[t]he income received by [FCCWS] from [Hertfordshire] CC and from London Waste is '*for the treatment of Third Party Waste at the Facilities*'", as those words feature in the definition of "$ATPW_{TPI}$" given in paragraph 11.4 (paragraph 90). I do not, therefore, accept that the income at issue in the present proceedings is correctly categorised as "Other Excess TPI Share". It is rather, I think, "Third Party Waste Excess TPI Share".

65. In any event, it seems to me, with respect, that the Judge failed to focus on the need for costs to be "specifically and solely" related to the generation of additional Third Party Income. In my view, it follows from the findings which the Judge made when considering whether costs had been "directly incurred" in generating relevant income that they were not, either, "specifically and solely" related to the generation of additional Third Party Income. The position is especially stark as regards the sums which FCCB has claimed to deduct in respect of divisional overhead ("management costs in an operating division that are not specific to an individual operating site or contract": paragraph 275 of the Judgment), corporate overheads (including "all the management and support costs associated with support functions e.g. Finance, IT, HR, Procurement, Directors": paragraph 277 of the Judgment) and "operational support charge" (including "the support costs to the operational sites of Fleet and Plant, SHEQ and Engineering": paragraph 279 of the Judgment). There can be no question of such costs being "specifically and solely" related to additional Third Party Income. Costs which do not arise "solely" in relation to additional Third Party Income but also in generating "Guaranteed Third Party Waste Third Party Income" must also fail to satisfy the requirements of proviso (a).

Burden of proof

66. As I have mentioned, one of the grounds of appeal is to the effect that the Judge erred in concluding that FCCB bore the burden of establishing certain matters. These included the deductibility of the heads of costs at issue.

67. Ms Parkin did not in her oral submissions develop this ground separately. In any event, I do not consider it to be well-founded.

68. The Judge proceeded on the basis that the Council bore the burden of proving that it was entitled to the relief it sought but that it was apparent from the terms of the Project Agreement that it was for FCCB, with "sole knowledge" of the costs, to demonstrate that particular items of costs were deductible. The Judge concluded that the evidence before him did not show that.

69. The Judge's approach discloses no legal error. FCCB has itself accepted that it has a contractual burden to identify deductible costs. Given, moreover, that it is FCCB which can speak to what costs have been incurred, and why, the evidence and explanations provided by FCCB are bound to be of crucial importance. There was nothing wrong in the Judge finding in the Council's favour in circumstances where he considered that the "all-or-nothing" approach adopted by FCCB had not yielded evidence to confirm the deductibility of the costs at issue.

Overall conclusion

70. I would dismiss FCCB's appeal in so far as it relates to the deduction of costs. The Judge did not, in my view, misconstrue "directly incurred". On top of that, the requirements of proviso (a) were not met.

The Luton unitary charge

71. It is common ground that the Diversion Notional Payment for which the Luton contract, as varied, provided represents Third Party Income. Where the parties differ is in relation to the unitary charge which was payable by Luton BC. The Council contends that the proportion of the unitary charge equating to the share of waste sent to Greatmoor constitutes Third Party Income. FCCB, in contrast, denies that any of the unitary charge is Third Party Income.

The Judgment

72. The Judge agreed with the Council. He concluded in paragraph 298 of the Judgment that the Council was "correct to argue that the unitary charge does include income from third parties associated with the project as derived from [Third Party Waste]". He considered that the reasoning of O'Farrell J in her judgment of 26 October 2021, in particular in paragraphs 84 and 85 of that judgment, was "plainly correct" and "applies just as much to the unitary charge in this case as to the income received from [Hertfordshire CC] and [LondonWaste] in the case before O'Farrell J": paragraph 299. He rejected an argument advanced by FCCB that no relevant Third Party Income could be identified because the unitary charge was "indivisible", saying that he had "no doubt that FCC cannot properly deploy the indivisible sum argument as a full defence to the claim": see paragraphs 297 and 308. He considered that "the simple solution adopted

by [the Council] provides a sufficient answer" to the objection, observing that it "may be rough and ready, but it is not manifestly unfair on FCC": paragraph 308. He was accordingly "satisfied that [the Council] 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 [the Council]": paragraph 316. He had noted in paragraph 310 that "the issue of deductible costs is not for this trial or for this judgment".

FCCB's case

73. Ms Parkin pointed out that the original contract with Luton BC long pre-dated the Project Agreement and that the unitary charge reflected services which had nothing to do with Greatmoor. On the basis of the Judge's decision, Ms Parkin said, income would be deemed Third Party Income which had nothing to do with the project for which the Project Agreement provided and was not derived from Third Party Waste (because, for example, it included income referable to the costs of constructing new facilities or those of providing recycling services). Luton BC paid FCCR the same, Ms Parkin commented, whether the waste went to Greatmoor or elsewhere. The Judge decided as he did, Ms Parkin submitted, on the basis that the result was not "manifestly unfair" rather than by reference to the wording of the Project Agreement. Further, the Judge's reliance on O'Farrell J's judgment was misplaced, not least because O'Farrell J had not been asked to consider a multi-service contract such as that with Luton BC. There being, as the Judge recognised in paragraph 309 of the Judgment, "insurmountable difficulties" in determining what FCCR had actually spent on its operation generating income from Third Party Waste processed at Greatmoor, the Council cannot be entitled to any of the unitary charge, Ms Parkin argued.

Discussion

74. "Third Party Income" is defined to encompass "income [of FCCB, FCCR and FCCWS] … associated with the Project including without limitation that derived from Third Party Waste, Electricity Output and Recyclates Output".

75. In a judgment from which, as I have said, there was no appeal, O'Farrell J held that the definition provides a "broad description", 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" and "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": see paragraphs 84 and 85. "If the waste is in fact delivered to the Facilities for treatment or disposal", O'Farrell J said in paragraph 92, "then the income derived from such waste, whenever generated, is Third Party Income".

76. While the Luton contract did not form part of the proceedings before O'Farrell J, on the face of it her words are applicable in relation to it. The unitary charge which Luton BC paid was in part attributable to waste which was ultimately delivered to Greatmoor, and it matters not that it was FCCR rather than FCCB which was entitled to the unitary charge or that FCCR collected the waste at a site remote from the Facilities.

77. Further, FCCB cannot, in my view, escape any liability by arguing that the unitary charge is indivisible. The contention implies that none of the unitary charge would be Third Party Income even if the services for which it was being paid overwhelmingly

related to waste which went to Greatmoor. It might have been argued that, if the unitary charge is "indivisible", it should be treated as Third Party Income in its entirety, on the footing that it represents income "associated with the Project" to at least a significant extent. Plainly, the "simple solution" which the Judge endorsed provides a fairer answer. In any case, on the basis of the "objective meaning of the language" of the definition and the meaning which would be conveyed to a "reasonable person", I do not think that income from third parties which is "associated with the Project" to some degree falls to be discounted entirely because it is also derived from activities unrelated to those which are the subject of the Project Agreement.

78. I would therefore dismiss this ground of appeal.

Haulage costs

79. Ground 3 of the Council's grounds of appeal states as follows:

> "The learned judge … erred in his construction of proviso (c), and in particular in determining that proviso (c) related only to handling Third Party Waste at the Facilities (and therefore did not apply to the cost of hauling Third Party Waste to the Main Facility from other waste transfer stations, performing the same function, involving the same costs and situated a similar distance from the Main Facility)."

80. Amongst the costs which FCCB has claimed to deduct are costs of transporting waste to Greatmoor from places other than High Heavens WTS. The Council maintains that such deductions are barred by proviso (b) and/or proviso (c) in the definition of "Third Party Income", and it relies in particular on proviso (c). However, it is FCCB's case that proviso (c) applies only to "costs of handling or processing" *at one of the Facilities* and so does not bite on costs of handling waste elsewhere. The Judge agreed and, accordingly, held that "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": see paragraph 246 of the Judgment. The Judge considered that such costs "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": see paragraph 246.

Proviso (c)

81. The key proviso in this context is proviso (c). It may be helpful to set it out again. It reads as follows:

> "the costs are not the costs of handling or processing the Third Party Waste or Recyclate by the Contractor or Affiliate".

The Judge's reasoning

82. The Judge explained in paragraph 243 of the Judgment that he had found the construction of proviso "a difficult exercise", but that he was in the end satisfied as to its proper construction.

83. The Judge's core reasoning can be seen in the following paragraphs of the Judgment:

> "239. As I have said, it appears that until the O'Farrell judgment FCC assumed that only gate fee income was included within TPI [i.e. Third Party Income]. It also appears from the chronology that it was not until 2018 at the earliest that [the Council] 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 [the Council]'s construction if - in the context of income from TPW [i.e. Third Party Waste] - 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 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."

84. The Judge had commented in paragraph 224 of the Judgment that there was "no evidence that any, or any significant, costs would be saved at the [waste transfer stations], given that they would have to be kept open for [Contract Waste], even if [Third Party Waste] was diverted elsewhere".

The parties' positions

85. Mr Mort pointed out that proviso (c) refers to "the costs of handling or processing … Third Party Waste" in general terms, with the result, he said, that, giving the words their natural and ordinary meaning, they apply to such handling or processing wherever it takes place, not merely if it is undertaken at a Facility. FCCB's case, Mr Mort argued, amounts to reading the proviso as if "at the Facilities only" were inserted after "Third Party Waste" when the parties did not in fact choose to include that qualification. Mr Mort further submitted that the interpretation of proviso (c) which he espoused is consistent with, and supported by, O'Farrell J's judgment of 26 October 2021.

86. Mr Mort further argued that his construction makes sense because the Council would otherwise be paying for haulage to Greatmoor twice. In this connection, he told us by reference to the "ImportPer" and "O&M" worksheets in the Base Case that costs totalling £58,686,000 were assumed for "TLS O&M Variable Haulage" over the course of the Project, with sums approaching £500,000 a month from July 2016 onwards. In fact, as Mr Mort noted, an even higher figure, £99,428,000, is to be found for "TLS O&M Variable Haulage" in the "O&M" worksheet. Mr Mort further pointed out that Mr Dickson explained that "TLS O&M Variable Haulage" referred to "the costs of getting the waste from the transfer stations to the plant". It can also be seen from Mr Dickson's witness statement that the calculations reflected anticipated volumes of both Contract Waste and Third Party Waste. Since the Unitary Charge which the Council pays FCCB takes account of these presumed costs, Mr Mort said, FCCB is already being paid to transfer Third Party Waste from High Heavens WTS to Greatmoor. If the FCC group instead chooses to transport Third Party Waste from elsewhere, without incurring the costs of haulage from High Heavens WTS, there is nothing unfair in FCCB being unable to deduct the costs of haulage, Mr Mort maintained. On FCCB's case, Mr Mort submitted, it only incurs the cost of hauling the waste from a waste transfer station to Greatmoor once, but it is compensated for that haulage cost twice: (a) once as a result of the allowance in the Base Case for the costs of hauling Third

Party Waste from High Heavens WTS to Greatmoor and (b) once as a cost which it can deduct pursuant to the definition of "Third Party Income".

87. Mr Mort argued that the Judge was mistaken in thinking that no significant costs would be saved if Third Party Waste were delivered to Greatmoor otherwise than via High Heavens WTS. To the contrary, Mr Mort said, the costs of haulage from High Heavens WTS no longer had to be incurred and so there were very large savings.

88. Ms Parkin, on the other hand, supported the Judge's decision. FCCB, she said, does not receive haulage income twice. It receives a "Monthly Base Payment" for accepting Contract Waste at the Facilities and it accounts for haulage income received by FCCWS from Hertfordshire CC and LondonWaste in accordance with the separate regime for sharing Third Party Income. The Council's case, Ms Parkin said, erroneously elides the two. FCCB would not be entitled to any additional payment from the Council if it transpired that the costs of hauling Contract Waste from High Heavens WTS to Greatmoor were higher than the Base Case allowed for. Equally, the Council has no right to pay less if FCCB does not in the event incur the costs of transporting Third Party Waste from High Heavens WTS to Greatmoor which had been assumed.

Conclusions

89. I agree with the Council that, contrary to the Judge's view, FCCB is not entitled to make deductions in respect of the haulage costs at issue.

90. My reasons are as follows:

i) Proviso (c) is expressed in general terms. It simply bars deductions in respect of "costs of handling or processing the Third Party Waste … by the Contractor or Affiliate". Nothing is said to limit the proviso to costs of handling or processing at a Facility. On the ordinary meaning of the words, therefore, the provision is not subject to the qualification for which FCCB contends;

ii) As the Judge recognised, his approach "produces an anomaly, in the sense that it may be argued that [Third Party Waste] has a different meaning in different parts of the same clause [i.e. the definition of 'Third Party Income']". O'Farrell J said in paragraph 85 of her unappealed judgment of 26 October 2021:

> "The definition [of 'Third Party Income'] 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 [Council]; 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."

Proviso (c)'s reference to "the costs of handling or processing the Third Party Waste" might similarly have been expected to extend to all costs of handling or processing waste from third parties that is ultimately received at Greatmoor,

regardless of the point in time at which the handling or processing takes place; and

iii) The fact that the costs of transporting waste from High Heavens WTS to Greatmoor have already been factored into the calculation of the Unitary Charge payable to FCCB means that the Council's construction of provision (c) does not give rise to unfairness in the way that the Judge perceived.

91. In my view, therefore, ground 3 of the Council's grounds of appeal succeeds. It seems to me that the deductions in respect of haulage costs are barred by proviso (c).

Overall conclusions

92. I would dismiss FCCB's appeal, but I would accede to ground 3 of the Council's appeal.

Lord Justice Jeremy Baker:

93. I agree.

Sir Launcelot Henderson:

94. I also agree.