Neutral Citation Number: [2019] EWHC 819 (TCC)

Case No: HT-2017-000110

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Rolls Building
Fetter Lane, London EC4A 1NL

Date: 2 April 2019

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- -

Between :

ESSEX COUNTY COUNCIL

Claimant

- and -

UBB WASTE (ESSEX) LIMITED

Defendant

- -
- -

Marcus Taverner QC and **Daniel Churcher** (instructed by **Slaughter and May**)
for the **Claimant**
Roger Stewart QC and **George McDonald** (instructed by **Norton Rose Fulbright LLP**)
for the **Defendant**

Hearing dates: 19 & 22 February 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 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.

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THE HONOURABLE MR JUSTICE PEPPERALL

MR JUSTICE PEPPERALL:

1. The Defendant, UBB Waste (Essex) Limited, applies to re-amend its Defence and Counterclaim. I heard the argument on this application on 19 and 22 February 2019. In view of the looming trial, I indicated my decision on UBB's application on 4 March 2019. This judgment sets out my reasons.

BACKGROUND

2. On 31 May 2012, UBB (a joint venture company incorporated by Urbaser Limited and Balfour Beatty Investments Limited) entered into a contract with Essex County Council pursuant to the Government's private finance initiative (PFI) for the design, construction, financing, commissioning, operation and maintenance of a mechanical biological waste treatment plant in Essex. The contract is to run for around 25 years.

3. The facility was built and on 25 November 2014 it was certified as having passed the Readiness Tests. The facility then entered into the Commissioning Period and was required to pass the Acceptance Tests before the extended Planned Services Commencement Date of 12 July 2015. It is common ground that the facility has not passed the Acceptance Tests either by such date or by the Acceptance Longstop Date of 12 January 2017.

4. Essex argues that UBB failed to design and construct the facility so that it was capable of passing the Acceptance Tests. It contends that UBB's failure either to pass the Acceptance Tests or to attempt to do so by the Acceptance Longstop Date is an event of Contractor Default and seeks, among other relief, a declaration that it is entitled to terminate the PFI contract pursuant to clause 67.

5. UBB denies any default. It argues that the performance of the facility was critically dependent on the composition of the waste. It contends that the facility would have passed the Acceptance Tests and would now be in the Services Period but for Essex's failures:

   5.1 first, to provide waste with the assumed composition provided to UBB when bidding for this contract; and

   5.2 secondly, to engage with UBB in the Options Review process to deal with the composition issues.

   Accordingly, UBB denies that Essex is entitled to terminate the contract. It argues that Essex is in breach of contract and it seeks damages as well as declaratory and injunctive relief. This is, UBB submits, "termination for convenience dressed up as termination for contractor default."

6. While the principal issues can be shortly stated, the arguments are complex and the documents voluminous. This case is listed before me for a twenty-day trial in May and June 2019 at which some ten lay witnesses and eleven experts will give evidence.

7. By its draft Re-Amended Defence and Counterclaim, UBB seeks both to respond to Essex's Amended Particulars of Claim and to make a significant number of further changes to its case. A number of re-amendments have been agreed between the parties but many others remain in issue.

THE LAW

8. Carr J helpfully summarised the principles to be applied on applications to amend in Quah Su-Ling v. Goldman Sachs International [2015] EWHC 759 (Comm). Drawing on, among other authorities, Swain-Mason v. Mills & Reeve [2011] 1 W.L.R. 2735, Hague Plant Ltd v. Hague [2014] EWCA Civ 1609 and Worldwide Corporation Ltd v GPT Ltd, 2 December 1988 (unreported), she said, at paragraph 38:

> "a) Whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
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> b) Where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
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> c) A very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
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> d) Lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
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> e) Gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
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> f) It is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
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> g) A much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation

proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

9. In CIP Properties (AIPT) Ltd v. Galliford Try Infrastructure Ltd [2015] EWHC 1345 (TCC), Coulson J, as he then was, undertook his own review of the same authorities. He summarised the principles at paragraph 19:

> "a) The lateness by which an amendment is produced is a relative concept (Hague Plant). An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed by the time of the amendment.
>
> b) An amendment can be regarded as 'very late' if permission to amend threatens the trial date (Swain-Mason), even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason (Brown).
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> c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise (Brown; Wani). In essence, there must be a good reason for the delay (Brown)
>
> d) The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly-drawn or focused (Swain Mason; Hague Plant; Wani).
>
> e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around' (Worldwide), to the disruption of and additional pressure on their lawyers in there run-up to trial (Bourke), and the duplication of cost and effort (Hague Plant) at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments (Swain Mason).
>
> f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered (Swain-Mason). Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise (Archlane)."

10. In Vilca v. Xstrata Ltd [2017] EWHC 2096 (QB), Stuart-Smith J cited and endorsed the summaries in both Quah Su-Ling and CIP Properties, although he said that he did not agree with Coulson J that there "must" be a good reason for delay. I agree with that caveat. As Stuart-Smith J observed, at paragraph 29, the lack of a good explanation is not of itself fatal to the application to amend but the presence or absence of an explanation which justifies the delay is one of the factors that must be considered in deciding where to strike the balance.

11. In my judgment, there is essentially one rule on any application to amend. Parties should be allowed to amend their statements of case to bring forward intelligible and apparently credible claims or defences where the balance of injustice to the applicant if the amendment is refused outweighs the injustice to the other party and to litigants in general if the amendment is permitted. As to this:

    11.1 I say intelligible and apparently credible, since the court ought not allow amendments that are liable to be struck out or against which the court would order summary judgment: Clarke v. Marlborough Fine Art (London) Ltd, The Times, 5 July 2001.

    11.2 The timing of the application is an important factor:

        a) Plainly the earlier the amendment is sought, the more likely it is that the court will conclude that the applicant's interest in being able to argue its full case outweighs any prejudice to the opponent or to litigants in general.

        b) Conversely, the later the amendment is made, the more likely it is that the court will find that the balance of injustice favours disallowing the amendment. Very late amendments that, if allowed, are likely to lead to the adjournment of a trial date are frequently disallowed not so much because there is some special rule in such cases but because the obvious prejudice to the opponent and to the administration of justice in losing the trial date often weighs more heavily in the balance than the prejudice to the applicant in refusing the amendment.

    11.3 The consequences of allowing an amendment will also be important. Some late amendments do not call for any further disclosure or witness evidence and do not put the trial date at risk. Such amendments are more likely to be allowed even if made late since they are less likely to cause significant prejudice to the other party and to other litigants.

    11.4 Late amendments ought to be properly particularised. Again, this is not some separate principle but recognition that the balance of injustice is likely to weigh against allowing a late amendment if it cannot be properly understood or met without further particulars.

    11.5 In considering the balance of injustice, the court should have regard to the overriding objective, including the requirements to ensure that litigation is conducted efficiently and at proportionate expense and to ensure compliance with rules, practice directions and orders. As was famously recognised in Mitchell v. News Group Newspapers [2013] EWCA Civ 1537, justice now means more simply than justice between the parties and the court will also consider the wider public interest in ensuring that other litigants can obtain justice efficiently and proportionately. These wider considerations should always be considered but will come into particular focus where the effect of a late amendment will be to cause a trial date to be adjourned.

THE TIMING OF THIS APPLICATION

12. Notice of application was filed on 22 January 2019. It was heard on 19 and 22 February 2019, just ten weeks before trial.

13. Essex issued this claim on 28 April 2017. UBB filed its original Defence and Counterclaim on 30 June 2017 and Essex served its Reply and Defence to Counterclaim on 29 September 2017. UBB amended its Defence and Counterclaim on 14 November 2017 and Essex amended its Reply and Defence to Counterclaim on 20 November 2017, but there the pleadings rested until last summer.

14. In August 2018, both parties wished to amend their statements of case. There were good reasons for reviewing matters at that stage since a number of things had changed since the case was first pleaded. The parties had given disclosure. Further, there had been developments on the project itself because this litigation concerns an ongoing contract. In addition, there had been developments as a result of the adjudications between the parties. The parties therefore agreed a timetable for the orderly and sequential service of the proposed amendments:

    14.1 Essex was to provide its proposed amendments to the Particulars of Claim by 24 August 2018.

    14.2 UBB was to provide its draft re-amendments to the Amended Defence and Counterclaim by 7 September 2018.

    14.3 Essex was to provide its draft re-amendments to the Amended Reply and Defence to Counterclaim by 21 September 2018.

    Such timetable was tight, especially in view of the size of disclosure in this case. It was, however, agreed and had the advantage that, if adhered to, the pleadings would have been finalised before the parties were due to exchange witness and expert evidence.

15. In accordance with the parties' agreement, Essex served its draft Amended Particulars of Claim on 24 August 2018. UBB consented to these amendments by its solicitor's letter of 11 October 2018. UBB failed, however, to provide its draft re-amendments by the agreed deadline. Slaughter and May (the council's solicitors) chased the re-amendments on 24 September, 1 October and 8 October 2018 before UBB served a draft on 11 October 2018.

16. On 31 October 2018, Slaughter and May responded to UBB's draft. It provided a detailed schedule responding to each proposed re-amendment. It offered to agree some re-amendments upon terms while many others were contested. In a number of instances, Essex sought further information as to how UBB put its case.

17. UBB failed to respond to Essex's schedule until 14 January 2019. During this period, Slaughter and May chased a response on no less than three occasions:

    17.1 By letter dated 15 November 2018, it pointed out that it was "crucial for the pleadings to be settled between the parties at the earliest opportunity." Yet still UBB neither responded nor acknowledged Slaughter and May's letter.

    17.2 Slaughter and May wrote again on 29 November 2018. It pointed out that UBB's proposed amendments ought to have been provided by 7 September 2018 and that the situation was "unacceptable." It added:

        > "UBB's delay in this respect is adversely affecting the parties' ability to progress matters of factual and expert evidence further. Indeed, you have now

> written to us demanding responses by return on certain matters of expert evidence, whilst at the same time failing to clarify your client's position on its Proposed Amendments and failing to respond to the Authority's reasonable requests for further information as to what issues of expert evidence your client considers to be in dispute. As we have made clear in separate correspondence, it would not be efficient or appropriate for the parties' respective experts to meet without any clarity on UBB's pleaded position.
>
> In the absence of any response from your client, the Authority has no choice but to proceed on the basis that UBB has abandoned all of its Proposed Amendments which have not already been conditionally agreed by the Authority.
>
> In respect of those of UBB's Proposed Amendments which the Authority has indicated it was prepared to agree to subject to UBB providing the customary confirmations, please now provide such confirmations by return, or alternatively confirm whether your client has now abandoned these proposed amendments. As a number of these amendments have significant implications in relation to the issues of expert evidence in dispute between the parties in these Proceedings, it is imperative for UBB to clarify its position promptly in light of the timetable for the experts' meetings."

Again, this letter went unanswered.

17.3 By letter dated 8 January 2019, Slaughter and May set out the history of the re-amendments and wrote:

> "Accordingly, given the lapse of time and the stage now reached in the Proceedings the Authority will only agree to any amendments to UBB's Amended Defence which are wholly consequential upon the agreed and filed amendments to the Particulars of Claim, provided that such amendments are submitted within seven days of the date of this letter."

18. When finally responding to the schedule of detailed comments upon the re-amendments on 14 January 2019, Norton Rose Fulbright asserted:

> "The Schedule contains numerous queries about almost every amendment made by UBB. It is another example of the Authority's wholly unreasonable approach to this litigation which appears to be designed to maximise the amount of legal costs incurred by all parties. The Authority's approach does it no credit at all.
>
> UBB's case as set out in the proposed amendments is adequately pleaded. UBB would therefore be entitled to refuse to respond to the Schedule. However, in order to avoid yet another pointless interlocutory battle, UBB has responded in the attached schedule."

19. I have rightly not been told what earlier conduct in the course of this heavily fought litigation might have moved the author of that letter to regard the argument over these re-amendments to be "another example", but I wholly reject the suggestion that Essex's approach to this issue was "wholly unreasonable" or that it was conduct designed simply to maximise legal costs. Indeed, I am bound to observe that it was the letter of 14 January that, to borrow the expression, did no credit to its author. A simple apology for UBB's

delay in dealing with this issue would have been far more appropriate than this combative response.

20. Mr Ramsden, UBB's solicitor, explains that the delay was simply caused by the weight of work on this case. Nevertheless, Roger Stewart QC, who appears for UBB with George McDonald, realistically accepted that UBB should have been able to respond to the council's schedule by mid-November and that it had therefore unreasonably delayed some 2 months in dealing with this issue. I agree. There was also earlier default in failing to propose the re-amendments in accordance with the agreed timetable. The net effect is that the application to re-amend was not made until 22 January 2019 and could not be heard until 19 February, just three days before the pre-trial review and ten weeks before trial. With proper attention to this issue, UBB's application to re-amend should, in my judgment, have been made last autumn and heard before Christmas.

21. In the interim, witness statements were exchanged on 16 November 2018 with responsive statements exchanged on 14 December. The parties' expert witnesses have also filed their joint statements and, on 8 February 2019, their reports. There is, however, further work to be done. Disclosure, while always a continuing obligation, is rather more open-ended in this case given that the parties remain in a contractual relationship. I am told that further updating disclosure will therefore be given before trial. Furthermore, Marcus Taverner QC, who appears for Essex with Daniel Churcher, explained that the waste experts will have to update their reports. At the moment they have dealt with data as to the composition of waste processed by the facility in 2016 and in the first two quarters of 2017. Essex's expert is now to be asked to analyse the data from the second two quarters of 2017 and the whole of 2018.

22. Mr Taverner does not suggest that the trial date is at risk. He stresses, however, that that is in large measure because Essex is extremely anxious to keep the trial date and that accordingly it will devote the necessary resources to deal with the re-amendments.

23. The mere fact that the trial date is not in jeopardy is not decisive. While Mr Stewart observes that Essex has instructed a large and highly experienced legal team, it has deployed the resources that it considers necessary in order properly to prepare and present its case at trial. A case of this size requires significant and intensive preparation in the weeks before trial and Essex is entitled to expect to be able to devote its efforts to that end, rather than find itself diverted from its own case preparation in dancing to UBB's tune in meeting late amendments.

24. It is, however, significant that there is no suggestion that these re-amendments put the trial date at risk or require further disclosure. In addition, for the most part, these re-amendments do not require any further evidence to be filed. It is also important to keep in mind that, while the draft has passed through a number of iterations, the text of the re-amendments was substantially provided to the council on 11 October 2018.

RULINGS UPON THE INDIVIDUAL RE-AMENDMENTS

(1) UNNECESSARY RE-AMENDMENTS

25. The statements of case in this litigation are unusually long and complex. Net of cover pages, indices and appendices, the Amended Particulars of Claim run to 63 pages, the Amended Defence and Counterclaim to 75 pages and the Amended Reply and Defence to Counterclaim to 76 pages. The draft Re-Amended Defence and Counterclaim is a 91-page document.

26. In my judgment, such prolixity risks losing sight of the purpose of statements of case. Lord Woolf MR observed in McPhilemy v. Times Newspapers Ltd [1999] 3 All E.R. 775, at page 793A, that statements of case are required to "mark out the parameters of the case that is being advanced by each party." A statement of case should identify the issues and the extent of the dispute between the parties, making clear the general nature of the case being advanced, but the exchange of witness statements should avoid the need for extensive detail. Prolixity risks obscuring rather than clarifying the issues in a case: McPhilemy, per Lord Woolf MR at page 793C.

27. In Tchenguiz v. Grant Thornton UK LLP [2015] EWHC 405 (Comm), [2015] 1 All E.R. (Comm) 961, Leggatt J, as he then was, observed, at [1]:

> "Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial."

28. The usual expectation is that parties should be able to plead their cases in no more than 25 pages. Paragraph 1.4 of Practice Direction 16 provides that if "exceptionally" a statement of case exceeds 25 pages, an appropriate short summary should also be filed and served. While the Practice Direction does not say never, it is plainly intended to discourage parties from filing longer statements of case. One might think that the 25-page rule would be most often flouted in complex multi-million-pound commercial litigation. The Commercial Court Guide, however, draws attention to the usual limit and requires parties to seek permission before filing a statement of case in excess of 25 pages in length. Although there is no similar procedure in the TCC, that does not give pleaders carte blanche to file prolix statements of case in this court.

29. In this case, I accept that even the most economical draftsman would struggle to plead this case in the usual 25 pages. I should also record that the parties have complied with the obligation under the Practice Direction to file short summaries of their statements of case. Further, no doubt conscious of the length of its own statements of case, Essex did not attack the draft re-amended pleading on the grounds of prolixity. Nevertheless, the statements of case on both sides are, in my judgment, longer than they should be and the expedient of filing a summary does not excuse ever increasing lengths of statements of case.

30. In this particular case, it is too late to do anything about this state of affairs. The case is

shortly to be tried and it would be a waste of resources that could be better employed in trial preparation to require the service of more concise statements of case. That said, it is particularly appropriate in view of the length and complexity of the statements of case and the very short time to trial that I should be vigilant on this application to ensure that the Re-Amended Defence and Counterclaim is not needlessly lengthened by unnecessary re-amendments. Accordingly, I disallow proposed re-amendments which are not necessary to advance UBB's defence or counterclaim in these proceedings.

31. Self-evidently taking this course cannot prejudice UBB. On the other hand, allowing unnecessary re-amendments might well prejudice both Essex and the administration of justice:

    31.1 Essex would suffer prejudice in having to consider and investigate these re-amendments in the limited time before trial.

    31.2 Despite my view that particular re-amendments are not necessary, Essex could not be criticised for wanting to respond to any re-amendments that are allowed. Indeed, Mr Taverner indicated in the course of his submissions that Essex intended to take precisely that course. Essex would therefore suffer some further prejudice in being diverted from more important trial preparation to responding to the unnecessary particulars.

    31.3 Further, the administration of justice would be prejudiced by adding needless complexity to the statements of case and by the introduction of unnecessary issues at trial. I accept Mr Taverner's submission that allowing such re-amendments would introduce swathes of material to both the Defence and Counterclaim and the Reply and Defence to Counterclaim with no tangible benefit.

32. The re-amendments that are disallowed on the grounds of necessity fall into five broad categories:

    32.1 <u>Motive:</u>

        a) A number of proposed re-amendments seek to plead out Essex's alleged motive for seeking to terminate the contract. It is alleged that the council's desire to terminate the contract has "nothing to do with the performance of the facility" but that it is instead "attributable to the realisation that the procurement of the facility was a fundamental mistake" in that there was no realistic economic case for the facility. It is said that Essex has been "determined" to terminate the contract from at least the end of 2015 and that it has not therefore been prepared to contemplate any steps or alterations which would allow the contract to operate for its full term.

        b) In my judgment, it is unnecessary to plead out motive. It was rightly common ground before me that this is an issue that can be explored in cross-examination. Proof of a motive for seeking termination might be evidence to support UBB's argument that the authority was not acting in good faith. The key allegation in such event remains, however, that there was a lack of good faith.

        c) Accordingly, I disallow the proposed re-amendments to paragraphs 2A, 11(9), 15A, 21A, 23, 63A, 126A and 159 in so far as they seek to plead motive. The

re-amendment to the last sentence of paragraph 4A will be limited to "The Authority did so in breach of contract."

d) Further, in so far as the additional plea at paragraph 15C that Essex has not been acting in good faith is parasitic on the disallowed text at paragraph 15A, it is likewise disallowed.

32.2 Pleading evidence: There is no requirement to plead evidence or to provide a commentary upon documents disclosed in the proceedings. UBB can cross-examine witnesses and make submissions upon these documents. I therefore disallow the proposed re-amendments to paragraphs 2A, 11(4), 15A, 23, 63A, 83A, 103, 126A, 129 and 139A in so far as they seek to plead out documents.

32.3 Authority Default: The Re-Amended Defence and Counterclaim seeks to plead a new case that Essex's alleged breaches of contract amounted to an Authority Default thereby giving UBB a time-limited right of termination. This new case, however, leads nowhere since there is no suggestion that UBB exercised any such right of termination. Further, no relief is sought in respect of the alleged Authority Default. I therefore disallow the proposed re-amendments at paragraphs 65A, 78J, 113A, 126B and 151A.

32.4 DEFRA:

a) As originally formulated, the re-amendments sought to introduce a new case against the Department for the Environment, Food and Rural Affairs (DEFRA). At paragraphs 15B-15C, it was to be pleaded that DEFRA was not itself acting in good faith and that it was "driving" the litigation. On reflection, UBB rightly resiled from this position.

b) The final formulation of paragraph 15B pleads that DEFRA "supported" Essex's decision to terminate the contract and that it appears to be funding the litigation. By a very late reformulation of paragraph 15C provided just one clear business day before this application came on for hearing, UBB drops the allegation that DEFRA had not acted in good faith, but seeks to plead:

> "If the Authority's desire to terminate the Contract and/or its breaches of the Contract set out below have been driven or affected by DEFRA, whether purportedly pursuant to the terms of the credit letter or otherwise, that does not excuse any breaches by the Authority. In particular, given the Authority asserts that it shares a common interest with DEFRA, if DEFRA has caused and/or contributed to the Authority's breach of the implied terms in paragraph 37 below, then DEFRA would also have acted in breach of the credit letter and the Authority should not have taken such breaches into account."

c) In my judgment, none of this needs to be pleaded. If thought relevant then UBB can cross-examine witnesses upon the question of DEFRA's support for termination, or the suggestion that DEFRA "drove or affected" Essex's desire to terminate. Further, as I understand its case, Essex does not seek to excuse any alleged breach on the basis of DEFRA's views. If it does at trial, then it would be open to UBB to argue that, as a matter of law, DEFRA's opinion of the matter does not excuse any breach of contract that may be proved against Essex. Again, such contention does not need to be pleaded.

d) DEFRA's alleged actions in "causing or contributing to" Essex's alleged breaches of contract and in acting in breach of a credit letter are not in point. These are late allegations against a non-party that lead nowhere.

e) I therefore disallow the proposed re-amendments at paragraphs 15B and 15C. In so far as the additional plea at paragraph 15C that Essex has not been acting in good faith is parasitic on the disallowed text at paragraph 15B, it is likewise disallowed. Further, I disallow the re-amendment at paragraph 139A in so far as it seeks to plead DEFRA's strategy.

32.5 Miscellaneous:

a) I also disallow on the grounds of necessity the proposed re-amendments at paragraph 11(8) (that Essex should always have appreciated that the facility was not economically viable but that it has been "unwilling to admit" this and has found it "politically expedient to seek to place the blame elsewhere") and at paragraph 25 (that Essex calculated the likely effect of its action). Like motive, these issues can be explored in cross-examination but do not need to be pleaded.

b) I have already disallowed the additional plea at paragraph 15C that Essex has not been acting in good faith in so far as it is parasitic on the disallowed text at paragraphs 15A-15B. Otherwise, it introduces no new case and need not repeat the case already pleaded on good faith.

c) Mr Stewart confirmed in his submissions that paragraph 21A was not intended to introduce a new allegation of want of good faith. Accordingly, I disallow such re-amendment as unnecessary repetition of the case that has already been pleaded. Such course also heads off Mr Taverner's concerns that UBB might be seeking to advance a further case by this re-amendment.

d) Paragraph 78H is an unnecessary statement of UBB's apparent intent to make yet further amendments to its Defence and Counterclaim. It is disallowed.

e) The proposed re-amendment at paragraph 84 is an unnecessary refinement of UBB's case. Its allegation of breach of contract has already been pleaded and this re-amendment is disallowed.

(2) GOOD FAITH RE-AMENDMENTS

33. UBB pleaded at paragraph 37 of its original Defence and Counterclaim:

"(1) The Authority and UBB will co-operate with each other in good faith in order to seek to further the commercial purpose of the Contract over the period of its life;

(2) The Authority must exercise any discretion granted to it under the Contract in good faith and not arbitrarily or capriciously;

(3) The Authority and UBB will co-operate during any contractual review procedures (including, but not limited to, the Options Review process);

(4) Proposed changes to the Facility, method statements and Performance Requirements will be considered by the Authority in good faith and consent to any such changes will not be unreasonably refused;

(5) The Authority will comply with all relevant laws and regulations (including, for the avoidance of doubt, legislation relating to the disposal of waste); and

(6) The Authority will not obstruct and/or prevent UBB's performance of its contractual obligations."

34. Seven instances of breach of these implied terms were originally pleaded:

34.1 Paragraphs 23-24:

a) At paragraph 23, UBB pleaded that Essex had sought to prevent the facility from passing the Acceptance Tests and sought to "find reasons" to terminate the contract at UBB's expense. It was then asserted that Essex had "ceased to act in accordance with its contractual obligations, co-operate with UBB and/or deal with UBB in good faith."

b) There then followed, at paragraph 24, eight particulars as to how it was said that Essex had acted. None expressly referred to good faith but Mr Stewart submits that the plain reading of paragraphs 23-24 taken together is that UBB was asserting that these were all things that the council had done other than in good faith.

34.2 Paragraph 65: UBB pleaded that Essex "acted unreasonably, capriciously and/or in breach of the duty to co-operate in good faith and/or the duty not to obstruct contractual performance" in refusing to consent to proposed changes to the operation of the facility to implement the QSRF Line.

34.3 Paragraph 76: UBB pleaded that Essex acted in further breach of the duty of good faith in refusing its consent to UBB's application to vary the environmental permit to allow the operation of the QSRF line.

34.4 Paragraph 119: While not specifying a breach of any duty of good faith, UBB pleaded at paragraph 119 that Essex was in breach of the implied terms at paragraphs 37 and 85(9) in its alleged failure to make contractually compliant proposals at the Options Review. Paragraph 85(9) pleaded a discrete implied term to co-operate in an Options Review but did not refer to good faith.

34.5 Paragraph 120(2): UBB pleaded that Essex failed to co-operate reasonably in an Options Review in breach of the implied terms at paragraphs 37 and 85(9).

34.6 Paragraph 126: UBB pleaded that Essex was in breach of "implied terms to co-operate" by failing to instruct an Authority Change to effect the changes proposed by UBB.

34.7 Paragraph 227: UBB pleaded that, had Essex acted in accordance with its obligation to co-operate in good faith, it would have agreed either to replace or remove the BMc test from the Acceptance Tests.

35. Ignoring paragraphs 15C and 21A (which I have already disallowed), UBB now seeks to expand its case on good faith at paragraphs 21, 24(5), 24(6A), 24(9), 67A, 78I and 139A of the Re-Amended Defence and Counterclaim. Mr Taverner submits that the original allegations of bad faith were "obviously wrong" but that they were "manageable." The new allegations are, he submits, wide ranging, "seriously badly pleaded" and unsupported by cogent evidence.

36. The thrust of Mr Taverner's complaint is that UBB has always failed properly to plead bad faith. He submits that an obligation of good faith cannot exist in a vacuum and that it must be attached to the performance of a contractual obligation or the exercise of a contractual discretion. Further he points to the common law's reluctance to imply general obligations to act in good faith in commercial contracts. Plainly, proper consideration of these issues requires analysis of the interesting judgment of Leggatt J, as he then was, in Yam Seng v. International Trade [2013] EWHC 111 (QB). Further, I shall no doubt have to consider cases such as Abu Dhabi National Tanker Co. v. Product Star Shipping Ltd [1993] 1 Lloyd's Rep. 397 and Braganza v. BP Shipping [2015] UKSC 17, [2015] 1 W.L.R. 1661, in respect of the implied limitations on the exercise of contractual discretion.

37. Mr Taverner skilfully developed his submission by reference to Moore-Bick LJ's well-made note of caution in MSC Mediterranean Shipping Co. SA v. Cottonex Anstalt [2016] EWCA Civ 789, at [45], that there is a real danger that a general principle of good faith "would be invoked as often to undermine as to support the terms in which the parties have reached agreement." Further, he referred me to Jackson LJ's judgment in Mid Essex Hospital Services Trust v. Compass Group Trust [2013] EWCA Civ 200, to Richard Salter QC's careful analysis of the authorities in Monde Petroleum SA v. Westernzagros Ltd [2016] EWHC 1472 (Comm), at [242]-[274], to Sir Rupert Jackson's extra-judicial January 2018 paper "Does good faith have any role in construction contracts?" and to Leggatt LJ's more recent decision in Al Neyahan v. Kent [2018] EWHC 333 (Comm).

38. Although Mr Taverner addressed me with some care upon the authorities, this application to re-amend the Defence and Counterclaim is not, in my judgment, the appropriate vehicle for a full consideration of either the existence or scope of the duties of good faith in this contract or questions of breach:

    38.1 First, the re-amendments do not plead a new formulation as to the implied terms but only additional allegations of breach. No requests for further information were made in respect of the original formulation of UBB's case. Furthermore, Essex did not apply to strike out the alleged implied terms or UBB's original case as to breach; nor did it seek summary judgment on these issues.

    38.2 Secondly, whatever decision I take on this application, issues as to the existence, scope and breach of any obligations of good faith already arise on the existing statements of case and will have to be determined at trial.

    38.3 Thirdly, while amendments should not be allowed where they are liable to be struck out or where summary judgment would be given against the amended case, this is a low threshold for the applicant to overcome. It is quite impossible for me to say on this application that UBB's case on the existence, scope or breach of the implied terms is hopeless.

    38.4 As to the existence and scope of any terms:

        a) I have been provided with extracts from the contractual documentation running to over 2,000 pages spanning five lever-arch files. Those were just five of nineteen lever-arch files provided to me on this 1½-day application. It has of course been impossible to gain anything other than a superficial understanding of the contract in the time available to me.

        b) In any event, the question of the existence and scope of implied duties of good faith is, at least on one view, a developing area of law. Accordingly, even

if it were possible to do so, it would be inappropriate to seek to resolve such issues on an amendment application.

38.5 As to the question of breach, it is equally impossible for the court to take a clear view in either direction at this interlocutory stage.

39. I turn therefore to consider the new allegations of bad faith. For the reasons already given, the re-amendments at paragraphs 15C and 21A are not allowed. In my judgment, the balance of injustice favours allowing each of the other re-amendments to plead additional allegations of lack of good faith:

39.1 Refusing these re-amendments would prejudice UBB in that it would not be able to bring forward its full case on breach.

39.2 Allowing the re-amendments will cause some prejudice to Essex in that it will now have to respond to additional allegations of breach of the alleged implied terms. That said, the balance comes down in favour of allowing the amendments:

a) First, the re-amendments do not seek to plead new implied terms.

b) Secondly, for the most part, the allegations do not involve new facts but rather a new case that matters that have already been pleaded as breaches of contract were also breaches of an implied duty of good faith.

c) Thirdly, Essex has had notice of these re-amendments since 11 October 2018.

d) Fourthly, while not decisive, Essex initially indicated that it would not object to most of the additional re-amendments in respect of allegations of bad faith. Such indication was conditional and I do not suggest that the council is bound by it. Indeed, it was entitled to take a harder line upon UBB failing to respond to its observations last autumn and in view of its delay until 22 January 2019 in making this application. Nevertheless, the council's first response indicates that it did not anticipate any significant difficulty in responding to the new case. It is therefore illuminating in terms of assessing the balance of injustice.

e) Fifthly, disclosure has already been given upon the underlying factual allegations.

f) Sixthly, UBB does not seek permission to file further evidence addressing its re-amendments but relies on the evidence already exchanged.

40. I turn then to consider each re-amendment in respect of the allegations of breach of the alleged duty of good faith. It is convenient also to deal with a limited number of associated re-amendments at the same time:

40.1 <u>Paragraph 21:</u>

a) UBB had always pleaded that Essex had wrongfully failed to participate unconditionally in an Options Review and that, when required to participate under a reservation of rights by an adjudication decision, it had failed to put forward contractually compliant options and had improperly instructed an Authority Change. By re-amendment, UBB seeks to plead that in so acting Essex was in breach of its duty of good faith.

b) I allow this amendment which neither involves a new term nor new facts but simply a new case that an already pleaded breach (namely the failure to

participate properly in the Options Review) was also a breach of the implied duty of good faith.

40.2 Paragraph 24(5): UBB had always pleaded that the council's alleged failure to participate promptly or at all in an Options Review was a breach of contract. It now seeks to add an allegation that such breach was a failure to act in good faith. For the same reasons, I allow this re-amendment.

40.3 Paragraph 24(6A):

a) UBB has always alleged that it reached agreement with Essex to allow mostly non-biodegradable bulky waste to bypass the biohalls. Such bulky waste was shredded, metals were removed and the remaining material was designated solid recovered fuel (SRF). In order to distinguish between SRF produced from the bulky waste and that produced after passing through the biohalls, the former was known as quick SRF, or QSRF. Accordingly, the QSRF Line was the new line added to the facility which allowed bulky waste to bypass the biohalls.

b) UBB pleaded from the outset that the introduction of the QSRF Line was agreed. It then pleaded, at paragraph 24(2), that Essex later raised "wholly unmeritorious objections" to the operation of the line.

c) The new paragraph 24(6A) addresses events that post-date the Amended Defence and Counterclaim, namely that Essex raised an objection with the planning authority that the operation of the QSRF Line put the facility in breach of its planning consent and that it sought to persuade the authority to stop the use of the line despite having previously approved its operation. In my judgment, UBB should be allowed to update its statement of case to plead these further events and to seek to make out a case that Essex was thereby in further breach of contract. I am strengthened in this view by the fact that Essex initially indicated its conditional agreement both to this re-amendment and to the associated re-amendment at paragraph 78I. I therefore allow this re-amendment.

40.4 Paragraph 24(9): UBB seeks to add a final particular to paragraph 24 that Essex "failed to act in accordance with the obligation of good faith." I allow this amendment on terms that the pleader prefaces this allegation with the words "in the premises set out above," thereby confining this plea to the particulars already given in paragraph 24. It was arguably implicit on a proper reading of paragraphs 23-24 of the Amended Defence and Counterclaim but is now made explicit. In any event, it does not plead a new term or new facts, but simply that alleged breaches already pleaded were also a breach of the implied duty of good faith.

40.5 Paragraph 67A:

a) UBB had already pleaded that (1) Essex had acted "unreasonably, capriciously and/or in breach of the duty to co-operate in good faith and/or the duty not to obstruct contractual performance" in refusing to consent to proposed changes (paragraph 65); and (2) Essex had "wrongfully" refused to accept necessary revisions to the method statements (paragraph 67).

b) Essex has agreed a re-amendment to paragraph 67A allowing UBB to add that the council's failure to amend a method statement rendered it impossible to pass the throughput test and distorted the recovery test. In addition, UBB seeks to plead that the council's refusal to amend the method statement was

"capricious, irrational, in breach of the duty to co-operate in good faith and/or a decision made for an improper purpose (namely to allow the Authority to terminate the Contract)."

c) It is not, in my judgment, a significant addition to plead that such refusal was itself a breach of the implied terms. Again, it involves no new term or facts. I therefore indicated on 4 March 2019 that I was minded to allow the further amendment to paragraph 67A provided that it could be properly particularised in short order. Accordingly, I directed that UBB should file and serve a further draft of paragraph 67A by 6pm on 8 March 2019 particularising (1) the date of the alleged refusal decision; and (2) any document containing or evidencing such refusal decision. I then set a brief timetable for further submissions. In the event, Essex accepted that the further particulars filed in accordance with my directions were adequate. I therefore confirm that the re-amendment at paragraph 67A as further particularised is allowed.

40.6 Paragraphs 78B, 78F, 78G and 78I:

a) Essex accepts that UBB can properly re-amend to plead, at paragraph 78C of the draft, the planning authority's decision that the QSRF Line was operated in breach of planning consent. It was right to make this concession given that such decision was made on 26 January 2018 after the service of the Amended Defence and Counterclaim. Further, as explained above, I have allowed UBB to plead at the new paragraph 24(6A) that Essex raised an objection with the planning authority that the operation of the QSRF Line put the facility in breach of its planning consent and that it sought to persuade the authority to stop the use of the line despite having previously approved its operation.

b) UBB now seeks to plead that Essex sought to bring improper pressure to bear on the planning authority to investigate the operation of the QSRF Line and to seek to stop its operation (paragraphs 78B, 78F and 78G), and that the council thereby acted in breach of the implied duties of co-operation and to act in good faith (paragraph 78I).

c) These are new and serious allegations against a public authority. Refusing permission for these re-amendments would cause prejudice to UBB in that it would not be able to bring forward its full case at trial. Equally, I accept that their late introduction will cause some prejudice to Essex as it seeks to respond. That said, the allegations arise from post-pleading events and from disclosure. I accept that they could not reasonably have been pleaded in the Amended Defence and Counterclaim. Further, the point is reasonably self-contained and Essex does not suggest that it cannot be addressed in time for trial.

d) While not decisive, Essex has had notice of this new issue since first receiving the draft on 11 October 2018 and initially indicated its conditional agreement to the important allegation at paragraph 78I. That is an indication that Essex then considered that it would be able to respond to this allegation and it has, no doubt, already investigated the matter.

e) I therefore allow each of these re-amendments.

40.7 Paragraphs 139A & 141:

a) Complaint was already made about the Authority Change Notice issued on 4 May 2017. By the new paragraph 139A, UBB seeks to plead that such notice

was not proposed in good faith. This allegation is linked to the case already pleaded at paragraph 119 (that Essex's alleged failure to participate in a contractually compliant Options Review was a breach of the implied terms) and at paragraph 126 (that the council's failure to instruct an Authority Change Notice to effect the changes proposed by UBB was a breach of the implied terms to co-operate).

b) I allow this re-amendment at paragraph 139A which neither involves a new term nor new facts but simply a new case that an already pleaded breach was also a breach of the implied terms. Equally, I allow the re-amendment at paragraph 141 which refers back to the new allegation at paragraph 139A.

(3) MISCELLANEOUS RE-AMENDMENTS

41. Finally, I address a number of miscellaneous further re-amendments:

41.1 Paragraph 4A:

a) As already indicated above, the last sentence of this re-amendment (which was the only part of it in issue before me) will be allowed subject to disallowing the reference to the council's alleged purpose. Accordingly, the re-amendment will simply read "The Authority did so in breach of contract."

b) While arguably unnecessary, I allow this amendment in order to include within the summary section of the statement of case the allegation of breach already pleaded at paragraph 227.

41.2 Paragraphs 8, 10, 11, 12, 13 & 15:

a) These re-amendments seek to re-amend UBB's case both as to how and the time at which the economic and political case for the facility changed. The question of a changed economic and political case was always pleaded and has been explored in the witness statements.

b) While not decisive, Essex conditionally agreed to the proposed re-amendments at paragraphs 13 and 15 last October. These re-amendments will not cause Essex particular difficulty and the balance of injustice comes down in favour of allowing UBB to plead its true case. I therefore allow each of these re-amendments.

41.3 Paragraphs 26(1A), 112, 126 and 152(2):

a) UBB pleads that, had Essex acted carried out a proper Options Review, it would have (1) agreed to UBB's 23 December 2016 proposals (paragraph 26(1)); and (2) accepted that the facility passed the proposed Quasi Acceptance Tests (paragraph 26(2)).

b) By its proposed re-amendments at paragraphs 26(1A), 112, 126 and 152(2), UBB seeks to plead a middle ground that, in the event that it fails to establish its primary case, Essex should have (1) agreed to a reduction in the performance standards; and/or (2) removed the requirement that the facility should pass the BMW reduction test or approved a change to the LOI test.

c) This is not a substantial change and the issue has been extensively covered by the lay and expert evidence. In my judgment, UBB might well suffer prejudice in being unable to run such alternative case in the event that it fails to establish

its primary position. Given (1) that Essex has had notice of this new case since last October; (2) that significant expert and lay evidence has already been filed on these issues; and (3) the council's acceptance that it can meet this new case at trial without the need for an adjournment, I consider that the balance of injustice favours the applicant and I allow these re-amendments.

41.4 Paragraph 29:

a) UBB pleads at paragraph 29 that the council's alleged breaches of contract give rise to a number of Compensation Events. It seeks to re-amend to plead that such breaches have also given rise to Relief Events.

b) This is a modest refinement. It does not involve further evidence but simply legal argument as to whether certain alleged facts do or do not constitute a Relief Event. Further, Essex has had notice of it since last October and was initially content to give its conditional agreement for this re-amendment. Accordingly, I am satisfied that Essex can meet this new case without significant additional work and I allow this re-amendment.

41.5 Paragraphs 149A, 155A, 155B, 155C, 155D and 254(10A):

a) UBB's primary case is that the Authority Change Notice was invalid. By these re-amendments, UBB seeks to plead an alternative case lest the court finds that the notice is valid. At the new paragraph 149A, UBB pleads that, if the notice is valid, it would be entitled to the Estimated Change in Project Costs. It then seeks to add, at paragraph 155A, that changes to the contract would be required in respect of the maximum design capacity, the throughput acceptance test and the time allowed for completion of the Acceptance Tests. It pleads the heads of cost allegedly recoverable in this scenario at paragraph 155B and pleads more fully its position as to the recoverability of delay costs at paragraphs 155C and 155D. All of this leads finally to the claim for declaratory relief as to UBB's alleged entitlement to recover such costs at paragraph 254(10A).

b) The council's own clear preference is that UBB's case at paragraph 155A should be dealt with in this litigation provided that it can be properly particularised. It has no desire to see a second action on the issue or to chance its arm at an argument that any such subsequent litigation would be an abuse of process. I am satisfied that the parties are familiar with the arguments on this issue since they have already been ventilated in adjudication proceedings. Further, Essex does not suggest that it needs an adjournment in order to meet this case.

c) In these circumstances, I indicated on 4 March 2019 that I was minded to allow the re-amendment at paragraph 155A provided that proper particulars were given as to the alleged reduction in capacity, the required change to the throughput test and the length of the extension of time contended for. I again set a brief timetable for further submissions but, in the event, Essex accepted that the further particulars filed in accordance with my directions were adequate. I therefore confirm that the re-amendment at paragraph 155A as further particularised is allowed.

d) The amendments at paragraphs 155B and 155C lead to the claim for declaratory relief at paragraph 254(10A). Mr Taverner objects that declaratory relief is inappropriate. That, however, is a legal argument that can be properly made at trial. Accordingly, I allow these further re-amendments.

e) Mr Taverner sought to demonstrate that the plea at paragraph 155D that there was a Relief Event is obviously bad. He expressed his confidence that he could develop such argument quickly. He may be right in his argument, but I do not consider that I am in a position to rule upon the point with an incomplete understanding of this complex contract. His argument can be made just as succinctly at trial and there will accordingly be no prejudice in putting over this point of law to trial. Accordingly, I allow the re-amendment at paragraph 155D.

41.6 Paragraph 241(1): I allow this modest amendment which flows from the case already pleaded about UBB's proposed design changes.

41.7 Paragraphs 254(3A), (3B) and (3C):

a) These re-amendments seek to plead three further declarations that will be sought at trial. I accept Mr Taverner's submission that declarations as to rights should be tightly drawn. The new declarations pleaded at paragraphs 254(3A) and (3B) are as to findings of fact that I will no doubt be invited to make. They are not, in my judgment, proper declarations as to the parties' contractual rights and I disallow them.

b) By contrast, I allow the re-amendment at paragraph 254(3C) which seeks a declaration as to an alleged breach of contract which flows directly from amendments that I have allowed to paragraph 4A.