

Legal Briefing

Ted Lowery considers a PFI contract dispute over income sharing arrangements

Buckinghamshire Council v FCC Buckinghamshire Ltd
[2025] EWCA Civ 921

In the Court of Appeal

Before Lord Justice Newey, Lord Justice Jeremy Baker
and Sir Launcelot Henderson

Judgment delivered 18 July 2025

The facts

On 17 April 2013, the Council entered into a project agreement with FCCB for the construction and thereafter the operation over a 30-year period of an energy-from-waste plant at Greatmoor Farm near Bicester and a satellite waste transfer station at High Wycombe.

As is typical for a PFI arrangement, the Council was required to pay FCCB a monthly unitary charge during the operational period, calculated in accordance with Schedule 15 to the project agreement. Where Greatmoor Farm's design processing capacity exceeded the volume of waste that the Council was expected to deliver, the project agreement allowed for the processing of waste supplied by third parties on terms that the income thereby generated was to be shared, reflecting the Council's significant capital investment in the project. Paragraph 11 in Schedule 15 provided that 75% of any Third Party Income earned by FCCB above a certain threshold was to be credited to the Council. Third Party Income was defined in the project agreement as income received by FCCB and its affiliates for waste processing subject to the deduction of costs directly incurred in generating such income that were (a) specifically and solely related to the generation of Third Party Income and (b) over and above those costs anticipated by the project agreement base financial case but subject to proviso (c) that excluded from the deductible costs the costs of handling or processing waste supplied by third parties.

Following completion of the works at Greatmoor Farm during 2016, FCCB commenced processing the

Council's waste alongside waste supplied by several neighbouring local authorities pursuant to contracts made with FCCB affiliated companies.

During 2020 the Council commenced proceedings seeking declarations as to the meaning and effect of the project agreement. In a judgment dated 26 October 2021, O'Farrell J found that Third Party Income included income received by FCCB's affiliate companies in connection with the transport to and the treatment of waste from third parties at Greatmoor Farm.

During 2022 the Council commenced the present proceedings contending that it had not been credited its full share of Third Party Income. At first instance the judge found that income received by an FCCB affiliate under a contract with Luton Borough Council (which had not been considered by O'Farrell J in 2021) was Third Party Income and that proviso (c) encompassed only the costs of handling waste supplied by third parties within the Greatmoor Farm site.

FCCB appealed on two grounds: firstly, that the deductible directly incurred costs required a causal connection with the income generated and had been construed too narrowly by the judge. Secondly, that where the Luton BC contract pre-dated the project agreement and was a multi-service arrangement with a unitary and indivisible payment, O'Farrell J's 2021 judgment was inapplicable. The Council appealed on grounds that the judge had erred when construing proviso (c) as encompassing only the handling within the Greatmoor Farm site of waste supplied by third parties.

The issues

For the purposes of calculating Third Party Income: (i) what costs were deductible as having been directly incurred in generating such income; (ii) were the Luton BC payments to be included; and (iii) were haulage costs incurred when transporting waste supplied by third parties to Greatmoor Farm covered by proviso (c)?

The decision

Delivering the leading judgment, Lord Justice Newey dismissed FCCB's appeals. He considered that the judge at first instance had been correct to find that, for costs to be directly incurred in generating Third Party Income, there must have been some immediate relationship between the earning of the income and the relevant outlay. The key question was whether the particular

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cost could in its entirety be traced to the particular income. Upon a reasonable and objective reading of the language used in Schedule 15, the imposition of a requirement for relevant costs to have been directly incurred indicated that the parties intended a restriction: the wider causal approach advocated by FCCB would have made the word '*directly*' superfluous.

As to the Luton contract, Lord Justice Newey considered that O'Farrell J's decision was applicable: the payments made by Luton BC to FCCB's affiliate were in part attributable to waste which was ultimately delivered to Greatmoor Farm. FCCB could not escape liability by arguing that the Luton BC payments were indivisible and the proportionate tonnage calculation adopted by the judge at first instance was a simple solution that provided a fair result.

Finally, Lord Justice Newey allowed the Council's appeal vis-à-vis haulage costs on grounds that proviso (c) was expressed in general terms and said nothing about limiting the relevant costs to those incurred when handling third party waste within the Greatmoor Farm site. It followed that the first instance judge was wrong to conclude that proviso (c) did not encompass haulage costs associated with transporting such waste to Greatmoor Farm.

Commentary

Byzantine mechanisms for income and savings sharing are common to PFI contracts, likewise disputes over how these are to be applied in practice.

In this case the imprecision of Schedule 15 and the amount of money at stake (including over the remaining 20+ years of the project) have led, thus far, to two full trials in the TCC and the present appeals.

Ted Lowery
October 2025