Neutral Citation Number: **[2025] EWHC 310 (TCC)**

Case No: **HT-2024-000326**

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **6 February 2025**

Before :

His Honour Judge Stephen Davies (sitting as a High Court Judge)

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Between :

Buckinghamshire Council	**Claimant**
- and -	
FCC Buckinghamshire Limited	**Defendant**

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Justin Mort KC and John McMillan (instructed by **Sharpe Pritchard LLP**) for the **Claimant**
Fiona Parkin KC, Zulfikar Khayum, George Mcdonald and Samar Abbas Kazmi (instructed by **Pinsent Masons LLP**) for the **Defendant**

Hearing dates: **5-6 February 2025**

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APPROVED JUDGMENT NUMBER ONE
(ABUSE OF PROCESS)

His Honour Judge Stephen Davies **Thursday, 6 February 2025**
(**10:02**am)

Judgment by **HIS HONOUR JUDGE STEPHEN DAVIES**

1. This is my judgment on the defendant's application to strike out the claimant's remaining claim in contract as pleaded in amended schedule 4 to the particulars of claim on the ground that it is an abuse of process on the basis either of issue estoppel or on the basis of what is commonly referred to as Henderson abuse.

2. There are three issues: first, whether it is an issue estoppel abuse case; secondly, whether it is a Henderson abuse case; and third, whether by seeking to raise this argument the defendant is itself guilty of an abusive attempt to relitigate the same argument which it ran and lost at a previous hearing on 30 August 2024.

3. Although the third is logically a preliminary point, I propose to deal with the issues in the above order. I do not intend to cover all the same ground as counsel covered in their detailed and helpful written and oral submissions, the latter delivered during the course of yesterday's hearing. There are a number of other matters which still need to be dealt with in the second day remaining of this hearing, so that time does not permit me to do so and nor is it necessary to do so. Any interested readers will see the background to the case from the judgment which I gave on the 21 June 2024 (neutral citation [2024] EWHC 1552 (TCC)) following the trial which took place in April 2024. The parties also have the transcript of my judgment on amendment delivered at the hearing on 30 August 2024 as well as the transcripts of my judgment on the earlier application to amend and application to adjourn the trial delivered at the hearing on 13 December 2023.

4. I will thus proceed directly to deal first with the issue estoppel abuse argument. In short, the defendant contends that the claim in contract is an attempt to relitigate issues already decided as regards the proper construction of the project agreement, in particular proviso (b)[1], and the proper approach to ascertaining deductible costs.

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[1] See paragraph 96 of the June 2024 judgment.

5. The relevant principles are helpfully summarised in the recent judgment of Mr Justice Bright in *Danish Customs and Tax Administration v MCML Limited* [2024] EWHC 148 (Comm) at paragraphs 35 to 42.

6. In paragraph 35, he set out the explanation given by Lord Keith in *Arnold v National Westminster Bank Plc (No.1)* [1991] 2 AC 93, at page 105 D-E. As applied to this case, the question is whether or not the claimant is seeking to reopen, in the schedule 4 contract claim, the same issue which formed a necessary ingredient in the cause of action litigated and decided by the April 2024 trial.

7. In paragraph 37, he noted that it is a strict requirement that the issue is the same in each case. In paragraph 38, he noted that issue estoppel cannot be enlarged by evidence, inference or argument. And in paragraph 39, he noted that the issue must be one which was expressly decided or which was a necessary and fundamental part of or step in the decision in the earlier case.

8. Here, it is common ground that the construction of proviso (b) was in play and was fully argued in the April 2024 trial and decided by me in the June 2024 judgment. It is also common ground that the construction of proviso (b) will also be fully in play and fully argued in the current contract claim if it is allowed to proceed.

9. However, as Mr Mort KC submits, in the April 2024 trial the construction of proviso (b) was directly related to the fundamental issue in that trial, which was whether or not the categories of cost which the defendant had deducted from third party income were properly deductible, in that they met the four cumulative requirements of the definition of third party income (TPI), i.e. that they were directly incurred in generating the TPI in question and the defendant could demonstrate that they fell within each of the three provisos.

10. In the current contract claim the claimant accepts the correctness of that determination, including the correctness of my determination on the proper construction of proviso (b). Although at the same time it is seeking to appeal that decision to the Court of Appeal it accepts, as of course it must, that

unless and until it obtains permission and then successfully appeals that determination, it is bound by it.

11. What it argues in the current contract claim is that on this basis, even though that means that the defendant can deduct variable haulage costs incurred in hauling third party waste from other non-contract waste transfer stations to the waste treatment facility (WTF) at Greatmoor, it ought to give credit against those costs for the saved costs which were included in the payments received from the claimant under the payment mechanism base case provisions of the contract for the haulage of third party waste from the two contract waste transfer stations (WTSs) at High Heavens and Amersham (albeit in the case of the Amersham WTS, since that was never constructed such payment is made under a separate deed of variation).

12. It is the case, I accept, that a principal part of its argument in support of its case on contract interpretation current contract claim was also a principal part of its argument in support of its case on contract interpretation in relation to proviso (b) claim, namely the appeal made to the unfairness to which it says would arise if the defendant was able both to set off the costs against TPI and receive the variable haulage element of the payment it receives from the claimant.

13. However, in my judgment, simply raising the same argument as part of its case to persuade the court in relation to what is a fundamentally different issue cannot, in my judgment and on the authorities, amount to an issue estoppel.

14. That analysis disposes of the argument based on issue estoppel abuse. I therefore turn next to issue 2, Henderson abuse, observing in passing that the breadth and flexibility of Henderson abuse provides a balance to the relative narrowness and inflexibility of issue estoppel abuse.

15. In short, the defendant contends that the claim in contract involves advancing an argument in respect of its claim to recover TPI which the claimant could and should have advanced at the April 2024 trial or, in any event, prior to the handing down of the June judgment, but did not do so.

16. In the circumstances, the defendant's case is that such conduct amounts to an abuse of process. The relevant principles have, again, recently helpfully been summarised in the judgment of Coulson LJ (with whom Arnold LJ and Stuart-Smith LJ agreed, save as to minor points immaterial for present purposes) in *Outotec v MW High Tech* [2024] EWCA Civ 844 at paragraphs 53.2 to 53.8.
17. In summary: (i) as appears from paragraph 53.2, it is a broad merits-based judgment; (ii) as appears from paragraph 53.3, the burden on the defendant is to show a clear case of abuse; (iii) as appears from paragraphs 53.4 and 5, where there is a breach of the Aldi guidelines (namely, where a party who realises that he may have connected claims which are not currently pleaded, must at least raise with the court the existence of such new claims), such a breach leads to a high risk that the second action will be found to be an abuse but does not automatically mean that it will be; (iv) as appears from paragraph 53.6, the decision is not a question of discretion, but an evaluation; (v) as appears from paragraph 53.7, the court must consider the causative effect of any failure to follow the breach of the Aldi guidelines by reference to the alternative case management or other decisions which might have been made had they been followed; (vi) finally, as appears from paragraph 53.8, the court must have regard to the public interest and to the legitimate private interests of the parties.
18. I will have to deal in a little detail with the relevant chronology as relied upon by the defendant. In November 2023, the claimant produced a draft of a proposed amended particulars of claim which raised a restitution claim, which was in very similar terms to that more recently advanced in schedule 4, for which permission was given on 30 August 2024. The important difference is that in paragraph 94 of the November 2023 draft it was made clear that the restitution claim was advanced on the contingent basis that the defendant was proved right in its case that it could deduct haulage costs from the non-contract WTSs (as well such WTS operating costs) from third party income; in other words, the contingency that subsequently materialised in my judgment.
19. It the November 2023 the claimant also raised the same argument in relation to the Amersham deed of variation. What it did not do, however, at that stage was to plead this as an alternative claim in

contract as well as in restitution. That only emerged in the draft produced in August 2024 following the June 2024 judgment.

20. I need to consider why the contract claim did not emerge earlier. There is no direct evidence as to this but the defendant has, rightly in my judgment, not suggested that there is any reason to consider that the claimant deliberately kept this alternative contract claim up its sleeve until August 2024. Instead, as Mr Mort said in submissions and, whilst I note that there is no evidence about it, I am satisfied that this reflects the decision I would make had I needed to make a finding on it, that it was only on their full review of the case following the June 2024 judgment that the claimant's advisers appreciated that the claim in restitution could also – and probably more profitably - be framed in the alternative as a claim in contract.

21. Returning to the chronology, in November 2023, at the same time as the claimant applied for permission to amend, the defendant also applied to vacate the trial listed for April 2024. As I decided in my judgment of 13 December 2023 in relation to those applications, I was satisfied that the claim as pleaded could fairly be tried in April 2024 and that as regards the amendments some, but not all, could be accommodated in that trial.

22. As regards the restitution claim, I decided (at paragraphs 28 to 30) that it could not be fairly accommodated at the April 2024 on the basis that it would need to be investigated by the defendant, pleaded to, and that it might well involve further disclosure and witness evidence and, possibly, expert evidence, as well as raising a limitation issue. Accordingly, I decided to adjourn the amendment application in that respect until after the April 2024 trial, if it ever became necessary anyway, given the contingent nature of the pleading.

23. Ms Parkin KC for the defendant submitted that the contract claim could have been included in the proposed amendment at this stage. This argument raises an issue as to whether it could have been pleaded at that stage in the terms it has now been, given that it was not until January or February 2024 that the O&M model sitting behind the base case spreadsheet was disclosed by the defendant,

which made clear that the variable haulage costs within the O&M model related to haulage for the delivery of waste from the contract WTSs to Greatmoor.

24. However, I am prepared to assume that - at least in broad terms - the contract claim could have been pleaded at that point on the basis that if the court was against the claimant on its contract interpretation claim in relation to the deductible costs, this claim could have been pleaded as an alternative to the restitution claim, i.e. that on a broader interpretation of the contract the defendant was required to give credit for such element of the base costs payments made by the claimant as represented the payment for haulage from the two WTSs.

25. Ms Parkin has submitted that, if it had been pleaded at that point, there were realistically only two alternative possibilities from which the court would have selected one or the other.

26. The first is that the court would have accepted that it was a pure point of contract construction, which could have been dealt with in the April 2024 trial, so that it would have been resolved at that stage and would not now need to be the subject of a second trial. The second is that the court would have accepted that it needed investigation and evidence in the same way as the restitution claim and, hence, could not have been tried in April 2024 for the same reasons.

27. However, and crucially, she submitted that in either scenario what would have been revealed was the close connection between the existing contract claims for trial in April 2024 and the new contract claim and the close connection between the new contract claim and the restitution claim. Thus, she submits, the end result would in all probability have been an adjournment of the whole claim and, hence, the April 2024 trial.

28. It follows, she submitted, that the failure to advance this case at the time and to comply with the Aldi guidelines has, at least arguably, led to the consequence that there will now be two trials of the contract claims instead of one. On that basis, she submits, it would be unfair to allow the second claim, i.e. the current contract claim, to proceed further.

29. Persuasively though this argument was put, I am unable to accept it. To the contrary, it is clear in my judgment is that if the alternative contract claim had been pleaded at this point it would have been seen immediately, as indeed it was in August 2024, that it was very closely related to the restitution claim. That is because, like the restitution claim, it was an alternative case only arising if the claimant lost on its primary deductible costs claim, and would raise questions which were not for the April 2024 trial, such as the circumstances in which the defendant made its decisions not to use the contract WSTSs and later not to send any third party waste to Greatmoor, the proper construction of the Amersham deed of variation as well as the quantification of these claims, and also any of the defences which the defendant has chosen to run in response to these claims.

30. Thus, I regard it as overwhelmingly likely that I would have adjourned off the alternative contract claim in the same way as I did the restitution claim. As is clear from my 13 December 2024 judgment, there is no basis on which I would have allowed the amendments to derail the April 2024 trial, a consequence which the claimant was determined to avoid. Indeed, that is precisely what I have already held would have happened in my judgment on 30 August 2024, when a similar point was argued before me in relation to the discretion to permit the contract claim to be advanced.

31. A number of important consequences follow from this investigation of the chronology and my conclusions. First, as regards the Aldi guidelines, there was no failure to follow them because I am satisfied that in November and December 2023 the claimant did not appreciate that it had this further alternative contract claim or, thus, decide to conceal it from the defendant or the court. The late contract claim had simply not occurred to it at that stage. It is inconceivable that if it had occurred to it the claimant would not have included it as an alternative to its proposed restitution claim, in the same way as it did in August 2024.

32. Whilst, as I have held, it was a claim which the claimant could have discovered at the time, in fact it did not, and that failure was not altogether unreasonable given my assessment in all of the circumstances, in particular its ignorance of the O&M model spreadsheet.

33. Second, it cannot be said that even if it had been raised, or should have been raised, there is any realistic possibility that it would have made any difference. There would always have been two trials.

34. Third, whilst it may be said that, by January or February 2024, the alternative contract claim ought to have become clearer to the claimant, it is not wholly surprising that it did not, firstly because of the pressure of trial preparation at that stage, and secondly because – as I noted in my June 2024 judgment in the section addressing the base case at paragraphs 105 to 115 – it was very much due to the clear explanation given by Mr Dixon in his witness statement and at the first trial that the detail of the spreadsheets (and thus the true significance of the O&M model) became clear.

35. Fourth, in the circumstances there was no possibility of any different case management decision even if the point had been identified and an application to amend been made in the run-up to the April trial, or even, although with respect I regard this submission as farfetched, in the period between the draft judgment and the judgment being handed down as an approved judgment.

36. In the circumstances, there is no sufficient basis in my judgment for concluding that this is a Henderson abuse case by reference to an application of the relevant principles.

37. I do not consider that the position is changed because, more recently, the claimant has discontinued the restitution claim. There is no basis for considering that it was not genuinely advanced in November 2023. Although the reasons for its discontinuance are not the subject for evidence, it seems to me that the overwhelming likelihood is that the difficulties in the way of such a claim, especially when compared to the alternative contract claim, have been realised by the claimant and a sensible decision taken to concentrate on the stronger and simpler claim.

38. It follows that it cannot be said that the claimant has been guilty of oppression or harassment by running initially with the restitution claim, then adding the contract claim, and then finally discontinuing the restitution claim and running with the contract claim alone. That would only have been the case if I had felt able to conclude that there was evidence to justify a finding that this had

all been done in a cynical way to achieve, through the back door, a result which it might have thought it could not have achieved through the front door. But there is simply no evidential basis for such a conclusion, which is wholly implausible and, indeed, has not been contended for.

39. I turn finally to issue 3, the 30 August 2024 hearing. Given my rulings on issue estoppel abuse and Henderson abuse I do not, strictly speaking, need to deal with this separately, but for completeness I will do so briefly. I am relieved that this is not a decisive point, because I do not regard the position as quite so clear cut as either the claimant or the defendant has submitted to me.

40. What appears to have happened is this. In the run-up to the 30 August 2024 hearing, the defendant's solicitors wrote a letter to the claimant's solicitors, asserting that the amendment to include the contract claim should not be allowed, either because it was a variant of the contract interpretation claim rejected in the April trial in relation to proviso (b), which appears to me to be saying because the claimant had already lost on this point it was not reasonably arguable, or alternatively because it could and should have sought permission to amend to include it before the April 2024 trial.

41. The letter made reference to the case of *Kensell v Khoury* [2020] EWHC 567, although it did not explain in terms why it was said to have been relevant. That now can be seen to have been unhelpful, because the decision (of Mr Justice Zacaroli, on appeal from the County Court in central London) involved a detailed consideration of Henderson abuse as well as the discretionary power to allow or refuse an amendment, so that it might have been regarded as being said to be relevant to one, or the other, or both.

42. However, as Mr Mort submits, it seems reasonably clear that the letter writer must have been intending to refer to Henderson abuse, because one of the points decided in the *Kensell* case was that Henderson abuse could apply to allegations which could and should have been made at a previous stage of the same case, which was of course – on the defendant's analysis – the case in relation to the contract amendment.

43. The defendant's skeleton argument for the 30 August 2024 hearing made the same point but, again, not making it clear whether it was being advanced as an argument in support of refusing permission on the merits, or as a Henderson abuse basis for refusing permission, or as a reason going to the discretionary power to allow or refuse an amendment. I accept that this was only one point in a host of points raised for determination in the course of that post-judgment hearing, which was listed for one day only at the end of August 2024, so that I do not wish to be overly critical of the defendant's advisers in not being clearer at that point.

44. At the hearing itself the main focus of the objection was in relation to at the restitution claim and, in particular, the limitation issues arising in that respect. After addressing that point in oral submissions, Ms Parkin said that it was also argued by the defendant that the restitution claim was bad in law and that, if time had permitted, she would have argued that it had no real prospect of success and should not be allowed on that basis. But time did not permit and she therefore invited me to deal with the issue pragmatically by allowing the amendment subject to the limitation issue being determined and subject to the defendant's rights being preserved to apply to strike out on the merits.

45. She then turned to address the contract claim and submitted that it was too late by reference to the *Kensell* case and also that it was contrary to my previous findings in the April 2024 judgment, but again and for similar pragmatic reasons suggested for the same reason that these points could be determined at a later stage.

46. I then said that I could see that the first point (claim contrary to the previous finding) appeared to be a strike out point and could be left to the further application, whereas the second point (too late to plead now) was a discretionary point and could be argued today.

47. That, I must accept with the benefit of hindsight, was a confused and confusing observation, because, as made clear by the authorities, including *Outotec* and *Kensell*, there is a general

discretion in relation to the general power to allow or to refuse an amendment, whereas the decision in relation to Henderson abuse is not a discretion, albeit it is an evaluative decision.

48. Perhaps understandably taken by surprise by this judicial observation, Ms Parkin did not make clear that in fact the defendant would be arguing this point as a Henderson abuse point, not a discretion point, and did want to leave it over to a further application if so advised. Instead, without objection from either party, I heard brief submissions on the point, which did not expressly raise Henderson abuse, and ruled that I would allow the amendments on various grounds, including rejecting the raised too late argument.

49. The end result of this, in my view, is that it cannot be concluded with complete confidence that either of the parties or, indeed, I as the judge had made it completely clear at that hearing as to precisely what they understood was being argued and on what basis.

50. In the circumstances, I would have been reluctant to say that the failure to state in terms that Henderson abuse was not being run as an abuse point on 30 August 2024 and was agreed to be left over to a further application if so advised should have prevented the defendant from running the point at this hearing, or to refuse it if it otherwise had merit. Nonetheless, I cannot help but observe that the application itself was only made on 19 December 2024, almost four months after the hearing on 30 August of 2024, and after which considerable costs had already been run up in pleading the case by both parties.

51. But as, I say, in the end issue three is not decisive.

52. That, therefore, concludes my judgment on this limb of the application.