

ENGLAND AND WALES / JUDGMENT

BioConstruct Ltd v Grays Thurrock Properties Ltd

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Neutral Citation Number: [2025] EWHC 3143 (TCC) IN THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES KING'S BENCH DIVISION TECHNOLOGY AND CONSTRUCTION COURT Case No: HT-2023-000419 Royal Courts of Justice, Rolls Building Fetter Lane, London, EC4A 1NL Date: 28/11/2025 Before : JONATHAN ACTON DAVIS KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- ----- Between : BIOCONSTRUCT LTD
- and - GRAYS THURROCK PROPERTIES LTD Respondent/ Claimant Applicant/ Defendant
- -----
- ----- Luke Wygas (instructed by Cripps LLP) for the Applicant Gaynor Chambers (instructed by Muckle LLP) for the Respondent Hearing date: 28 October 2025
- ----- APPROVED JUDGMENT This judgment was handed down remotely at 10:30am on 28 November 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives. Jonathan Acton Davis KC: 1. 2. 3. 4. 5. 6. 7. The Applicant, Grays Thurrock Properties Ltd, is the Defendant and the Respondent, BioConstruct Ltd, is the Claimant in this litigation. I refer to the Parties throughout this Judgment as “BioConstruct” and “GTP”. The dispute concerns the construction of an anaerobic digestion plant at Court Lodge Farm, Stack Road, Horton, Kirby, Kent, DA9 4DU. BioConstruct specialises in the construction of renewable energy plants. In 2018, GTP entered into an Agreement with BioConstruct, by way of a subcontract for the construction of the plant. Once operational, the plant would produce biomethane gas and electricity through the processing of the Design Feedstock. It is GTP’s case that under the Subcontract, the Design Feedstock was to consist of certain amounts of whole plant, rye, silage, cattle manure with straw, maize silage, cattle slurry, wheat, straw, water, fermentation substrate, whey permeate and chicken droppings. The subcontract set out 14 milestones for payment. The dispute arises out of the fact that GTP has not paid Milestones 14, RR1 and RR2. GTP counterclaims the cost of remedying the alleged defects in the Plant. The Counterclaim is not relevant to the Application. The matter was commenced by a Claim Form dated 10th November 2023. The CCMC took place on 25th October 2024. The trial is set down for October 2026. This Application is a strike out application. It was issued on 1st April 2025, over 6 months after close of pleadings, and 5 months after the CCMC. 8. By the Application

Notice, GTP seek: “an Order for summary judgment and/or strike out of the majority of the Claimant’s case (as set out in the Draft Order served with this Application), for the reasons set out in the witness statement of Thomas James Bourne dated 1st April 2025.” 9. The Draft Order provides for: “the claims for declarations set out in paragraph 97 of the Particulars of Claim be struck out pursuant to CPR 3.4(2)(a) or summary judgment be entered in favour of the Defendant pursuant to CPR 24.3 in relation to the declarations set out in paragraph 97 of the Particulars of Claim and the claims for quantum in relation to Milestone 14 - Take-Over, acceptance (payment and interest) RR1 (payment and interest) and RR2 (payment and interest), as set out, inter alia, in the Quantum Appendix to the Particulars of Claim be struck out pursuant to CPR 3.4(2)(a) or summary judgment be entered in favour of the Defendant pursuant to CPR 24.3 in relation to the claims for quantum in relation to Milestone 14 - Take-Over, acceptance (payment and interest), RR1 (payment and interest) and RR2 (payment and interest), as set out, inter alia, in the Quantum Appendix to the Particulars of Claim.” 10. Paragraph 97 of the Particulars of Claim reads: “Remedies and Declarations BioConstruct is entitled to and/or claims declaration or declarations that: 97.1 A Take-Over Certificate ought to have been issued on or around 1st April 2020 and/or that the Plant was in any event taken over on that date (or such other date as the Court shall determine). 97.2 GTP’s defaults and/or acts of prevention meant that the Performance Tests could not be carried out. For the avoidance of doubt, the defaults and/or acts of prevention relied on are: 97.2.1 Ms Billings’ refusal to issue and/or re-issue a Take-Over Certificate on or around 1st April 2021, which was unreasonable and/or a breach of duty’s obligations of the provisions referred to in paragraph 63 above. 97.2.2 GTP’s refusal to pay Milestone 10 and/or Milestone 12 and/or Milestone 14 no later than 14 days before the relevant FDP for each of these Milestone. If (which is denied) BioConstruct is not entitled to the declaration sought in the proceeding sub-paragraph, a declaration that BioConstruct’s ability to deal with the Performance Test and procedures and/or COC Protocol/Snagging List was adversely affected by Force Majeure, as detailed in Section D.7.1 above. The defects liability period ended on 1st April 2021 in relation to all works other than the Tank Works, and that BioConstruct is not viable for any defects appearing or notified over the expiry of the relevant defects liability period for all works other than the Tank Works.” 97.3 97.4 11. Although the Draft Order does not mention paragraph 98, paragraph 98 of the Particulars of Claim refers to the Quantum Appendix as follows: “The claims for payment of sums due BioConstruct is entitled to and claims the sum set out in the Quantum Appendix from GTP. The total claimed is £918,480. I apprehend that those claims are the subject of the relief proposed at paragraph 2 of the Draft Order.” 12. 13. 14. Thus, it will be seen that in the Application Notice and Draft Order, GTP chose to attack the relief and not the paragraphs in the pleading which lay the groundwork for the relief. The Application Notice makes no reference to any Civil Procedural Rule as being the basis of the applications. However, the Draft Order refers to CPR 3.4(2)(a) and CPR 24.3 in the alternative. In response to my question, Counsel for GTP said that, in respect of the relief sought, he relied upon both provisions. As to CPR 3.4(2)(a), it is plain from the notes to CPR 3.4.1 that the provision covers Statements of Case which are “unreasonably vague, incoherent, vexatious or obviously ill-founded (or) which do not

amount to a legally recognisable claim or defence”. 15. 16. As to Summary Judgment under CPR 24.3, the Court must consider whether BioConstruct’s claim has a realistic prospect of success. The Court ought not to conduct a mini trial at this stage and the evidence which can reasonably be expected to be available at trial should be taken into account, as well as the evidence currently provided. The witness evidence before the Court was that of Thomas Bourne and Lucy Billings on behalf of GTP. BioConstruct’s witness evidence consisted of statements from Andreas Brocker, Andreas Stentzel, Thomas Gottheil and Kai Roth. 17. The Application is made on the following bases: (i) the Subcontract is a Milestone Contract. Clearly, therefore, if the Milestones are not achieved, no payment is due; (ii) BioConstruct’s pleaded case does not demonstrate that it has satisfied Milestone

14. Therefore, BioConstruct’s case in relation to Milestone 14 and the subsequent Milestones (namely, Milestones RR1 and RR2) should be struck out. 18. GTP relies on the following four alternative matters to demonstrate that BioConstruct’s case has no reasonable prospects of success: (i) 7th March 2020 is not “immediately preceding” 15th February 2020 as required by the Subcontract; (ii) the required “Design Feedstock” was not issued; (iii) Steady State Operation was not demonstrated; and (iv) BioConstruct has failed to provide the documentation needed for Take Over. BioConstruct commenced performance testing of the plant in 2020. Schedule 15 of the Subcontract specified the Performance Tests. In particular, the Plant must have achieved Steady State Operation for at least 18 consecutive days “immediately preceding” the commencement of Take Over Testing (paragraph 6.4.2 of Schedule 15). Take Over Testing assessed the production of biomethane against the Design Feedstock input over a continuous 48 hour period. By an email of 28th January 2020, Mr Gottheil advised Ms Billings of the commencement of the testing phase. Mr Gottheil stated that the plant was commencing “Steady State Operation and will start the Take Over Test as soon as we have finished the Steady State”. He noted that his email also constituted “notification that the Take Over Test might start shortly (earliest in 1 week according to Contract)”. BioConstruct carried out the Steady State Tests between 29th January 2020 and 15th February 2020. The plant complied with the output requirement for Steady State Operation between 29th January and 15th February 2020. GTP’s case in relation to the Steady State Tests is that BioConstruct has not demonstrated the Plant was “biologically stable”. On 18th February 2020, Mr Stentzel told Ms Billings by email that they had “completed the Performance Test and now want to start the Take Over Test”. He proposed a meeting on 25th February 2020 at the plant. On 21st February 2020, Ms Billings agreed to a meeting on 25th February 2020. High nitrogen levels were discussed at the meeting. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. On 26th February 2020, Mr Stentzel indicated that BioConstruct wished to conduct Take Over Tests on 3rd March 2020 or 4th March 2020. In the end, the Take Over Tests were not conducted on those dates. BioConstruct says that is because of issues with propane. In any event, Take Over Tests were carried out on 7th and 8th March 2020. It is GTP’s case that the test did not use the Design Feedstock as required under the Subcontract. By letter dated 1st April 2020, BioConstruct provided GTP with biological data relating to the Steady State Operations. This included biological analysis for the period 5th February 2020 to

14th February 2020. On 1st February 2020, BioConstruct asked GTP to issue a Take-Over Certificate, on the basis that testing had been successfully concluded. A signed Take-Over Certificate would have entitled BioConstruct to payment of Milestone 14 and then subsequent payments under the Subcontract. GTP declined to issue a Take-Over Certificate. BioConstruct now seeks £918,480 for the balance of payment under the Subcontract on the basis that it has achieved Milestone 14 and the subsequent Milestones. GTP's case is that Milestone 14 has not been achieved even on the case as pleaded by BioConstruct. 30. Based on the above, it can be seen that it is central to GTP's Application that: (i) the Subcontract is a Milestone Contract. Clearly, therefore, if the Milestones are not achieved, no payment is due; (ii) BioConstruct's pleaded case does not demonstrate that it has satisfied Milestone

14. Therefore, BioConstruct's case in relation to Milestone 14 and the subsequent Milestones, namely Milestones RR1 and RR2, should be struck out. 31. GTP argues four alternative ways which demonstrate that BioConstruct's case has no reasonable prospects of success: (i) 7 March 2020 is not "immediately preceding" 15 February 2020, as required by the Subcontract; (ii) the required "Design Feedstock" was not used; (iii) Steady State Operation was not demonstrated; and (iv) BioConstruct has failed to provide the documentation needed for Take Over. 32. 33. To be successful, GTP must succeed on all of those grounds. If the Court determines that one of those arguments gives BioConstruct a reasonable prospect of success, there is no ground for striking out the paragraphs in the Statement of Case which seek relief. It would be otherwise if GTP had identified particular paragraphs or sentences in the body of the Pleading which it could say were doomed to failure either under CPR 3.4(2) (a) or CPR24.2(a)(iii). In response to the Defence, BioConstruct chose to serve a Reply. It is common ground, and to the extent that it is not, the Court accepts that much, but not all, of the material and argument relied upon by BioConstruct on the 4 issues summarised at paragraph 31 above is raised for the first time in the Reply. 34. 35. The first point, therefore, taken by GTP is that BioConstruct cannot rely on the matters pleaded in the Reply to remedy its case because to the extent that they amount to causes of action, they should have been pleaded in the Particulars of Claim. In support of that proposition, GTP rely upon the decision of Pepperall J. in *Martlet Homes Ltd v Mulalley & Co Ltd* [2021] EWHC 296. In that case, at [20], Pepperall J. said: "In my judgment, the terms of r. 16.4(1)(a), the optional nature of the Reply, the rule restricting subsequent statements of case and the terms of the Practice Direction all point to the clear conclusion that any ground of claim must be pleaded in the Particulars of Claim. New claims must be added by amending the Particulars of Claim and cannot simply be pleaded by way of Reply. ... A Reply can be particularly useful in order to refute a ground of defence. For example, a Reply can properly plead) 20.1 a later date of knowledge pursuant to ss. 14 or 14A of the Limitation Act 1980, or that the court should disapply the primary limitation period pursuant to ss. 32A or 33 of the Act, in answer to a plea in the Defence that the claim is statute barred; 20.2 that an exemption or limitation clause was not incorporated into the parties' contract or that it was of no effect in excluding or limiting liability because the clause did not satisfy the condition of reasonableness within the meaning of the Unfair Contract Terms Act 1977; or 20.3 that the defendant is estopped by

some earlier judgment or representation from relying upon a particular defence. In each example, the claimant would be pleading new facts in order to refute a defence, but it would not be pleading a new claim.”

36. Mr Wygas agreed with me that it is appropriate to use a Reply for the purposes of a “Yes, but” argument. 37. 38. 39. 40. 41. Schedule 15, and in particular, paragraphs 6.4.1, with its reference to “immediately preceding” is pleaded at paragraph 51 of the Particulars of Claim. Thereafter, at paragraphs 52 – 55 of that pleading, the Chronology is recited, and at paragraph 56, compliance with Schedule 15, paragraph 6.4.1 is alleged. At paragraph 58 of the Particulars of Claim it is said that “the criteria for Take Over were therefore achieved during the Take Over Testing period”. At paragraph 3 of the Defence, it is denied that BioConstruct has complied with its contractual obligations in relation to Take Over on the ground that 15 February 2020 is not “immediately preceding 7 March 2020, amongst other grounds”. In the Reply that averment is denied at paragraph 34 “for the reasons set out in sections D6 and D7 of the Particulars of Claim and/or in the matter set out in section D6 of this Pleading”. At paragraph 6.6.1 of the Reply, it is pleaded that “immediately preceding means with all reasonable speed considering the circumstances”. 42. Thereafter various matters of fact are pleaded. 43. 44. 45. 46. 47. 48. 49. 50. 51. That interpretation of “immediately preceding” lies at the core of BioConstruct’s Response to this Application as is recorded at paragraph 84.1 of its Skeleton Argument on this Application, “immediately preceding means with all reasonable speed considering the circumstances”. In support of that interpretation, BioConstruct refer to 2 authorities, *R v Inspector of Taxes ex parte Clarke* [1974] and *In Re Coleman’s Depositories Ltd*, and *Life and Health Insurance Association* [1907] 2 KB 798 per Fletcher Moulton LJ. At p.807. BioConstruct also rely upon witness evidence in support of that interpretation. The plea in the Reply is not a new cause of action. The cause of action appears in the Particulars of Claim. The plea in the Reply is effectively argument which is responsive to the denial by GTP. It is in the nature of “Yes, but”, rather than a new cause of action. Therefore, I decide the argument based on Martlet against GTP. Further, given that the interpretation relied upon by BioConstruct is supported by authority, it is impossible to say that it has no real prospect of success within the meaning of CPR 24.3. Insofar as the Application is made under CPR 3.4(2)(a), the Court has no difficulty in discerning the nature of the claim. No defect in the pleading in the Statement of Claim can be identified, and none was suggested by GTP. The Application in respect of the meaning of “immediately preceding” is dismissed under both limbs. As to the remaining arguments, namely whether the required Design Feedstock was not used, whether Steady State Operation was not demonstrated, and that BioConstruct has failed to provide the documentation needed for Take Over, it is unnecessary for me to consider them in any detail in the light of the finding summarised above. Had I done so, my conclusions would have been that none of them constitutes a new cause of action. The cause of action is the contractual claim for money, whereas the issues relied upon by GTP for the purpose of this Application are argument relied upon by BioConstruct to support that claim for money. Those arguments give rise to issues of fact as is apparent from the witness statements and

skeleton arguments and are not apt for resolution by this Court under CPR 24.2(a)(iii). Where there are disputed matters of evidence, it cannot be said that “there is no real prospect of success”. Similarly, no defect in the prayer for relief (paragraphs 97 and

- 98) can be identified such as to justify it being struck out. The Court, therefore, dismisses this Application, whether it be considered under CPR 3.4(2)(a) or CPR 24.3. It is to be hoped that costs can be agreed, if not, I will decide the issue in the manner most convenient to the Parties.

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