



Neutral Citation Number: [2017] EWHC 1364 (TCC)

Case No: HT-2015-000336

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**TECHNOLOGY AND CONSTRUCTION COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 08/06/2017

Before :

**MRS JUSTICE O'FARRELL DBE**

Between :

- (1) ERITH HOLDINGS LIMITED  
(2) ERITH HAULAGE COMPANY LIMITED  
(3) ERITH PLANT SERVICES LIMITED

**Claimant**

- and -

**RONALD WILLIAM MURPHY**

**Defendant**

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**Patrick Clarke** (instructed by **DLA Piper UK LLP**) for the **Claimants**  
**Thomas Elias** (instructed by **Forsters LLP**) for the **Defendant**

Hearing dates: 7<sup>th</sup> February 2017, 8<sup>th</sup> February 2017, 9<sup>th</sup> February 2017  
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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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MRS JUSTICE O'FARRELL DBE

**Mrs Justice O’Farrell:**

1. The claimants (collectively referred to as “Erith”) are companies providing enabling services to the construction industry, including waste removal and haulage services.
2. In 2014, the defendant, Ronald Murphy, was the owner of a site located on the east side of Horn Link Way, Greenwich, London SE10 0RT (“the Site”), operated by his company, Murphy’s Waste Limited (“MWL”), now in liquidation, as a waste collection and transfer station.
3. The claim is for the sum of £715,053.82 due under or for breach of a contract between Erith and Mr Murphy; alternatively, as sums due under or for breach of a personal guarantee or indemnity given by Mr Murphy; alternatively, as sums due by way of restitution.
4. Erith’s case is that in August/September 2014 Mr Murphy entered into an oral agreement with Steven Darsey of Erith that Erith would supply waste clearance services for which Mr Murphy would pay or indemnify the group (“the Works Agreement”). Between November 2014 and January 2015 the parties entered into a revised agreement (“the Revised Works Agreement”) under which Erith agreed to provide further waste clearance services for which Mr Murphy would pay. Thereafter, Mr Murphy confirmed that he would be personally responsible for those costs (“the Indemnity/Guarantee”). The outstanding sum due in respect of the services is £630,053.82 plus VAT. In addition, Erith made a loan of £85,000 to Mr Murphy to meet his staff costs, to which Erith is entitled to repayment.
5. Mr Murphy disputes the claim on the basis that the Works Agreement was made between Erith and MWL; there was no agreement with Mr Murphy in his personal capacity. There was no Revised Works Agreement. There was no, or no enforceable Indemnity/Guarantee. The loan of £85,000 was made to MWL and not to Mr Murphy.

*Background Facts*

6. Erith Haulage Company Limited (“Erith Haulage”) and Erith Plant Services Limited (“Erith Plant”) are subsidiaries of Erith Holdings Limited (“Erith Holdings”). Mr Darsey is the chairman and a director of Erith Holdings, and a director and company secretary of Erith Haulage.
7. Erith and Mr Murphy have been involved in the waste disposal business for over 40 years. Mr Darsey and Mr Murphy have known each other for over 30 years.
8. In about 1978, Mr Murphy started operating his waste management business from the Site and in 1994 he purchased the freehold of the Site. By 2014, Mr Murphy, who was 70 years’ old and living in Malta, wished to sell the Site and MWL as a going concern.
9. The Site was used to manage and process inert waste and industrial waste. For this purpose, MWL held a waste management licence issued by the Environment Agency pursuant to Part II of the Environmental Protection Act 1990. Inert waste,

comprising mainly concrete and soil, could be screened, crushed and recycled by MWL to produce sub-soil. Industrial waste had to be removed and disposed of in burners or landfill sites. In early 2014, MWL became unable to send waste to its main disposal site at Corey Environmental as a result of changes to Corey's planning permission, under which industrial waste deliveries were permitted by barge but prohibited by road. MWL did not have the facility to deliver waste by barge and, therefore, industrial waste built up at the Site, exceeding the limits permitted under MWL's waste management licence.

10. In early August 2014, Mr Murphy contacted Mr Darsey to enquire whether Erith had the capacity to remove a large amount of waste from the Site. During discussions, Mr Darsey indicated that Erith would be interested in purchasing the freehold of the Site from Mr Murphy. Mr Murphy indicated that he would be interested in selling the freehold but only as a composite sale of the Site and the MWL business as a going concern. Mr Darsey was more interested in purchasing the land, rather than the business, but at a meeting on 28 August 2014, the parties agreed to explore the potential sale of both the Site and MWL to Erith.
11. Further to this meeting, John Morris of Erith visited the Site and valued MWL's plant and equipment in the sum of £200,000 to £300,000. Mr Darsey also requested details of MWL's financial position and made arrangements to obtain an independent valuation of the Site.
12. On 17 September 2014, Mr Darsey and Mr Murphy discussed further the potential sale of the Site and business. At around this time, it was agreed that Erith would carry out waste clearance works from the Site. The works started on about 16 or 17 September 2014. No price was agreed for the works but Erith estimated that the costs of clearance would be approximately £500,000, based on Mr Morris' visual assessment of the quantity of waste. It was further agreed that Erith would liaise directly with the Environment Agency to ascertain and attempt to resolve its concerns regarding the accumulation of waste on the Site.
13. On 22 October 2014, Mr Leigh Phillips of Erith sent an email to the Environment Agency, seeking a meeting:  

“We are currently investigating the acquisition of Murphy's Waste Transfer Station in Greenwich, London and would like to discuss and clarify the current and historical environmental issues with regards to the facility in question.”
14. On 23 October 2014, Mr Brian McVeigh of the Environment Agency replied to that email:  

“Yes happy to discuss the proposal with Erith Group. I have been approached by another operator locally and really only want to initiate discussions in person when a deal is certain to take place...

“Please be advised that due to issues faced with these operations over the past 16/18 months and with internal pressures on poor performing sites enforcement action is currently being considered i.e. permit suspension or revocation.”

15. On 27 October 2014 Erith submitted a written "subject to contract" sale and purchase offer to Mr Murphy in the following terms:

"Further to our recent discussions I would like to confirm the following:

- i) Erith to purchase the freehold land at Horn Link Way, Greenwich and the business known as Murphy's Waste for a consideration of 3.6 million pounds (Sterling).
- ii) Upon completion of the contract Erith is to pay 3.00 million GBP deferring the final £600,000 GBP for twelve months post completion.
- iii) Full disclosure of company matters to include but not be restricted solely to HMRC, Environment Agency, London Borough of Greenwich, HSE, Debtors, Creditors, Personnel Records and Audited Accounts.
- iv) This offer is made subject to formal valuation at the purchaser's expense.
- v) This offer shall remain open subject to the aforementioned for a period of ninety days extending to 19<sup>th</sup> January 2015.

I trust this records the context of our recent conversation and I look forward to proceeding in early course.

We are currently endeavouring to open discussions with the Environment Agency and HSE and shall report back our findings."

16. In September and October 2014, Erith Haulage carried out waste removal from the Site and submitted invoices to MWL. On 31 October 2014 MWL paid £109,507.17 in respect of those invoices. Thereafter, although the waste removal services continued, Mr Darsey decided not to issue invoices on a monthly basis because he considered that the waste removal costs could be included as part of the cost of acquisition of the Site and the business.
17. In addition to waste removal operations, from the end of October 2014, Erith permitted MWL to tip waste using Erith's account.
18. On 14 November 2014 Paul Valiant of Erith carried out a survey of the Site and prepared a stockpile layout drawing and cross sections, although it was not used to calculate the quantity of waste on site.
19. On about 19 November 2014 Colliers International UK LLP produced a valuation report in which the Site was valued at £3.5 million based on a site with vacant possession and cleared of all waste. Colliers advised that, if the Site were sold without the benefit of planning permission or the associated environmental permit for waste management, its value would be £2.6 million.

20. On 24 November 2014 Mr Darsey and Steve Martin of Erith Haulage attended a meeting with Mr McVeigh and Tania Vescovi of the Environment Agency at which the anticipated sale of the Site and MWL was discussed. Following the meeting, Mr McVeigh sent an email, identifying the Agency's concerns about excessive stockpiling of combustible waste at the Site, stating:
- “As discussed Murphy's Waste is one of the most high profile sites in the country at the minute and I am having to report on a weekly basis at the minute on the current state of play. A joint LFB/Environment Agency visit is planned in the next month or two to access fire risk.
- “As the business sale is near complete I do require ASAP from Erith an action plan in writing by the end of this week as to what they plan to do with the site/operations. I understand from our discussions that changes to the permit/s held may take a few months however actions to improve the site operations are imminent and these should be reflected in your plan.”
21. Unfortunately, following an unannounced visit on 27 November 2014, the Environment Agency considered that there was excessive combustible waste material on the Site and on 28 November 2014 MWL's waste permit was suspended.
22. On 1 December 2014, Erith produced an internal audit report on the Site which was critical of MWL's health and safety and environmental management. Leigh Phillips, the Group Environmental Manager, set out his concerns, including the following:
- “The whole facility is suffering from a near total failure of conformance to even the most basic requirements.
  - The Environment Agency have issued a number of warnings, improvement notices and resulting in prohibitions in a very short space of time, confirming that requirements to ensure the facility complies to its permits has not been achieved.
  - The Facility Manager has been cautioned under the EPA on a number of occasions by the local inspector. This does not appear to have generated any compliances at all.
  - Due to the very high levels of both inert and combustible materials being stored on site, I would deem this facility to be at a very high risk and probability of fire with little or no potential to adequately fight a fire at source...”
23. On 5 December 2014 Mr Guy Pini of HSBC sent an email to Mr Darsey in respect of the proposed purchase of the Site and waste business and set out his understanding of Erith's proposal:
- “To confirm:-
- The land is being purchased for £3m with £1.3m coming from the Pension Fund. The property is to be purchased by the Pension Fund.

- Murphy (Waste) Limited will be purchased by the Erith group for £1 with a deferred consideration of £600k ...”

24. On 8 December 2014 Ms Vicky Stokes of Erith informed Mr Pini that:

“The Pension Fund will be purchasing the land and we are yet undecided about which company will buy the company bit.

The deferred consideration will be decided 12 months after completion.”

25. From the end of November 2014 and through December 2014, waste was removed from the Site and Erith continued to liaise with the Environment Agency with a view to lifting the suspension on the permit. By letter dated 12 January 2015 the Environment Agency accepted that compliance had been achieved in respect of the conditions set out in the November 2014 notice and lifted the permit suspension.
26. On 12 January 2015 Mr Valiant of Erith carried out a further survey of the Site and prepared a revised stockpile layout drawing and cross sections. The survey showed the areas of waste but did not include a calculation of the volumes of waste on site.
27. On 13 January 2015 Mr Martin of Erith notified Mr McVeigh of the Environment Agency that Erith intended to continue with the proposed purchase of the Site and MWL.
28. In January and February 2015 Erith carried out further waste removal services, including the provision of an operated excavator, and continued to permit MWL to tip waste using Erith’s account.
29. In early 2015, Erith Haulage paid the following sums to MWL:
- i) On 15 January 2015, Erith Haulage paid £40,000 into the account of MWL.
  - ii) On 31 January 2015, Erith Haulage paid £15,000 into the account of MWL.
  - iii) On 11 February 2015, Erith Haulage paid £30,000 into the account of MWL.
30. On 21 January 2015 Mr Pini of HSBC notified Mr Darsey that the loan facility for the purchase of the land had been approved. In respect of the potential purchase of MWL, Mr Pini noted that a debenture and cross company guarantee would be required, and the bank would need to carry out due diligence.
31. In about January 2015, Erith engaged solicitors, DLA Piper UK LLP, to act on its behalf in respect of the proposed transaction and Mr Murphy engaged Forsters LLP. The solicitors entered into discussions regarding the transaction and DLA arranged for legal searches and audit reports to be carried out.
32. On 20 January 2015, DLA sent an email to Forsters, stating:

“Further to previous correspondence in relation to the above matter I can confirm that I have now received instructions to act on behalf of Erith in connection with the purchase of the above land.

“I am told that at this stage it will just be a property transaction with my client paying the sum of £3 million. There is to be no deferred consideration and any asset purchase will be dealt with separately at a later date...”

33. On 27 January 2015 Forsters sent a draft contract in respect of the proposed purchase of the Site by Erith from Mr Murphy for £3 million and on 4 February 2015 DLA provided a response by tracked changes.

34. On 6 February 2015 DLA sent the following email to Forsters:

“I have spoken to my client this morning and the position as described to me is:

1. My client is purchasing the property through their pension fund and will be using bank finance. I am told that your client is aware of this.
2. The original intention was to buy the property and the business at the same time but due to uncertainty around the liabilities sitting in the business the property transaction is to proceed straight away and my client will run the business as agent for yours for a period of time. This will allow my client to satisfy themselves in relation to the liabilities in the business prior to it being transferred and the agency arrangement is something that our clients are dealing with between themselves and are not expecting to have documented by us.
3. There will however have to be a lease in place to formalise the occupation of the business prior to completion of the transfer. This will be required by both the bank and the institutional trustee and in my opinion will need to be a contracted out lease with (depending on the length of the term) a rolling landlord break. I don't view the term as an issue and assume it will be kept short to minimise any tax implications.

Can you please take instructions in relation to this and perhaps we can discuss further later today.”

35. Erith must have discussed this proposal with the Environment Agency because on 11 February 2015, Mr McVeigh sent an email to Mr Coleshill of LFEPa, copied to Mr Martin of Erith, stating:

“Ownership at Murphy's Waste has still to be finalised; however I spoke with Steve Martin from Erith Group earlier this week who are near certain to take over operations very soon... From what I know the Murphy's Waste Ltd company will still be in place for the next 3 / 4 months and will be run by Erith Group management...”

36. On 13 February 2015 Forsters replied to DLA's email of 6 February 2015, agreeing to the proposed terms and enclosing draft heads of terms in respect of the lease. The draft heads of terms included provisions whereby the landlord (an Erith pension trustee) would assume all TUPE liabilities for the MWL employees and be liable to pay all outstanding creditors.

37. On 17 February 2015 DLA informed Forsters that Erith rejected the draft heads of terms; Erith was not prepared to take on the unknown liability to MWL’s creditors and, although it was prepared to operate the business, it was not prepared to take on liability for the MWL employees. An alternative structure was put forward, namely:
  - i) the grant of a headlease from Mr Murphy to Erith Holdings;
  - ii) the grant of a sub-lease from Erith to MWL;
  - iii) the transfer of the freehold interest in the Site from Mr Murphy to the Erith Pension Scheme;
  - iv) a management agreement whereby Erith would operate the MWL business.
38. There followed silence from Mr Murphy, despite chasing emails and a telephone call from DLA, suggesting that he was losing interest in, or had decided against, the proposed transaction.
39. Mr Martin wrote to the Environment Agency by email dated 24 February 2015, stating:

“Just to update you from my end we have not taken over the management of the site at this juncture. I await confirmation of the ownership potential and assume that legalities have not been finalised.”
40. On 5 March 2015 Mr McVeigh sent an email to Mr Martin, stating:

“Steve – can we have a chat. I am not getting good vibes coming from Murphy’s waste and am concerned.”
41. On 7 April 2015 DLA sent an email to Forsters, chasing a substantive response to Erith’s proposal and stating:

“If it is their intention to proceed then please also come back to me with a meaningful response to the property structure detailed in my email of 17 February and the requirements we discussed for the matter to proceed by corporate sale namely for your client to provide full, clear and unequivocal warranty cover in relation to third party liabilities with half the purchase price being retained to back those warranties up. As we discussed the money that is to support the warranties is to be held for a period of at least 12 months on terms which do not make it unduly difficult for my client to recover any liability that they incur.”
42. On 21 April 2015 DLA sent a further email to Forsters, stating:

“I note that I have still yet to receive a substantive response in relation to this matter.

“In the circumstances my client will have little choice but to take steps to recover the costs that are due to them from your client unless this matter can now be progressed without further delay.”



43. Forsters replied on the same day:

“I am waiting for full instruction from my client but they have noted that they are raising funds to settle the costs due to your client.”

44. On 27 April 2015 DLA sent a further chasing email to Forsters:

“Further to your email below can you please confirm whether you have yet received instructions.

“Can you also please let me know when your client expects to be in a position to pay the costs due to my client.”

45. Forsters sent an email to DLA on 27 April 2015:

“I have today received instruction that my client will not be proceeding with the sale of the property to your client.

“My client has confirmed that arrangements will be put in place to settle the costs due to your client.”

46. In summary, the parties entered into negotiations in August / September 2014 with a view to the sale and purchase of the Site and MWL. By the end of October 2014 agreement had been reached on the purchase price, subject to contract, formal valuation of the Site and due diligence in respect of MWL. Thereafter, Erith became concerned by the lack of financial information provided in respect of the business and the potential scale of MWL’s unknown liabilities. By the beginning of 2015, Erith wished to go ahead with the sale of the land as a separate transaction without any commitment to purchase MWL. Although Erith was prepared to manage MWL for a period of time, which would enable the Site to be cleared and would maintain the waste licence for the Site, it was not prepared to take on the liabilities of the business. Mr Murphy did not want to sell the land separately; he wanted to sell the land and MWL as a going concern. In particular, he wanted Erith to take on responsibility for MWL’s employees and its liabilities. The parties were unable to resolve those differences and the proposed transaction was not concluded.

*The Dispute*

47. On 29 April 2015 DLA sent a note of the sums outstanding in respect of the waste removal services and the loans, a total of £715,053.82:

**“MURPHY’S WASTE**

	Net	VAT	TOTAL
TIPPED ON OUR ACCOUNT (Veolia’s)	£290,458.28	£58,091.66	£348,549.94

MUCK AWAY (Screened Soil + General Waste)	£242,145.64	£48,429.25	£290,574.89
PLANT HIRE (debt to EPS)	£13,532.50	£2,706.50	£16,239.00
PAID DIRECTLY TO MURPHYS WASTE	£85,000.00		£85,000.00
TOTAL OWED TO ERITH			<b>£740,363.83</b>
OWED TO MURPHY'S WASTE (General Waste) Invoices 8993 + 8976 + 9016	£21,091.68	£4,218.33	£25,310.01
			<b>£715,053.82"</b>

48. By letter dated 19 May 2015, DLA informed Forsters that Erith would commence legal proceedings if the outstanding payments were not made:

“You are aware that it was our client’s original intention to purchase the shares in Murphy (Waste) Limited along with the land on the east side of Horn Lane, Greenwich, comprising of a waste transfer station from your client Ronald Murphy for a total consideration of £3.6 million. Because of uncertainties surrounding the actual and potential liabilities of the company our client subsequently decided to proceed with the land purchase only, for a total consideration of £3 million.

“In contemplation of the purchase, our client carried out site clearance works to the land at Horn Lane in the total sum of £740,363.83. This was done on the back of an assurance from your client Ronald Murphy that such costs would be reimbursed.

“Our Mark Keeling received an email of 27 April 2015 at 18:31 from you informing us that your client does not wish to proceed with the property sale. You did, however, re-confirm the assurance given by your client that they would settle the costs due to our client in respect of the site clearance works...”

49. Forsters responded by letter dated 26 June 2015:

“It is quite clear that our client is under no liability to your client. Any liability to your client that has arisen ... is a liability of Murphy’s Waste Limited. There is no legal relationship between our client and your client,

not least because all invoices from your client are addressed to Murphy's Waste Limited in clear recognition of the actual position..."

50. On 21 July 2015, MWL ceased trading and went into liquidation. The freehold of the Site was sold by Mr Murphy to Peter Norris (Haulage) Limited for £2.5 million. In the liquidation, the joint administrators obtained payments of £100,000 in respect of MWL's waste licences and £485,000 in respect of plant, machinery and vehicles.

*The Issues*

51. The parties have agreed a list of issues, of which the following are material:
- i) Was the Works Agreement made by the Erith Group with MWL or with Mr Murphy personally?  
  
As part of the consideration of the above issue:  
  
Under the proposed contract of sale of Mr Murphy's business, MWL, and the Site, was the contingency of £600,000 proposed as a contingency against sums owed by Mr Murphy or sums owed by MWL to Erith?
  - ii) Did the parties enter into a Revised Works Agreement and, if so, did it contain express or implied terms that:
    - a) in relation to the site clearance works, Erith would be paid the invoiced sums or a reasonable sum for such services;
    - b) if the sale of the Site did not proceed, Mr Murphy would be personally liable to pay the invoiced sums or a reasonable sum for the site clearance services?
  - iii) As to the alleged Indemnity / Guarantee:
    - a) Did Mr Murphy agree to be personally liable to pay Erith for the site clearance services in the event that the sale of MWL and the Site to the Erith Group did not go ahead?
    - b) Was any such agreement supported by consideration?
    - c) Was any such agreement, enforceable, as it was not made in writing?
    - d) Was there any reliance on the alleged Indemnity / Guarantee?
  - iv) Was the loan of £85,000 made by Erith to MWL or to Mr Murphy and did it fall within the scope of any indemnity / guarantee by Mr Murphy?
  - v) Did Mr Murphy's solicitors, on behalf of Mr Murphy, acknowledge and admit in correspondence with Erith's solicitors that he personally owed any, and if so what, sums to any of the Erith Group?
  - vi) Is Erith entitled to recover the sums claimed from Mr Murphy:

- a) under, or for breach of, any of the agreements;
- b) pursuant to the alleged Indemnity / Guarantee;
- c) by way of a claim for unjust enrichment?

*Evidence*

- 52. Witness statements were prepared by Mr Darsey of Erith and Mr Murphy and both witnesses gave oral evidence.
- 53. It is common ground that the agreements and/or promises the subject of the claim were not put into writing. Therefore, the court must resolve the dispute by reference to the oral evidence of the witnesses against the factual matrix that is agreed or established by the background documents.

*The Works Agreement*

- 54. It is common ground that there was an oral agreement in August / September 2014, entered into by Mr Darsey and Mr Murphy, whereby Erith would carry out waste removal from the Site for which it would be entitled to compensation.
- 55. Erith's case is that the initial agreement was made between Erith (whichever Erith company carried out the works) and Mr Murphy in his personal capacity. The oral agreement between Mr Darsey and Mr Murphy was that Erith would carry out the site clearance works and Mr Murphy would personally reimburse Erith for those works.
- 56. Erith relies on the terms of the sale and purchase proposal sent by Mr Darsey to Mr Murphy on 27 October 2014 as evidence that Mr Murphy accepted personal responsibility for payment. Although the proposal was subject to contract and the proposed transaction was never concluded, the document set out the terms the parties had discussed. Mr Murphy was the owner of the land and the business and therefore any purchase monies would be paid to him. The provision for £600,000 to be deferred for twelve months was a contingency against sums owed to Erith in respect of the waste removal services. The inclusion of such contingency in respect of sums otherwise payable to Mr Murphy indicated that Mr Murphy would be liable for such sums. If, as anticipated by the parties at that time, the sale and purchase agreement were concluded, the costs of the waste removal would be deducted from the contingency. If the transaction did not proceed, Mr Murphy would pay the sums due in respect of those services.
- 57. Mr Murphy's case is that the agreement was made by Mr Darsey, on behalf of Erith Haulage and/or Erith Plant, with Mr Murphy on behalf of MWL. He relies on the fact that all invoices were sent by Erith Haulage and Erith Plant, not to Mr Murphy, but to MWL. The invoices that were paid, up to end October 2014, were paid by MWL. The summary claim sheet sent by Erith's solicitors to Mr Murphy's solicitors on 29 April 2015 was entitled "Murphy's Waste" and set-off sums owed to MWL against the outstanding Erith invoices. Included in the MWL administration were claims by Erith Plant (for the outstanding invoice claimed in these proceedings of £16,239) and Erith Haulage (for a nominal sum of £1).

58. Mr Murphy accepts that the deferred consideration of £600,000 in the October offer reflected the contingency in respect of the cost of the waste removal services but submits that the deferred consideration was to be held against the purchase price for the business of MWL, rather than the land. Reliance is placed on the reference by Mr Pini of HSBC in his email of 5 December 2014 to the purchase of the land for £3 million and the purchase of MWL for £1 with a deferred consideration of £600,000. Also, when the transaction under negotiation was for the sale of the land without the business, the purchase price was £3 million (rather than £3.6 million, the price for the land and the business set out in the October offer).
59. Although the claim is pleaded on the basis of a direct agreement between Erith and Mr Murphy, Mr Darsey accepted in cross-examination that the initial agreement in respect of the waste clearance work was with Mr Murphy acting for MWL:
- Q. ... the agreement was with Murphy's (Waste) Limited?
- A. No, the agreement was that Ron would underwrite me being paid.
- Q. But you are saying that Ron's underwriting, that came later though, didn't it? Right at the start when
- A. Oh, right at the start, no, I agree with you.
- Q. So right at the start
- A. Right at the start it was a bought part ledger item, as I said, part of the 109 grand.
- ...
- Q. I thought you said just now, that at the start you agreed that the contract was with Murphy's Waste?
- A. It wasn't a contract. It was a request for a service, that two are completely different things.
- Q. You then supplied the invoices to Murphy's Waste?
- A. Yes.
- Q. And Murphy's Waste paid some of them.
- A. Well, yes.
60. Mr Murphy's evidence, as set out in his witness statements, was that there was never any suggestion in the August/September 2014 meetings that he would pay for the waste removal services personally. However, he admitted in cross-examination that he did not have any independent recollection of the telephone conversations with Mr Darsey following the August/September 2014 meetings.
61. In respect of the terms of the October sale and purchase proposal, Mr Murphy's evidence was that they reflected the proposed transaction on which he and Mr Darsey

shook hands and the deferred consideration of £600,000 related to the costs of the waste removal services:

Q. And the reason for that deferral was that it was envisaged that, before completing the purchase, Erith would carry out substantial clearance services that would be set-off against that deferred sum?

A. And it wasn't not substantial, it was just enough to keep the wheels turning at the operation in production. You know, you never get that - a whole site clear. It closed down.

Q. But the £600,000 was in respect of those services, wasn't it, Mr Murphy?

A. What was on site at that time in the building.

Q. If no services were carried out, you would receive £3,600,000 for the site and the business, would you not, Mr Murphy?

A. Yes.

Q. If £600,000 worth of services were carried out, you would receive £3 million for the site and the business, would you not, Mr Murphy?

A. Yes.

62. Both parties agree that there was a contract. The initial agreement in respect of the waste removal services was an informal arrangement between Mr Darsey and Mr Murphy that was not put in writing or evidenced by any contemporaneous documents. On a contractual analysis of the evidence, Mr Murphy, on behalf of MWL, agreed with Mr Darsey of Erith Holdings that one or more of its companies would carry out waste removal services from the Site in return for payment. Mr Darsey and Mr Murphy were not concerned as to which company within the Erith Group would carry out the services. In practice, the contract was performed on Erith's part by Erith Haulage and Erith Plant in carrying out the services.
63. There was no fixed scope or price for the works, although the rates appear to have been agreed. Mr Murphy questioned the appropriateness of one of the rates during cross-examination but the September and October invoices were paid without evidence of any challenge or reservation and it was not identified as part of the pleaded defence.
64. The works started in mid-September 2014 and invoices were submitted initially by Erith Haulage to MWL. The payments made at the end of October 2014 were made by MWL to Erith Haulage. Although the funds were provided by Mr Murphy, they were deposited into MWL's account and MWL paid Erith Haulage. The invoices and payments are strong evidence that both parties considered the agreement to be with MWL.
65. The October proposal does not affect the above analysis. The basis of the sales and purchase proposal, which was subject to contract, was that Erith would purchase, and Mr Murphy would sell, the Site and the business for £3.6 million. The sum of

£600,000 would be deferred and part or all of it would be set against the waste removal costs. It was in the interests of both parties to clear the Site because the land would be more valuable if the waste removal services were carried out. If the sale and purchase agreement were concluded, the formalities of invoicing for the clearance works would be immaterial because the transaction covered the land and the business, both of which were owned by Mr Murphy. Therefore, the document did not need to address the question of whether MWL or Mr Murphy would be liable for the clearance costs. On its face, it was capable of supporting either party's case. If the costs were charged directly to Mr Murphy, they could be set against the purchase price otherwise payable for the Site; if the costs were charged to MWL, they would form part of its outstanding liabilities, reducing its value, and they could be set against the purchase price otherwise payable for the company. The October document did not indicate who would pay for the services if the transaction did not proceed, or if it proceeded on different terms. The terms of the proposal did not allocate the purchase price or the deferred sum as between the Site and the business.

66. However, Mr Pini's email of 5 December 2014, which was not contradicted by Erith when received, indicated that the contingency of £600,000 would be held against the purchase price for the company and would not affect the purchase price of the land, which was £3 million. This was also reflected in the terms of the revised proposal for the sale of the land without the business in January 2015, which remained at £3 million i.e. it was not affected by any of the site clearance costs.
67. In my judgment, the Works Agreement was between Mr Darsey, acting on behalf of Erith Holdings, and Mr Murphy, acting on behalf of MWL. Mr Murphy's evidence was that he did not give a personal undertaking to pay for the waste removal services. Mr Darsey accepted in cross-examination that the initial agreement for waste removal services was with MWL. The Works Agreement was entered into by MWL and not by Mr Murphy in his personal capacity.

#### *Revised Works Agreement*

68. Erith's case is that in about November 2014 Mr Darsey offered and Mr Murphy agreed that Erith would continue to provide site clearance works up to a value of £1 million, and would continue to submit invoices for such works, but that payment would be deferred and treated as part of the purchase price and/or would become subject to an accounting between Erith and MWL which would become an Erith Group company. If the sale of the Site did not proceed, Mr Murphy would be personally liable for such costs.
69. Mr Murphy disputes that there was any such agreement.
70. In his first witness statement, at paragraphs 40-42, Mr Darsey stated:

"I ultimately took the commercial decision that I would be willing to continue to provide Site clearance works up to a value £1 million...

"This agreement was made with Mr Murphy on the understanding that whilst invoices would be submitted for these works, payment would be deferred so that if the sale of the Site and/or Company completed, the

invoices issued in respect of works undertaken by Erith Haulage and/or Erith Plant would form part of the consideration of the sale.

“This agreement was made on the further express understanding that in the event that the sale did not complete, and/or for some other reason Erith Holdings, Erith Haulage and/or Erith Plant were left out of pocket, Mr Murphy would personally reimburse us for the Site clearance services we were providing.”

71. In cross-examination, Mr Darsey was unclear as to when the Revised Works Agreement was made:

“It went up to 1 million over the phone with Ron Murphy on or around between November and January...”

As I told you, the chronology, I’m not sure, but Ron and I definitely agreed that £1 million, and I was sitting on my sofa on the phone when I did it. I’m not sure about the chronology, I’m not, honestly, but it was on or around between November and January.”

72. There were site surveys undertaken by Mr Valiant of Erith on 14 November 2014 and 12 January 2015, which might have indicated an increase in the quantity of waste at the Site. However, the surveys were not used to calculate the volume or mass of waste and Mr Darsey’s evidence was that he did not in fact rely on them in assessing the quantities of waste to be removed:

“I did not quantify those surveys, we had the dimensions but I didn’t quantify them, but it was apparent from my staff telling me that there was more volume in there, and it was accepting waste in there quicker than we and others could clear it.”

73. At the end of November 2014, it is likely that the Environment Agency’s suspension of MWL’s waste permit prompted concern on the part of Mr Darsey as to the extent of the problem at the Site. The grounds for such concern would have been confirmed by Mr Leigh’s audit report on 1 December 2014, the Environment Agency records detailing the quantities of waste removed from the Site during the suspension period and an assessment of the waste remaining thereafter. It is also likely that Mr Darsey recognised that any remaining waste on the Site would affect the value of the land, as indicated in the Colliers’ valuation report.

74. Mr Murphy accepted that the waste problem at the Site was discussed in November 2014 in his witness statements:

“I have checked Mr Darsey’s phone records which show that I phoned him on 24, 28 and 29 November 2014 for a total of 9 minutes 38 seconds. Although I now have no independent recollection of the conversations, it is highly likely, given the ongoing EA investigations, that I would have discussed these with Mr Darsey and the best way forward.”



75. Mr Murphy accepted in cross-examination that the volume of waste had increased by the end of November 2014 but denied that there was any conversation regarding site clearance works of £1 million:
- Q. ... Here the opposite happened, had it not, the volume had increased?
- A. That length of time but the volume basis, so yes.
- Q. So what happened was when revisiting the figure is that they took the £3.6 million off for the site and took away the deferred consideration element of that, so it was just £3 million for the purchase and instead of the deferred consideration of £600,000 Mr Darsey said that they would increase the site clearance that they would do up to £1 million?
- A. Not to me, no.
76. The difficulty faced by Erith in respect of the Revised Works Agreement is that, although there is evidence of general discussions regarding the waste on site, there is no reference in any of the documents to a revised estimate or any further agreement during this period. There is no reference to Erith's assessment that the quantities of waste had doubled and there is no reference to any revised estimate of the costs of removing the waste, in the sum of £1 million or any other sum. Significantly, there is no documentary evidence that Erith communicated any increase in the estimated waste removal costs, or Mr Murphy's responsibility for such costs, to any other party. On the contrary, the available documents suggest no change to the estimated waste removal costs:
- i) The sale and purchase proposal of 27 October 2014 referred to deferred consideration of £600,000, which the parties agree reflected the potential costs of the waste services.
  - ii) Mr Pini's email of 5 December 2014 referred to deferred consideration of £600,000, indicating that the estimated waste removal costs were unchanged at that stage.
  - iii) The email of 9 January 2015, sent by Mr Crabbie of Forsters to Mr Keeling of DLA, referred to the £600,000 deferred payment and attached the October proposal document.
  - iv) The email of 20 January 2015, sent by Mr Keeling to Mr Crabbie, set out the revised proposal for the sale of the land without the business for the sum of £3 million without any deferred consideration.
77. Although it is clear, from the paucity of documents in this case, that Mr Darsey and Mr Murphy conducted most of their dealings in meetings or by telephone, it is not credible that an agreed increase in the waste removal costs of up to £1 million, to be dealt with by way of deferred consideration or direct payment by Mr Murphy, would be left unrecorded and not communicated to the funders or the solicitors conducting the negotiations.

78. For the above reasons, I am not satisfied on the balance of probabilities that the parties entered into the Revised Works Agreement.

*Indemnity / Guarantee*

79. Erith's case is that at the end 2014 and/or beginning 2015, Mr Murphy gave an undertaking that if the proposed sale transaction were not completed, he would pay Erith for the waste removal services. The promise amounted to an agreement to indemnify Erith in respect of the services. The consideration for the indemnity agreement was the increased value of the cleared Site. Erith relied on the indemnity in continuing to carry out the waste removal works. Mr Murphy is liable under the terms of the indemnity for the invoiced services.

80. Mr Murphy's case is that he did not give such a promise or undertaking. In any event, any such agreement would be unenforceable (a) for want of consideration and/or (b) as a personal guarantee that was not made or recorded in writing.

81. In his first witness statement, Mr Darsey stated that Mr Murphy agreed that he would personally reimburse Erith for the site clearance works if the proposed sale did not go through:

“ I do not recall specifically the number of occasions on which Mr Murphy assured me that he would discharge the company's liabilities towards the Erith Group in the event that the Company was financially unable to do so, however I recall Mr Murphy providing these assurances on several separate occasions. I would not have continued to allow the Erith Group to perform the Site clearance works ... had I not received these personal assurances from Mr Murphy.”

82. In cross-examination, Mr Darsey stated, when asked what Mr Murphy told him:

Q. He said something along those lines, if the company couldn't pay, then he would pay?

A. Yes.

83. Mr Murphy denied that he gave an undertaking to pay the waste service costs if the proposed sale of the Site did not go ahead. In his witness statements his evidence was as follows:

“While it was certainly in Erith's interests to continue to provide site clearance services to MWL in the expectation that it would purchase the Site (and it had already built in a protection mechanism by deferring consideration of £600,000), it would have made no commercial sense at all for me to provide my own unlimited personal guarantee and indemnity to Erith when its contract was with MWL ... There is also no question that, if such an indemnity or guarantee had been agreed, I would have insisted that it should be recorded by both me and Mr Darsey in writing.”

84. In cross-examination, Mr Murphy stated:

- Q. The purchase of the site had £3 million and £600,000 deferred consideration [under] the original agreement. That changed to £3 million plus the site clearance works. If that purchase had gone through, you would not be expecting to pay for the site clearance works at all, would you? You just get your £3 million and you do not pay Erith anything for site clearance; that was the position, was it not?
- A. That was the original position, that I shook his hand on, yes.
- Q. No, if it does not go through, Erith is still entitled to be paid -
- A. - balance of that.
- Q. Yes. Now, for the avoidance of any doubt, Mr Darsey expressly raised this issue with you on the phone. I know you say in your witness statement you do not remember it, but he raised the issue: what happens if we fall out; what happens if the deal does not go through? What you said to Mr Murphy then was to confirm that position, which is you will pay him if the deal does not go through?
- A. No, it never happened ... pay the bill. I did not pay any ... and I never had an invoice come to me.

85. I accept Mr Darsey's evidence that he became concerned about the financial solvency of MWL towards the end of 2014 / beginning of 2015. At that stage, Erith stepped back from the proposed purchase of the business and turned its focus to the sale of the Site as a separate transaction. I also accept that Mr Darsey may well have asked for, and Mr Murphy may well have provided, general assurances that if the proposed transaction did not go through, Erith would get paid for the waste removal services by MWL. Mr Murphy admitted that he did not recall what was said during the telephone conversations with Mr Darsey. However, I do not accept that Mr Murphy agreed to give a personal indemnity in respect of the ongoing costs. Mr Murphy provided very substantial financial support for MWL during this period and subsequently (sums totalling £500,000 approximately in 2014 and a further £500,000 approximately in 2015). However, funds were always channelled through the company. There is no evidence of Mr Murphy paying any of MWL's debts directly or giving personal undertakings in respect of MWL's debts.
86. The agreement for the waste removal services was with MWL, all invoices were submitted to MWL and all payments were made by MWL. Therefore, any assurances as to payment for the waste removal costs made by Mr Murphy, likewise, were on behalf of MWL.
87. Therefore, I reject Erith's case that Mr Murphy agreed to indemnify Erith in respect of the waste removal costs.
88. In any event, Mr Darsey's evidence was that Mr Murphy agreed to pay those costs, if the transaction did not go through and if MWL was unable to pay the sums due. That would amount to a guarantee rather than a contract of indemnity because Mr Murphy would have secondary liability for the costs, arising on the failure by MWL to pay the sums due: *Moschi v Lep Air Services* [1973] AC 331 (HL); *Vossloh AG v Alpha*

*Trains (UK) Ltd* [2010] EWHC 2443 (Ch.) per Sir William Blackburne at Paras.22-26.

89. Any such guarantee would be supported by consideration. The terms of the Works Agreement did not impose any obligation on Erith to remove any specific quantity or type of waste from the Site. The pleaded case, admitted by Mr Murphy, was that Erith would commence the site clearance works to alleviate the concerns of the Environment Agency. There was no agreement to remove all waste from the Site and Mr Murphy was clear in his oral evidence that he did not expect the Site to be cleared. Mr Murphy would benefit from continued waste removal because it would maintain the environmental waste permit and increase the value of the Site.
90. However, section 4 of the Statute of Frauds 1677 stipulates that a contract of guarantee must be in writing or evidenced by a memorandum or note in writing and signed by the party giving the promise: *Actionstrength Limited v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17. Any guarantee given by Mr Murphy was made orally, by telephone. Therefore, it would be unenforceable.
91. Further, given the uncertainty of the date(s) on which any guarantee were given, Erith has not established that there was any reliance on the same. Up to February 2015, the parties expected that the proposed sale and purchase of the land and/or business would be completed. It was in Erith's interest to continue carrying out the waste removal works because it would maintain the waste licence and increase the value of the land.
92. In summary, Erith has not established that there was an enforceable indemnity or guarantee under which Mr Murphy accepted personal responsibility for the waste removal costs.

#### *Loan*

93. In January and February 2015, sums totalling £85,000 were paid by Erith Haulage into the account of MWL. It is common ground that the deposits were a loan by Erith Haulage to alleviate MWL's cash flow difficulties. The dispute is whether the loan was made to MWL or to Mr Murphy.
94. Mr Darsey's evidence is that Mr Murphy confirmed that he would personally reimburse the Erith Group for the loan in the event that MWL was unable to pay it. Mr Murphy stated in his first witness statement that the loan was negotiated by Mary Lynch, the office manager of MWL and that he did not have any part in the negotiations. However, in cross-examination, he stated that he asked for the first tranche of £40,000 to be paid to MWL by Erith in a telephone conversation with Mr Darsey. Mr Murphy stated that he offered to put funds back into MWL when he returned to the UK but that Mr Darsey told him that he would "take it off the bill". The further tranches of the loan were arranged by Ms Lynch without his knowledge.
95. As a matter of fact the loan was made by Erith Haulage to MWL. I reject Erith's case that the loan was made to Mr Murphy and/or that Mr Murphy undertook to repay the loan. If that had been the position, there would be some record of it, either in correspondence between Erith and its funders or legal advisors, or between the solicitors drawing up the transaction documents. By February 2015, the proposed sale

was for the land without the business. The omission of any deduction from the purchase price for the land indicates that the parties agreed that the loan was a matter to be dealt with by MWL.

96. In any event, for the reasons set out in respect of the guarantee above, Mr Darsey's evidence as to the terms of any promise by Mr Murphy shows that it would amount to a guarantee, rather than an indemnity. As set out above, it would not be enforceable. Erith Haulage has a valid claim for repayment of the loan from MWL but not from Mr Murphy.

#### *Admissions*

97. Erith's case is that on a true construction of the email exchanges between the parties' solicitors, Forsters, acting for Mr Murphy, admitted that he was responsible personally for payment of the outstanding waste removal costs. Mr Murphy's case is that there was no admission of liability. Any agreement to pay the costs could be interpreted as agreement on the part of Mr Murphy or MWL.
98. The email exchanges between solicitors acting for the parties were in general terms. Prior to 29 April 2015 when the account for "Murphy's Waste" was sent by DLA to Forsters, the reference to costs did not identify the sums, description or basis on which they were claimed. Forsters simply confirmed to DLA that their client was "*raising funds to settle the costs due to your client*" and that "*arrangements will be put in place to settle the costs due to your client*". Those statements did not in terms admit that Mr Murphy (as opposed to MWL) owed the outstanding sums to Erith. In the context of Mr Murphy's financial support for MWL in 2014 and 2015, the arrangements could be a reference to an injection of funds into MWL to enable it to satisfy the outstanding invoices. An admission must be in clear and unambiguous terms in order to bind a party. In this case, the confirmation that costs would be paid did not amount to an admission of liability on the part of Mr Murphy.

#### *Unjust Enrichment*

99. Erith has an alternative claim for the costs of the waste removal services based on unjust enrichment.
100. In order to establish a claim in unjust enrichment, Erith must establish:
- i) Mr Murphy has been enriched;
  - ii) the enrichment was at the expense of Erith;
  - iii) the enrichment was unjust; and
  - iv) there are no available defences to Mr Murphy.

See: *Benedetti v Sawiris* [2013] UKSC 50 per L. Clarke at Para.50; *Banque Financiere de la Cite SA v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL); *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 (HL).

101. It is clear that Mr Murphy was enriched at Erith's expense. The waste removal works enabled Mr Murphy to benefit from the maintenance of MWL's waste licence and the

increased value of the Site. The enrichment was unjust in that the services were provided by Erith in anticipation of the proposed contract of sale that was not concluded.

102. However, it is common ground that a claim for unjust enrichment will not succeed where there is a subsisting, enforceable contract: *MacDonald Dickens & Macklin v Costello* [2011] EWCA Civ 930 per Etherton LJ at Paras.23 and 30. In this case, there was a Works Agreement made between Erith Holdings and MWL in respect of the waste removal services. Therefore, the claim for unjust enrichment must fail.

*Conclusion*

103. I find that there was a valid contract for the waste removal services between Erith Holdings and MWL. Mr Murphy was not a party to the contract in his personal capacity and did not undertake any personal responsibility for the costs thereafter.
104. For the above reasons, the claimants' claims against the defendant are dismissed.